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7. Principles of law are deduced from vast mass of decisions.
8. Principles of law presented in a logical and cogent manner.
9. Commentary, a reasoned exposition of law.
10. Conflict of opinions in the decisions pointed out and discussed.
11. Copious references to cognate sections and notes are given.
12. Cases overruled or reversed pointed out in the foot-note remarks.
13. Remarks in the foot-notes amplify and illustrate the principles in the Commentary and indicate the distinguishing features of the case.
14. Any case in the Table of Cases will show where to get the entire case-law on the point.
15. The first reference in the foot-notes and reference to Official Reports are indicated in the Table of Cases.
16. Topical Index locates the exact point required.

Case-law is the life-blood of a law book

Side pp. 1954, (4pp.)

DONATED
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In one sense no reported case can ever be obsolete while the laws and judicial usages of English-speaking countries are what they are: that is, no man can say beforehand that any given case, however antiquated or trifling it may appear in itself to be, may not at some time have its use for the modern practitioner or text-writer. Every decision in the books is part of the history of the law, and no part of that history can be absolutely insignificant.—(Sir Frederick Pollock, Bart., LL.D., Corpus Professor of Jurisprudence in the University of Oxford.)

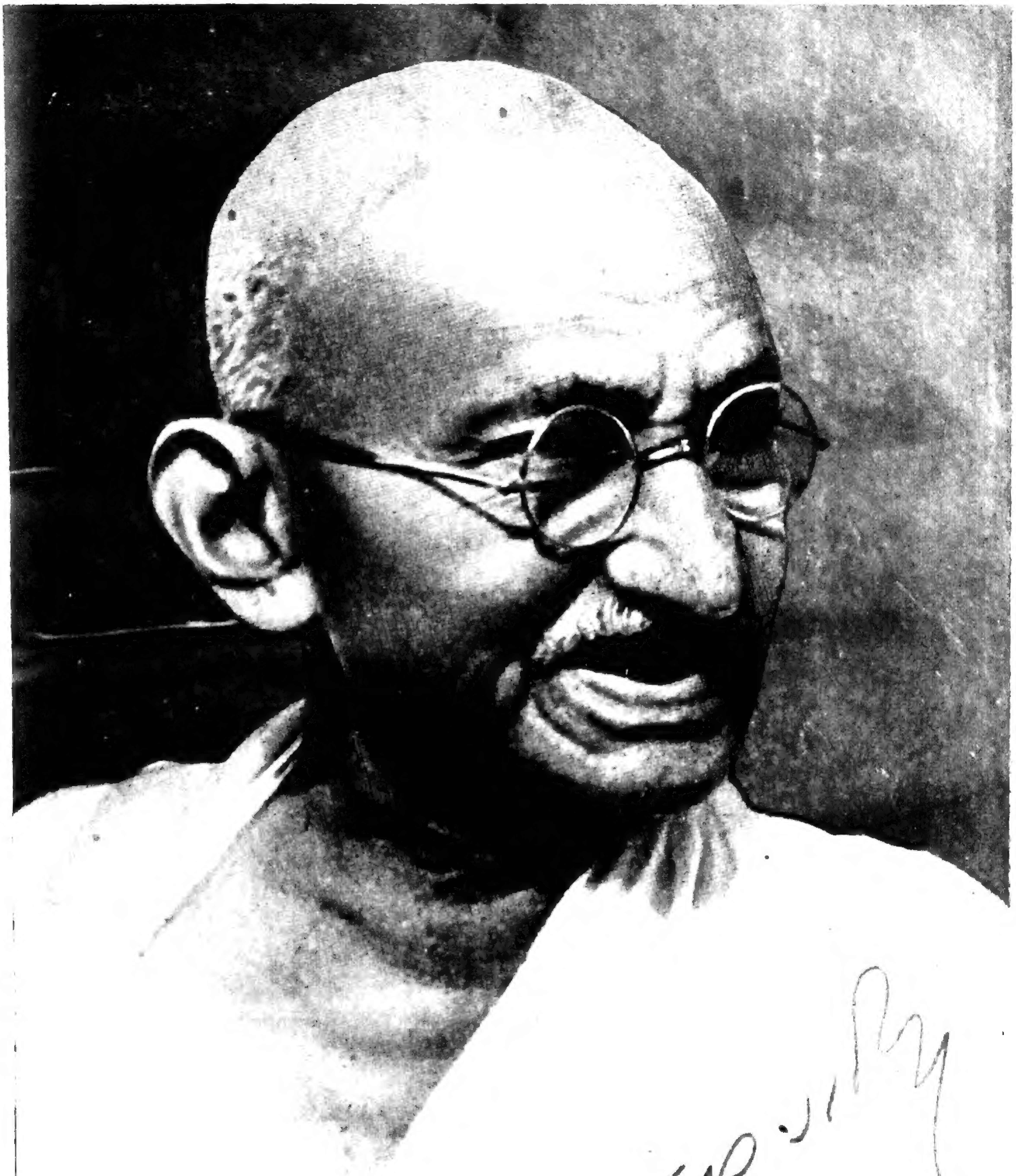
Accurate knowledge of the present state of the law upon any subject involves necessarily the history of the development of the law upon that subject, which can only be attained by following down the decisions touching upon it. — (Francis M. Scott, Justice, Supreme Court, New York.)

The law is the last interpretation of the law given by the last Judge.

The enunciation of the most elementary principle of law is frequently met by a demand for "an authority in support of that proposition . . . ." No time spent upon providing oneself with a precedent is ever wasted even though the book may have to be judiciously hidden from view until required.—(The Hon'ble Sir Cecil Walsh, Kt.,K.C., Ex-Offg., Chief Justice, Allahabad High Court.)

The last Judicial Interpretation of the law is the Law on which your case hangs.

To correctly appraise a Judicial decision, it is important to know later applications of its rules to varying states of facts by way of extension or qualification. —(S. Shepard, Chief Justice, Court of Appeal, Washington (U. S. A,).)



A. I. R. Commentaries

THE
CONSTITUTION OF INDIA

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY

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VOLUME I

ARTICLES 1-109

1st (1954) Edition

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The statute law herein stated is as on the 26th January, 1954, and the case-law, as on the 25th August, 1953.

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PREFACE

The Indian Constitution has been the subject of a number of treatises within the short time since the completion of the Constitution. The matter has been dealt with in different forms and from different approaches in the books so far published. Broadly speaking, there are three classes of books on the subject : (i) Commentaries : In this class of books, the articles of the Constitution are dealt with *seriatim* and commented upon with the help of case-law and other authorities. (ii) General surveys and summaries : In this class of books, the Constitution is surveyed as a whole with the author's comments and criticisms. (iii) Books dealing with special subjects like fundamental rights and writ proceedings. The present book is planned to fall in the first category mentioned above. It has been prepared on the well-known A. I. R. system of Commentary, which, while it has its critics, has been found to satisfy the needs of the profession better than other methods of law book writing. The nature of the subject, however, has necessitated the moulding of the usual A. I. R. system to its own special requirements. It has been considered that the value of the book will be enhanced if the principles of law stated are copiously supported by quotations from the leading judgments bearing on the principles. Hence, the book not only cites the references for the cases which are relied on for the several propositions but the discussion is throughout re-inforced by quotations from judgments. This has got a double result : Firstly, it enables the reader to have the statement of the law in the very words of the eminent judges who have expounded the law. Secondly, it enhances the readable quality of the book by the inclusion of numerous passages of fine English prose dealing with such inspiring topics as personal liberty, rule of law, right of equality and so on.

It is well known that our Constitution is based on a study of the various Constitutions of the world and incorporates several ideas and conceptions borrowed from other Constitutions. But three main sources may be specially mentioned. First is the American Constitution which is generally regarded as a model of a Federal Constitution. On the subject of fundamental rights, judicial enquiry into validity of laws, inter-State commerce, etc., American decisions afford a most valuable source of guidance for our Courts, although, no doubt, there are fundamental features of difference between the American Constitution and our own Constitution which necessitate circumspection and caution while applying American precedents to the solution of our own problems. Secondly, in regard to writ proceedings, which are a special and, next to fundamental rights, perhaps the most prominent feature of the Indian Constitution, English case-law is invaluable, because our Constitution-makers have, in borrowing the terminology of English law to describe the writs, evidently intended that our Courts should be guided by the principles of English law in this respect as far as possible. English decisions also constitute a valuable source of legal principles on other topics covered by the Commentary. Thirdly, the Constitution is in many places an adaptation of the Government of India Act, 1935. The result of this is that the decisions on the Government of India Act are also useful in interpreting and understanding our Constitution. Case-law has, therefore, been tapped from all these sources in the preparation of this Commentary.

Comparisons with other Constitutions and with the Government of India Act have been incorporated in the body of the Commentary itself in appropriate places.

The text of the American Constitution will be given in the Appendix and it is proposed to include various other items of a useful nature in the Appendices at the end of the third volume.

The case-law included in this volume is up to the 25th of August, 1953. The decisions of the Supreme Court in *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd.*, A. I. R. 1954 S. C. 119 and *State of West Bengal* v. *Subodh Gopal Bose*, A. I. R. 1954 S. C. 92, relating to Article 31, were pronounced when the book was more than half way through the press. Nevertheless, footnotes have been added in appropriate places in the Commentary on Article 31 drawing attention to the Supreme Court decisions and to the lines on which the Commentary may require revision in their light.

The Authors express their thanks to Messrs. D. V. Chitaley, B.A., LL.B., Advocate, D. W. Chitaley, B. A., LL. B., D. G. Ranade, V. S. Balkundi, B. A., LL. B., R. G. Dhoble, B.A., LL.B., V. B. Bakhale, M.A., LL.B., D. H. Zadgaonkar, B.A., LL.B., K. S. Bakre, B.SC., LL.B., D. R. Rajandekar, B.A., LL.B., G. M. Jatar, B.A., LL.B., M. Kuppuswami, B.A., B.L., Advocate, H. G. Pathak, B.A., LL.B., and G. B. Sidhaye, B.A., LL.B., Advocate, for help received in the preparation of the book. It is but fair to add, however, that of these gentlemen, the authors feel specially obliged to Mr. V. B. Bakhale, who has borne the main brunt of assisting them in all the stages of the work.

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V. V. Chitaley
S. Appu Rao.

13th January, 1954.

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CONTENTS OF VOLUME I

PAGES

Abbreviations ... ... v to viii

Text of the Constitution of India ... ... xvii to cxcii

Commentary on the Constitution of India ... ... 1 to 1008

ABBREVIATIONS

REPORTS

A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.

A. M. L. J. ... Ajmer-Merwara Law Journal.

I. L. R. Assam ... Indian Law Reports Assam Series.

All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.

Agra. ... Agra High Court Reports.

All. L. Jour. ... Allahabad Law Journal.

All. W. N. ... Allahabad Weekly Notes.

All. W. R. ... Allahabad Weekly Reporter.

Beng. L. R. ... Bengal Law Reports.

Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.

Bom. H. C. R. ... Bombay High Court Reports.

Bom. L. R. ... Bombay Law Reporter.

Bom. P. J. ... Bombay Printed Judgments.

Bourke ... Bourke's Reports.

Bur. L. Jour. ... Burma Law Journal.

Bur. L. R. ... Burma Law Reports.

Bur. L. Tim. ... Burma Law Times.

Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.

Cal. L. Jour. ... Calcutta Law Journal.

Cal. L. Rep. ... Calcutta Law Reports.

Cal. W. N. ... Calcutta Weekly Notes.

C. P. L. R. ... Central Provinces Law Reports.

Com. Cas. ... Company Cases.

Cor. ... Coryton's Reports.

Cr. Rg. ... Criminal Rulings of the Bombay High Court.

Cri. L. Jour. ... Criminal Law Journal.

Cut. or I. L. R. Cut. ... Indian Law Reports, Cuttack Series.

Cut. L. T. ... Cuttack Law Times.

E. P. ... East Punjab.

E. P. or I. L. R. E. P. ... Indian Law Reports, East Punjab Series.

F. C. R. ... Federal Court Reports.

F. L. J. ... Federal Law Journal.

Hay ... Hay's Reports.

Him. Pra. ... Himachal Pradesh.

Hyd. ... Hyderabad.

Hyd. or I. L. R. Hyd. ... Indian Law Reports, Hyderabad Series.

Hyde ... Hyde's Reports.

Ind. App. ... Law Reports, Indian Appeals.

Ind. Cas. ... Indian Cases.

Ind. Jur. (N. S.) ... Indian Jurist (New Series).

Ind. Jur. (O. S.) ... Indian Jurist (Old Series).

I. T. R. ... Income Tax Reports.

J. & K. ... Jammu & Kashmir.

J. & K. L. R. ... Jammu & Kashmir Law Reports.

J. L. R. ... Jaipur Law Reports.

Kar. (I. L. R.) ... Indian Law Reports, Karachi Series.

K. L. T. or Ker. L. T. ... Kerala Law Times.

Knapp ... Knapp's Reports.

Lab. L. J. ... Labour Law Journal.

Lah. or I. L. R. Lah. ... Indian Law Reports, Lahore Series.

Lah. L. Jour. ... Lahore Law Journal.

Lah. L. T. ... Lahore Law Times.

L. R. A. ... Law Reporter, Allahabad.

Low. Bur. Rul. ... Lower Burma Rulings.

Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.

Luck. Cas. ... Lucknow Cases.

Madh. B. or M. B. ... Madhya Bharat.

Madh. B. L. R. ... Madhya Bharat Law Reports.

Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.

Mad. H. C. R. ... Madras High Court Reports.

Mad. Jur. ... Madras Jurist.

Mad. L. Jour. ... Madras Law Journal.

Mad. L. Tim. ... Madras Law Times.

Mad. L. W. ... Madras Law Weekly.

Mad. W. N. ... Madras Weekly Notes.

M. L. R. or Mar. L. R. ... Marwar Law Reporter.

Marsh. ... Marshall's Reports.

Moo. Ind. App. ... Moore's Indian Appeals.

Moo. P. C. C. ... Moore's Privy Council Cases.

Mys. ... Mysore.

I. L. R. Mys. ... Indian Law Reports, Mysore Series.

Mys. H. C. R. ... Mysore High Court Reports.

Mys. L. J. ... Mysore Law Journal.

Nag. (I. L. R.) ... Indian Law Reports, Nagpur Series.

Nag. L. Jour. ... Nagpur Law Journal.

Nag. L. R. ... Nagpur Law Reports.

N.-W. P. H. C. R. ... North-West Provinces High Court Reports.

Oudh Cas. ... Oudh Cases.

Oudh L. Jour. ... Oudh Law Journal.

Oudh L. R. ... Oudh Law Reports.

Oudh S. C. ... Oudh Select Cases.

Oudh W. N. ... Oudh Weekly Notes.

Pak. Cases Lah. ... Pakistan Cases.

Pak. L. R. Lahore ... Pakistan Law Reports Lahore.

Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.

Pat. L. Jour. ... Patna Law Journal.

Pat. L. Tim. ... Patna Law Times.

Pat. L. W. ... Patna Law Weekly.

Pat. W. N. ... Patna Weekly Notes.

Pepsu L. R. ... Pepsu Law Reports.

Pun. or I. L. R. Punjab ... Indian Law Reports, Punjab Series.

Pun. L. R. ... Punjab Law Reporter.

Pun. Re. ... Punjab Records.

Pun. W. R. ... Punjab Weekly Reporter.

Raj. ... Rajasthan.

Rang. ... Indian Law Reports, Rangoon Series.

Rang. L. R. ... Rangoon Law Reports.

Rat. ... Ratanlal's Unreported Criminal Cases.

R. S. C. ... Rules of the Supreme Court of England.

Sau. ... Saurashtra.

Sau. L. R. ... Saurashtra Law Reporter.

Sind L. R. ... Sind Law Reporter.

S. C. J. ... Supreme Court Journal.

S. C. R. ... Supreme Court Reports.

Suth. W. R. ... Sutherland's Weekly Reporter.

Trav. Co. or T. C. ... Travancore-Cochin.

T. C. L. R. ... Travancore-Cochin Law Reports.

T. L. J. ... Travancore Law Journal.

U. P. L. R. ... United Provinces Law Reports.

Upp. Bur. Rul. ... Upper Burma Rulings.

Vind.-Pra. or V. P. ... Vindhya Pradesh

Weir. ... Weir's Criminal Rulings.

ENGLISH, IRISH, SCOTTISH, AMERICAN AND AUSTRALIAN LAW REPORTS

All E. R. ... All England Law Reports.
A. L. J.... Australian Law Journal.
A. L. R. ... American Law Reports Annotated.
App. Cas....(Law Reports) Appeal Cases.
Ch. D....(Law Reports) Chancery Division (1876-1890).
Ch. App....Chancery Appeals.
Cl. & Fin.... Clark and Finnelly [House of Lords].
C. L. R....Commonwealth Law Reports.
Co. Rep. ... Coke (Sir Edward) (Common Law).
Cox....Cox [Chancery].
Cranch...Cranch's Report(Supreme Court).
Dall...Dall's Reports.
E. R....English Reports.
Eq. ...(Law Reports) Equity (1866-1875).
Eq. R....Equity Reports (1853-1855
Eq. Cas. Abr. ... Equity Cases Abridged [Chancery.]
Fed. Rep....Federal Reporter.
Gray...Gray's Reports.
H. L....(Law Reports) House of Lords.
H. L. C....House of Lords Cases (continuation of Clark and Finnelly).
How....Howard's Reports.
I. R....Irish Reports.
J. P. ... Justice of the Peace.
Jur. (N. S.)...Jurist Reports (New Series).
K. B. ... (Law Reports) King's Bench.
Law Ed....Lawyers' Edition.
L. J. Ch....Law Journal Reports Chancery.
L. J. (N. S.) Ch. ... Law Journal Reports (New Series) Chancery.
L. J. (N. S.) Ex. ... Law Journal Reports (New Series) Exchequer.
L. J. K. B....Law Journal Reports, King's Bench.
L. J. P. C....Law Journal Reports, Privy Council.
L. J. Q. B....Law Journal Reports, Queen's Bench.
L. R. C. P....Law Reports, Common Pleas.
L. R. Eq....Law Resports, Equity.
L. R. Ex....Law Reports, Exchequer.
L. R. H. L....Law Reports, House of Lords.
L. R. P. C....Law Reports Privy Council.
L. T....Law Times Reports.
L. T. (N. S.) ... Law Times Reports (New Series).
Mass ... Massachussets Reports (Supreme Court).
N. S. W....New South Wales Reports.
N. Y. ... New York.
Pet....Peter's Reports (Supreme Court).
Q. B. ... (Law Reports) Queen's Bench (1891 onwards) or Queen's Bench Reports 1841 to 1852).
Q. B. D. ... (Law Reports) Queen's Bench Division (1876-1890).
R....Reports [All The Courts].
R. R. ...Revised Reports.
R. S. C. ... Rules of the Supreme Court of England.
Smith...J.P.Smith's Reports[Kings Bench].
T.L.R....Times Law Reports.
U. S. ... Cases Argued and Decided in the Supreme Court of the United States.
Wall...Wallace's Reports (Supreme Court).
Wheat ... Wheaton's Reports (Supreme Court).
W.R. (Eng.)...Weekly Reporter (England).

Other Abbreviations.

Appr. ... Approved.
Art. ... Article.
C. ... Case Number.
C. A. ... Court of Appeal.
Civ. ... Civil.
Cl. ... Clause.
Cr. ... Criminal.
Diss. ... Dissented.

Dist.	... Distinguished.
D. B.	... Division Bench.
Expl.	... Explained.
F. A.	... First Appeal.
F. B.	... Full Bench.
F. C.	... Federal Court.
F. N.	... Foot-Note.
Foll.	... Followed.
G. I.	... Government of India.
I. O.	... The Indian (Adaptation of Existing Laws) Order, 1947.
Jour.	... Journal.
L. P.	... Letters Patent.
M. I. D.	... Monthly Indian Digest.
(1946-52) I. D. 225	... 1946-1952 Indian Digest Point Number 225.
'52 I. D. A.	... 1952 Indian Digest Annual Part.
N.	... Note.
No.	... Number.
O.	... Order.
P.	... Page.
Pr.	... Para.
Pt.	... Point.
P. C.	... Privy Council.
Pre.	... Preamble.
R.	... Rule.
Ref.	... Referred.
Rel. on.	... Relied on.
S.	... Section.
S. B.	... Special Bench.
S. C.	... Supreme Court.
V.	... Volume Number.
Y. D. F.	... Yearly Digest Fortnightly.

IN THE FOOT-NOTES TO THE COMMENTARY —

(*a*) ('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

(*b*) Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on, and to all Foreign cases.

(*c*) The method of citation of A. I. R. is slightly changed. It is, for example, thus: 1949 Cal. 583 [A I R V 36 C 160 Pr. 6]. In the square bracket V stands for volume, the figure 36 denotes the 36th volume of the All India Reporter, "1914" being the first volume, C stands for case and Pr. stands for para of the judgment.

THE
CONSTITUTION OF INDIA

CONTENTS

PREAMBLE

PART I

THE UNION AND ITS TERRITORY

ARTICLE
1. Name and territory of the Union.
2. Admission or establishment of new States.
3. Formation of new States and alteration of areas, boundaries or names of existing States.
4. Laws made under Articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.

PART II

CITIZENSHIP

5. Citizenship at the commencement of the Constitution.
6. Rights of citizenship of certain persons who have migrated to India from Pakistan.
7. Rights of citizenship of certain migrants to Pakistan.
8. Rights of citizenship of certain persons of Indian origin residing outside India.
9. Persons voluntarily acquiring citizenship of a foreign State not to be citizens.
10. Continuance of the rights of citizenship.
11. Parliament to regulate the right of citizenship by law.

PART III

FUNDAMENTAL RIGHTS

General

12. Definition.
13. Laws inconsistent with or in derogation of the Fundamental Rights.

Right to Equality

14. Equality before law.
15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
16. Equality of opportunity in matters of public employment.

ARTICLE

17. Abolition of Untouchability.
18. Abolition of titles.

Right to Freedom

19. Protection of certain rights regarding freedom of speech, etc.
20. Protection in respect of conviction for offences.
21. Protection of life and personal liberty.
22. Protection against arrest and detention in certain cases.

Right against Exploitation

23. Prohibition of traffic in human beings and forced labour.
24. Prohibition of employment of children in factories, etc.

Right to Freedom of Religion

25. Freedom of conscience and free profession, practice and propagation of religion.
26. Freedom to manage religious affairs.
27. Freedom as to payment of taxes for promotion of any particular religion.
28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

Cultural and Educational Rights

29. Protection of interests of minorities.
30. Right of minorities to establish and administer educational institutions.

Right to Property

31. Compulsory acquisition of property.

31A. Saving of laws providing for acquisition of estates, etc.

31B. Validation of certain Acts and Regulations.

Right to Constitutional Remedies

32. Remedies for enforcement of rights conferred by this Part.
33. Power to Parliament to modify the rights conferred by this Part in their application to Forces.
34. Restriction on rights conferred by this Part while martial law is in force in any area.
35. Legislation to give effect to the provisions of this Part.

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

36. Definition.
37. Application of the principles contained in this Part.
38. State to secure a social order for the promotion of welfare of the people.
39. Certain principles of policy to be followed by the State.
40. Organisation of village panchayats.
41. Right to work, to education and to public assistance in certain cases.
42. Provision for just and humane conditions of work and maternity relief.
43. Living wage, etc., for workers

Article

44. Uniform civil code for the citizens.
45. Provision for free and compulsory education for children.
46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.
47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.
48. Organisation of agriculture and animal husbandry.
49. Protection of monuments and places and objects of national importance.
50. Separation of judiciary from executive.
51. Promotion of international peace and security.

PART V

THE UNION

Chapter I.—The Executive

The President and Vice-President

52. The President of India.
53. Executive power of the Union.
54. Election of President.
55. Manner of Election of President.
56. Term of office of President.
57. Eligibility for re-election.
58. Qualifications for election as President.
59. Conditions of President's office.
60. Oath or affirmation by the President.
61. Procedure for impeachment of the President.
62. Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.
63. The Vice-President of India.
64. The Vice-President to be *ex-officio* Chairman of the Council of States.
65. The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.
66. Election of Vice-President.
67. Term of office of Vice-President.
68. Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.
69. Oath or affirmation by the Vice-President.
70. Discharge of President's functions in other contingencies.
71. Matters relating to or connected with the election of a President or Vice-President.
72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.
73. Extent of executive power of the Union.

ARTICLE

Council of Ministers

74. Council of Ministers to aid and advise President.
75. Other provisions as to Ministers.

The Attorney-General for India

76. Attorney-General for India.

Conduct of Government Business

77. Conduct of business of the Government of India.
78. Duties of Prime Minister as respects the furnishing of information to the President, etc.

CHAPTER II.—PARLIAMENT

General

79. Constitution of Parliament.
80. Composition of the Council of States.
81. Composition of the House of the People.
82. Special provision as to representation of States in Part C and territories other than States.
83. Duration of Houses of Parliament.
84. Qualification for membership of Parliament.
85. Sessions of Parliament, prorogation and dissolution.
86. Right of President to address and send messages to Houses.
87. Special address by the President at the commencement of every session.
88. Rights of Ministers and Attorney-General as respects Houses.

Officers of Parliament

89. The Chairman and Deputy Chairman of the Council of States.
90. Vacation and resignation of, and removal from, the office of Deputy Chairman.
91. Power of the Deputy Chairman or other persons to perform the duties of the office of, or to act as, Chairman.
92. The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.
93. The Speaker and Deputy Speaker of the House of the People.
94. Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.
95. Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.
96. The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.
97. Salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker.
98. Secretariat of Parliament.

Conduct of Business

99. Oath or affirmation by members.
100. Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

ARTICLE

Disqualifications of Members

101. Vacation of seats.
102. Disqualifications for membership.
103. Decision on questions as to disqualifications of members.
104. Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified.

Powers, Privileges and Immunities of Parliament and its Members

105. Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof.
106. Salaries and allowances of members.

Legislative Procedure

107. Provisions as to introduction and passing of Bills.
108. Joint Sitting of both Houses in certain cases.
109. Special procedure in respect of Money Bills.
110. Definition of "Money Bills".
111. Assent to Bills.

Procedure in Financial Matters

112. Annual financial statement.
113. Procedure in Parliament with respect to estimates.
114. Appropriation Bills.
115. Supplementary, additional or excess grants.
116. Votes on account, votes of credit and exceptional grants.
117. Special provisions as to financial Bills.

Procedure Generally

118. Rules of procedure.
119. Regulation by law of procedure in Parliament in relation to financial business.
120. Language to be used in Parliament.
121. Restriction on discussion in Parliament.
122. Courts not to inquire into proceedings of Parliament.

CHAPTER III.—LEGISLATIVE POWERS OF THE PRESIDENT

123. Power of President to promulgate Ordinances during recess of Parliament.

CHAPTER IV.—THE UNION JUDICIARY

124. Establishment and constitution of Supreme Court.
125. Salaries, etc., of Judges.
126. Appointment of acting Chief Justice.
127. Appointment of *ad hoc* Judges.
128. Attendance of retired Judges at sittings of the Supreme Court.
129. Supreme Court to be a court of record.
130. Seat of Supreme Court.
131. Original jurisdiction of the Supreme Court.
132. Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.

ARTICLE

133. Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.
134. Appellate jurisdiction of Supreme Court in regard to criminal matters.
135. Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.
136. Special leave to appeal by the Supreme Court.
137. Review of judgments or orders by the Supreme Court.
138. Enlargement of the jurisdiction of the Supreme Court.
139. Conferment on the Supreme Court of powers to issue certain writs.
140. Ancillary powers of Supreme Court.
141. Law declared by Supreme Court to be binding on all Courts.
142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.
143. Power of President to consult Supreme Court.
144. Civil and judicial authorities to act in aid of the Supreme Court.
145. Rules of Court, etc.
146. Officers and servants and the expenses of the Supreme Court.
147. Interpretation.

CHAPTER V.—COMPTROLLER AND AUDITOR-GENERAL OF INDIA

148. Comptroller and Auditor-General of India.
149. Duties and powers of the Comptroller and Auditor-General.
150. Power of Comptroller and Auditor-General to give directions as to accounts.
151. Audit reports.

PART VI

THE STATES IN PART A OF THE FIRST SCHEDULE

CHAPTER I.—GENERAL

152. Definition.

CHAPTER II.—THE EXECUTIVE

The Governor

153. Governors of States.
154. Executive power of State.
155. Appointment of Governor.
156. Term of office of Governor.
157. Qualifications for appointment as Governor.
158. Conditions of Governor's office.
159. Oath or affirmation by the Government.
160. Discharge of the functions of the Governor in certain contingencies.
161. Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.
162. Extent of executive power of State.

ARTICLE

Council of Ministers

163. Council of Ministers to aid and advise Governor.
164. Other provisions as to Ministers.

The Advocate-General for the State

165. Advocate-General for the State.

Conduct of Government Business

166. Conduct of business of the Government of a State.
167. Duties of Chief Minister as respects the furnishing of information to Governor, etc.

CHAPTER III.—THE STATE LEGISLATURE

General

168. Constitution of Legislatures in State.
169. Abolition or creation of Legislative Councils in States.
170. Composition of the Legislative Assemblies.
171. Composition of the Legislative Councils.
172. Duration of State Legislatures.
173. Qualification for membership of the State Legislature.
174. Sessions of the State Legislature, prorogation and dissolution.
175. Right of Governor to address and send messages to the House or Houses.
176. Special address by the Governor at the commencement of every session.
177. Rights of Ministers and Advocate-General as respects the Houses.

Officers of the State Legislature

178. The Speaker and Deputy Speaker of the Legislative Assembly.
179. Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.
180. Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.
181. The Speaker and the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.
182. The Chairman and Deputy Chairman of the Legislative Council.
183. Vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman.
184. Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.
185. The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.
186. Salaries and allowances of the Speaker and Deputy Speaker and the Chairman and Deputy Chairman.
187. Secretariat of State Legislature.

Conduct of Business

188. Oath or affirmation by members.
189. Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

ARTICLE

Disqualifications of Members

190. Vacation of seats.
191. Disqualifications for membership.
192. Decision on questions as to disqualifications of members.
193. Penalty for sitting and voting before making oath or affirmation under Article 188 or when not qualified or when disqualified.

Powers, Privileges and Immunities of State Legislatures and their Members

194. Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof.
195. Salaries and allowances of members.

Legislative Procedure

196. Provisions as to introduction and passing of Bills.
197. Restriction on powers of Legislative Council as to Bills other than Money Bills.
198. Special procedure in respect of Money Bills.
199. Definition of "Money Bills".
200. Assent to Bills.
201. Bills reserved for consideration.

Procedure in Financial Matters

202. Annual financial statement.
203. Procedure in Legislature with respect to estimates.
204. Appropriation Bills.
205. Supplementary, additional or excess grants.
206. Votes on account, votes of credit and exceptional grants.
207. Special provisions as to financial Bills.

Procedure Generally

208. Rules of Procedure.
209. Regulation by law of procedure in the Legislature of the State in relation to financial business.
210. Language to be used in the Legislature.
211. Restriction on discussion in the Legislature.
212. Courts not to enquire into proceedings of the Legislature.

CHAPTER IV.—LEGISLATIVE POWER OF THE GOVERNOR

213. Power of Governor to promulgate Ordinances during recess of Legislature.

CHAPTER V. — THE HIGH COURTS IN THE STATES

214. High Courts for States.
215. High Courts to be courts of record.
216. Constitution of High Courts.
217. Appointment and conditions of the office of a Judge of a High Court.
218. Application of certain provisions relating to Supreme Court to High Courts.
219. Oath or affirmation by Judges of High Courts.

ARTICLE
220. Prohibition of practising in courts or before any authority by Judges.
221. Salaries, etc., of Judges.
222. Transfer of a Judge from one High Court to another.
223. Appointment of acting Chief Justice.
224. Attendance of retired Judges at sittings of High Courts.
225. Jurisdiction of existing High Courts.
226. Power of High Courts to issue certain writs.
227. Power of superintendence over all courts by the High Court.
228. Transfer of certain cases to High Courts.
229. Officers and servants and the expenses of High Courts.
230. Extension of or exclusion from the jurisdiction of High Courts.
231. Restrictions on the powers of the Legislatures of States to make laws with respect to jurisdiction of a High Court in a State having jurisdiction outside that State.
232. Interpretation.

CHAPTER VI. — SUBORDINATE COURTS

233. Appointment of district judges.
234. Recruitment of persons other than district judges to the judicial service.
235. Control over subordinate courts.
236. Interpretation.
237. Application of the provisions of this Chapter to certain class or classes of magistrates.

PART VII

THE STATES IN PART B OF THE FIRST SCHEDULE

238. Application of provisions of Part VI to States in Part B of the First Schedule.

PART VIII

THE STATES IN PART C OF THE FIRST SCHEDULE

239. Administration of States in Part C of the First Schedule.
240. Creation or continuance of local Legislatures or Council of Advisers or Ministers.
241. High Courts for States in Part C of the First Schedule.
242. Coorg.

PART IX

THE TERRITORIES IN PART D OF THE FIRST SCHEDULE AND OTHER TERRITORIES NOT SPECIFIED IN THAT SCHEDULE

243. Administration of territories specified in Part D of the First Schedule and other territories not specified in that Schedule.

ARTICLE

PART X

THE SCHEDULED AND TRIBAL AREAS

244. Administration of Scheduled Areas and tribal areas.

PART XI

RELATIONS BETWEEN THE UNION AND THE STATES

CHAPTER I. — LEGISLATIVE RELATIONS

Distribution of Legislative Powers

245. Extent of laws made by Parliament and by the Legislatures of States.
246. Subject-matter of laws made by Parliament and by the Legislatures of States.
247. Power of Parliament to provide for the establishment of certain additional Courts.
248. Residuary powers of legislation.
249. Power of Parliament to legislate with respect to a matter in the State List in the national interest.
250. Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.
251. Inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States.
252. Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.
253. Legislation for giving effect to international agreements.
254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.
255. Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

CHAPTER II. — ADMINISTRATIVE RELATIONS

General

256. Obligation of States and the Union.
257. Control of the Union over States in certain cases.
258. Power of the Union to confer powers, etc., on States in certain cases.
259. Armed Forces in States in Part B of the First Schedule.
260. Jurisdiction of the Union in relation to territories outside India.
261. Public acts, records and judicial proceedings.

Disputes relating to Waters

262. Adjudication of disputes relating to waters of inter-State rivers or river valleys.

Co-ordination between States

263. Provisions with respect to an Inter-State Council.

ARTICLE

PART XII

FINANCE, PROPERTY, CONTRACTS AND SUITS

CHAPTER I. — FINANCE

General

264. Interpretation.
265. Taxes not to be imposed save by authority of law.
266. Consolidated Funds and public accounts of India and of the States.
267. Contingency Fund.

Distribution of Revenues between the Union and the States

268. Duties levied by the Union but collected and appropriated by the States.
269. Taxes levied and collected by the Union but assigned to the States.
270. Taxes levied and collected by the Union and distributed between the Union and the States.
271. Surcharge on certain duties and taxes for purposes of the Union.
272. Taxes which are levied and collected by the Union and may be distributed between the Union and the States.
273. Grants in lieu of export duty on jute and jute products.
274. Prior recommendation of President required to Bills affecting taxation in which States are interested.
275. Grants from the Union to certain States.
276. Taxes on professions, trades, callings and employments.
277. Savings.
278. Agreement with States in Part B of the First Schedule with regard to certain financial matters.
279. Calculation of "net proceeds", etc.
280. Finance Commission.
281. Recommendations of the Finance Commission.

Miscellaneous Financial Provisions

282. Expenditure defrayable by the Union or a State out of its revenues.
283. Custody, etc., of Consolidated Funds, Contingency Funds and moneys credited to the public accounts.
284. Custody of suitors' deposits and other moneys received by public servants and courts.
285. Exemption of property of the Union from State taxation.
286. Restrictions as to imposition of tax on the sale or purchase of goods.
287. Exemption from taxes on electricity.
288. Exemption from taxation by States in respect of water or electricity in certain cases.
289. Exemption of property and income of a State from Union taxation.
290. Adjustment in respect of certain expenses and pensions.
291. Privy purse sums of Rulers.

ARTICLE

CHAPTER II.—BORROWING

292. Borrowing by the Government of India.
293. Borrowing by States

CHAPTER III.—PROPERTY, CONTRACTS RIGHTS, LIABILITIES, OBLIGATIONS AND SUITS

294. Succession to property, assets, rights, liabilities and obligations in certain cases.
295. Succession to property, assets, rights, liabilities and obligations in other cases.
296. Property accruing by escheat or lapse or as *bona vacantia.*
297. Things of value lying within territorial waters to vest in the Union.
298. Power to acquire property.
299. Contracts.
300. Suits and proceedings.

PART XIII

TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

301. Freedom of trade, commerce and intercourse.
302. Power of Parliament to impose restrictions on trade, commerce and intercourse.
303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.
304. Restrictions on trade, commerce and intercourse among States.
305. Effect of Articles 301 and 303 on existing laws.
306. Power of certain States in Part B of the First Schedule to impose restrictions on trade and commerce.
307. Appointment of Authority for carrying out the purposes of articles 301 to 304.

PART XIV

SERVICES UNDER THE UNION AND THE STATES

CHAPTER I.—SERVICES

308. Interpretation.
309. Recruitment and conditions of service of persons serving the Union or a State.
310. Tenure of office of persons serving the Union or a State.
311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.
312. All-India services.
313. Transitional provisions.
314. Provision for protection of existing officers of certain services.

CHAPTER II.—PUBLIC SERVICE COMMISSIONS

315. Public Service Commissions for the Union and for the States.
316. Appointment and term of office of members.
317. Removal and suspension of a member of a Public Service Commission.

ARTICLE

318. Power to make regulations as to conditions of service of members and staff of the Commission.
319. Prohibition as to the holding of offices by members of Commission on ceasing to be such members.
320. Functions of Public Service Commissions.
321. Power to extend functions of Public Service Commissions.
322. Expenses of Public Service Commissions.
323. Reports of the Public Service Commissions.

PART XV

ELECTIONS

324. Superintendence, direction and control of elections to be vested in an Election Commission.
325. No person to be ineligible for inclusion in, or to claim to be included in a special electoral roll on grounds of religion, race, caste or sex.
326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.
327. Power of Parliament to make provision with respect to elections to Legislatures.
328. Power of Legislature of a State to make provision with respect to elections to such Legislature.
329. Bar to interference by courts in electoral matters.

PART XVI

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES

330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.
331. Representation of the Anglo-Indian community in the House of the People.
332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.
333. Representation of the Anglo-Indian community in the Legislative Assemblies of the States.
334. Reservation of seats and special representation to cease after ten years.
335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.
336. Special provision for Anglo-Indian community in certain services.
337. Special provision with respect to educational grants for the benefit of Anglo-Indian community.
338. Special Officer for Scheduled Castes, Scheduled Tribes, etc.
339. Control of the Union over the administration of Scheduled Areas and the Welfare of Scheduled Tribes.
340. Appointment of a Commission to investigate the conditions of backward classes.
341. Scheduled Castes.
342. Scheduled Tribes.

ARTICLE

PART XVII

OFFICIAL LANGUAGE

CHAPTER I.—LANGUAGE OF THE UNION

343. Official Language of the Union.
344. Commission and Committee of Parliament on official language.

CHAPTER II.—REGIONAL LANGUAGES

345. Official language or languages of a State.
346. Official language for communication between one State and another or between a State and the Union.
347. Special provision relating to language spoken by a section of the population of a State.

CHAPTER III.—LANGUAGE OF THE SUPREME COURT, HIGH COURTS, ETC.

348. Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.
349. Special Procedure for enactment of certain laws relating to language.

CHAPTER IV.—SPECIAL DIRECTIVES

350. Language to be used in representations for redress of grievances.
351. Directive for development of the Hindi Language.

PART XVIII

EMERGENCY PROVISIONS

352. Proclamation of Emergency.
353. Effect of Proclamation of Emergency.
354. Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.
355. Duty of the Union to protect States against external aggression and internal disturbance.
356. Provisions in case of failure of constitutional machinery in States.
357. Exercise of legislative powers under Proclamation issued under Article 356.
358. Suspension of provisions of Article 19 during emergencies.
359. Suspension of the enforcement of the rights conferred by Part III during emergencies.
360. Provisions as to financial emergency.

PART XIX

MISCELLANEOUS

361. Protection of President and Governors and Rajpramukhs.
362. Rights and privileges of Rulers of Indian States.
363. Bar to interference by Courts in disputes arising out of certain treaties, agreements, etc.

ARTICLE
364. Special provisions as to major ports and aerodromes.
365. Effect of failure to comply with, or to give effect to, directions given by the Union.
366. Definitions.
367. Interpretation.

PART XX

AMENDMENT OF THE CONSTITUTION

368. Procedure for amendment of the Constitution.

PART XXI

TEMPORARY AND TRANSITIONAL PROVISIONS

369. Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List.
370. Temporary provisions with respect to the State of Jammu and Kashmir.
371. Temporary provisions with respect to States in Part B of the First Schedule.
372. Continuance in force of existing laws and their adaptation.
373. Power of President to make order in respect of persons under preventive detention in certain cases.
374. Provisions as to Judges of the Federal Court and proceedings pending in the Federal Court or before His Majesty in Council.
375. Courts, authorities and officers to continue to function subject to the provisions of the Constitution.
376. Provisions as to Judges of High Courts.
377. Provisions as to Comptroller and Auditor-General of India.
378. Provisions as to Public Service Commissions.
379. Provisions as to provisional Parliament and the Speaker and Deputy Speaker thereof.
380. Provision as to President.
381. Council of Ministers of the President.
382. Provisions as to provisional Legislatures for States in Part A of the First Schedule.
383. Provision as to Governors of Provinces.
384. Council of Ministers of Governors.
385. Provision as to provisional Legislatures in States in Part B of the First Schedule.
386. Council of Ministers for States in Part B of the First Schedule.
387. Special provision as to determination of population for the purposes of certain elections.
388. Provisions as to the filling of casual vacancies in the Provisional Parliament and Provisional Legislatures of the States.
389. Provision as to Bills pending in the Dominion Legislature and in the Legislatures of Provinces and Indian States.
390. Moneys received or raised or expenditure incurred between the commencement of the Constitution and the 31st day of March, 1950.

ARTICLE
391. Power of the President to amend the First and Fourth Schedules in certain contingencies.
392. Power of the President to remove difficulties.

PART XXII

SHORT TITLE, COMMENCEMENT AND REPEALS

393. Short title.
394. Commencement.
395. Repeals.

SCHEDULES

FIRST SCHEDULE—The States and the territories of India.
SECOND SCHEDULE—
    PART A.—Provisions as to the President and the Governors of States specified in Part A of the First Schedule.
    PART B.—Provisions as to the Ministers for the Union and for the States in Part A and Part B of the First Schedule.
    PART C.—Provisions as to the Speaker and the Deputy Speaker of the House of the People and the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the Legislative Assembly of a State in Part A of the First Schedule and the Chairman and the Deputy Chairman of the Legislative Council of any such State.
    PART D.—Provisions as to the Judges of the Supreme Court and of the High Courts in States in Part A of the First Schedule.
    PART E.—Provisions as to the Comptroller and Auditor-General of India.
THIRD SCHEDULE—Forms of Oaths or Affrmations.
FOURTH SCHEDULE—Allocation of seats in the Council of States.
FIFTH SCHEDULE—Provisions as to the administration and control of Scheduled Areas and Scheduled Tribes.
    PART A.—General.
    PART B.—Administration and control of Scheduled Areas and Scheduled Tribes.
    PART C.—Scheduled Areas.
    PART D.—Amendment of the Schedule.
SIXTH SCHEDULE—Provisions as to the administration of Tribal Areas in Assam.
SEVENTH SCHEDULE—
    LIST I—Union List.
    LIST II—State List.
    LIST III—Concurrent List.
EIGHTH SCHEDULE—Languages.
NINTH SCHEDULE

THE
CONSTITUTION OF INDIA

[AUTHENTICATED BY THE PRESIDENT
OF THE CONSTITUENT ASSEMBLY ON
THE 26TH OF NOVEMBER, 1949.]

Preamble. WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

PART I

THE UNION AND ITS TERRITORY

Name and territory of the Union.

1. (*1*) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

(3) The territory of India shall comprise —

(*a*) the territories of the States;

(*b*) the territories specified in Part D of the First Schedule; and

(*c*) such other territories as may be acquired.

Admission or establishment of new States.

2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

Formation or new States and alteration of areas, boundaries or names of existing States.

3. Parliament may by law —

(*a*) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(*b*) increase the area of any State;

(*c*) diminish the area of any State;

(*d*) alter the boundaries of any State;

(*e*) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the boundaries of any State or States specified in Part A or Part B of the First Schedule or the name or names of any such State or States, the views of the Legislature of the State or, as the case may be, of each of the States both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President.

Laws made under articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.

4. (*1*) Any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

PART II

CITIZENSHIP

Citizenship at the commencement of the Constitution.

5. At the commencement of this Constitution, every person who has his domicile in the territory of India and —

(*a*) who was born in the territory of India; or

(*b*) either of whose parents was born in the territory of India; or

(*c*) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement,

shall be a citizen of India.

Rights of citizenship of certain persons who have migrated to India from Pakistan.

6. Notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if —

(*a*) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(*b*) (*i*) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(*ii*) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

Rights of citizenship of certain migrants to Pakistan.

7. Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (*b*) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

Rights of citizenship of certain persons of Indian origin residing outside India.

8. Notwithstanding anything in Article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

Persons voluntarily acquiring citizenship of a foreign State not to be citizens.

9. No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.

Continuance of the rights of citizenship.

10. Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

Parliament to regulate the right of citizenship by law.

11. Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

PART III

FUNDAMENTAL RIGHTS

General

Definition.

12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Laws inconsistent with or in derogation of the fundamental rights.

13. (*1*) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(*a*) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(*b*) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Right to Equality

Equality before law.

14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

15. (*1*) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(*a*) access to shops, public restaurants, hotels and places of public entertainment; or

(*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Equality of opportunity in matters of public employment.

16. (*1*) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.

(*4*) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Abolition of Untouchability.

17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Abolition of titles.

18. (*1*) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(*4*) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

Protection of certain rights regarding freedom of speech, etc.

19. (*1*) All citizens shall have the right—

(*a*) to freedom of speech and expression;

(*b*) to assemble peaceably and without arms;

(*c*) to form associations or unions;

(*d*) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(*f*) to acquire, hold and dispose of property; and

(*g*) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (*a*) of clause (*1*) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

(3) Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from

making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(*i*) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Protection in respect of conviction for offences.

20. (*1*) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Protection of life and personal liberty.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Protection against arrest and detention in certain cases.

22. (*1*) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in clauses (1) and (2) shall apply —

(*a*) to any person who for the time being is an enemy alien; or

(*b*) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless —

(*a*) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (*b*) of clause (7); or

(*b*) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (*a*) and (*b*) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe —

(*a*) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (*a*) of clause (4);

(*b*) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (*c*) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (*a*) of clause (4).

Right against Exploitation

Prohibition of traffic in human beings and forced labour.

23. (*1*) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Prohibition of employment of children in factories, etc.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Right to Freedom of Religion

Freedom of conscience and free profession, practice and propagation of religion.

25. (*1*) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law —

(*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

(*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I. — The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II. — In sub-clause (*b*) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Freedom to manage religious affairs.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right —

(*a*) to establish and maintain institutions for religious and charitable purposes ;

(*b*) to manage its own affairs in matters of religion ;

(*c*) to own and acquire movable and immovable property ; and

(*d*) to administer such property in accordance with law.

Freedom as to payment of taxes for promotion of any particular religion.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

28. (*1*) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (*1*) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights

Protection of interests of minorities.

29. (*1*) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Right of minorities to establish and administer educational institutions.

30. (*1*) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Right to Property

Compulsory acquisition of property.

31. (*1*) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(*a*) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(*b*) the provisions of any law which the State may hereafter make —

(*i*) for the purpose of imposing or levying any tax or penalty, or

(*ii*) for the promotion of public health or the prevention of danger to life or property, or

(*iii*) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of Section 299 of the Government of India Act, 1935.

Saving of laws providing for acquisition of estates, etc.

31A. (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article,—

(*a*) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant ;

(*b*) the expression "rights," in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

Validation of certain Acts and Regulations.

31B. Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

Right to Constitutional Remedies

Remedies for enforcement of rights conferred by this Part.

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice of the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Power to Parliament to modify the rights conferred by this Part in their application to Forces.

33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Restriction on rights conferred by this Part while martial law is in force in any area.

34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

Legislation to give effect to the provisions of this Part.

35. Notwithstanding anything in this Constitution,—

(*a*) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(*i*) with respect to any of the matters which under clause (3) of Article 16, clause (3) of Article 32, Article 33 and Article 34 may be provided for by law made by Parliament; and

(*ii*) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (*ii*);

(*b*) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (*i*) of clause (*a*) or providing for punishment for any act referred to in sub-clause (*ii*) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.

Explanation.—In this article, the expression "law in force" has the same meaning as in Article 372.

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

Definition.

36. In this Part, unless the context otherwise requires "the State" has the same meaning as in Part III.

Application of the principles contained in this Part.

37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

State to secure a social order for the promotion of welfare of the people.

38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Certain principles of policy to be followed by the State.

39. The State shall, in particular, direct its policy towards securing—

(*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;

(*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

(*d*) that there is equal pay for equal work for both men and women;

(*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(*f*) that childhood and youth are protected against exploitation and against moral and material abandonment.

Organisation of village panchayats.

40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Right to work, to education and to public assistance in certain cases.

41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Provision for just and humane conditions of work and for maternity relief.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

Living wage, etc., for workers.

43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Uniform civil code for the citizens.

44. The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Provision for free and compulsory education for children.

45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Organisation of agriculture and animal husbandry.

48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

Protection of monuments and places and objects of national importance.

49. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by Parliament by law to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be.

Separation of judiciary from executive.

50. The State shall take steps to separate the judiciary from the executive in the public services of the State.

Promotion of international peace and security.

51. The State shall endeavour to—

(*a*) promote international peace and security;

(*b*) maintain just and honourable relations between nations;

(*c*) foster respect for international law and treaty obligations in the dealings of organised people with one another; and

(*d*) encourage settlement of international disputes by arbitration.

PART V

THE UNION

CHAPTER I.—THE EXECUTIVE

The President and Vice-President

The President of India.

52. There shall be a President of India.

Executive power of the Union.

53. (*1*) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall —

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority ; or

(b) prevent Parliament from conferring by law functions on authorities other than the President.

Election of President.

54. The President shall be elected by the members of an electoral college consisting of—

(a) the elected members of both Houses of Parliament ; and

(b) the elected members of the Legislative Assemblies of the States.

Manner of election of President.

55. (1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner :—

(a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly ;

(b) if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one ;

(c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable votes and the voting at such election shall be by secret ballot.

Explanation. — In this article, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

Term of office of President.

56. (1) The President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

(*a*) the President may, by writing under his hand addressed to the Vice-President, resign his office;

(*b*) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in article 61;

(*c*) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (*a*) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

Eligibility for re-election.

57. A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.

Qualifications for election as President.

58. (1) No person shall be eligible for election as President unless he—

(*a*) is a citizen of India,

(*b*) has completed the age of thirty-five years, and

(*c*) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation.—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor or Rajpramukh or Uparajpramukh of any State or is a Minister either for the Union or for any State.

Conditions of President's office.

59. (1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

Oath or affirmation by the President.

60. Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

> "I, A. B., do $\dfrac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India."

Procedure for impeachment of the President.

61. (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

(2) No such charge shall be preferred unless—

(*a*) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(*b*) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.

62. (1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of Article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

The Vice-President of India.

63. There shall be a Vice-President of India.

The Vice-President to be *ex-officio* Chairman of the Council of States.

64. The Vice-President shall be *ex-officio* Chairman of the Council of States and shall not hold any other office of profit:

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under Article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under Article 97.

The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.

65. (1) In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

Election of Vice-President.

66. (1) The Vice-President shall be elected by the members of both Houses of Parliament assembled at a joint meeting in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

(2) The Vice President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.

(3) No person shall be eligible for election as Vice-President unless he—

(*a*) is a citizen of India;

(*b*) has completed the age of thirty-five years; and

(*c*) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation.—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor or Rajpramukh or Uparajpramukh of any State or is a Minister either for the Union or for any State.

Term of office of Vice-President.

67. The Vice-President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

(*a*) a Vice-President may, by writing under his hand addressed to the President, resign his office;

(*b*) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution;

(*c*) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.

68. (1) An election to fill a vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after the occurrence of the vacancy, and the person elected to fill the vacancy shall, subject to the provisions of Article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

Oath or affirmation by the Vice-President.

69. Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation in the following form, that is to say—

> "I, A. B., do $\dfrac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

Discharge of President's functions in other contingencies.

70. Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.

Matters relating to or connected with the election of a President or Vice-President.

71. (1) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

(2) If the election of a person as President or Vice-President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.

(3) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President.

Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

72. (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(*a*) in all cases where the punishment or sentence is by a Court Martial;

(*b*) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(*c*) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (*c*) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor or Rajpramukh of a State under any law for the time being in force.

Extent of executive power of the Union.

73. (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend —

(*a*) to the matters with respect to which Parliament has power to make laws; and

(*b*) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement :

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State specified in Part A or Part B of the First Schedule to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Council of Ministers

Council of Ministers to aid and advise President.

74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what advice was tendered by Ministers to the President shall not be inquired into in any court.

Other provisions as to Ministers.

75. (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and until Parliament so determines, shall be as specified in the Second Schedule.

The Attorney-General for India

Attorney-General for India.

76. (1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

Conduct of Government Business

Conduct of business of the Government of India.

77. (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

Duties of Prime Minister as respects the furnishing of information to the President, etc.

78. It shall be the duty of the Prime Minister —

(*a*) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;

(*b*) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and

(*c*) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

CHAPTER II. — PARLIAMENT

General

Constitution of Parliament.

79. There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

Composition of the Council of States.

80. (1) The Council of States shall consist of —

(*a*) twelve members to be nominated by the President in accordance with the provisions of clause (3); and

(*b*) not more than two hundred and thirty-eight representatives of the States.

(2) The allocation of seats in the Council of States to be filled by representatives of the States shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (*a*) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art and social service.

(4) The representatives of each State specified in Part A or Part B of the First Schedule in the Council of State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the State specified in Part C of the First Schedule in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

Composition of the House of the People.

81. (1) (*a*) Subject to the provision of clause (2) and of Articles 82 and 331, the House of the People shall consist of not more than five hundred members directly elected by the voters in the States.

(*b*) For the purpose of sub-clause (*a*), the States shall be divided, grouped or formed into territorial constituencies and the number of members to be allotted to each such constituency shall be so determined as to ensure that there shall be not more than one member for every 500,000 of the population.

(*c*) The ratio between the number of members allotted to each territorial constituency and the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published shall, so far as practicable, be the same throughout the territory of India.

(2) The representation in the House of the People of the territories comprised within the territory of India but not included within any State shall be such as Parliament may by law provide.

(3) Upon the completion of each census, the representation of the several territorial constituencies in the House of the People shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.

Special provision as to representation of States in Part C and territories other than States.

82. Notwithstanding anything in clause (1) of Article 81, Parliament may by law provide for the representation in the House of the People of any State specified in Part C of the First Schedule or of any territories comprised within the territory of India but not included within any State on a basis or in a manner other than that provided in that clause.

Duration of Houses of Parliament.

83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

Qualification for membership of Parliament.

84. A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

(*a*) is a citizen of India;

(*b*) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and

(*c*) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

Sessions of Parliament, prorogation and dissolution.

85. (1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The President may from time to time—

(a) prorogue the Houses or either House;

(b) dissolve the House of the People.

Right of President to address and send meassages to Houses.

86 (1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

(2) The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

Special address by the President at the commencement of every session.

87. (1) At the commencement of the first session after each general election to the House of the People and at the commencement of the first session of each year the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address.

Rights of Ministers and Attorney-General as respects Houses.

88. Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.

Officers of Parliament

The Chairman and Deputy Chairman of the Council of States.

89. (1) The Vice-President of India shall be *ex-officio* Chairman of the Council of States.

(2) The Council of States shall, as soon as may be, choose a member of the Council to be Deputy Chairman thereof and, so often as the office of Deputy Chairman becomes vacant, the Council shall choose another member to be Deputy Chairman thereof.

Vacation and resignation of, and removal from, the office of Deputy Chairman.

90. A member holding office as Deputy Chairman of the Council of States—

(a) shall vacate his office if he ceases to be a member of the Council;

(b) may at any time, by writing under his hand addressed to the Chairman, resign his office; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (*c*) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.

91. (1) While the office of Chairman is vacant, or during any period when the Vice-President is acting as, or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant, by such member of the Council of States as the President may appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council of States the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

92. (1) At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of Article 91 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman, or, as the case may be, the Deputy Chairman, is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice-President from his office is under consideration in the Council, but, notwithstanding anything in Article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

The Speaker and Deputy Speaker of the House of the People.

93. The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

94. A member holding office as Speaker or Deputy Speaker of the House of the People —

(*a*) shall vacate his office if he ceases to be a member of the House of the People ;

(*b*) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

(c) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

95. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker.

The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.

96. (1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of Article 95 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in Article 100 be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

Salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker.

97. There shall be paid to the Chairman and the Deputy Chairman of the Council of States, and to the Speaker and the Deputy Speaker of the House of the People, such salaries and allowances as may be respectively fixed by Parliament by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

Secretariat of Parliament.

98. (1) Each House of Parliament shall have a separate secretarial staff:

Provided that nothing in this clause shall be construed as preventing the creation of posts common to both Houses of Parliament.

(2) Parliament may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of either House of Parliament.

(3) Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

Conduct of Business

Oath or affirmation by members.

99. Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

100. (1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

Disqualifications of members

Vacation of seats.

101. (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State specified in Part A or Part B of the First Schedule, and if a person is chosen a member both of Parliament and of a House of the Legislature of such a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—

(*a*) becomes subject to any of the disqualifications mentioned in clause (1) of Article 102, or

(*b*) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

Disqualifications for membership.

102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(*a*) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(*b*) if he is of unsound mind and stands so declared by a competent Court;

(*c*) if he is an undischarged insolvent;

(*d*) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(*e*) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final.

Decision on questions as to disqualifications of members.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

104. If a person sits or votes as a member of either House of Parliament before he has complied with the requirements of Article 99, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union.

Penalty for sitting and voting before making oath or affirmation under Article 99 or when not qualified or when disqualified.

Powers, Privileges and Immunities of Parliament and its Members

105. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

106. Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitu-

Salaries and allowances of members.

tion applicable in the case of members of the Constituent Assembly of the Dominion of India.

Legislative Procedure

Provisions as to introduction and passing of Bills.

107. (1) Subject to the provisions of Articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of Article 108, lapse on a dissolution of the House of the People.

Joint sitting of both Houses in certain cases.

108. (1) If after a Bill has been passed by one House and transmitted to the other House—

(*a*) the Bill is rejected by the other House ; or

(*b*) the Houses have finally disagreed as to the amendments to be made in the Bill ; or

(*c*) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,

the President may, unless the Bill has lapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill :

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (*c*) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:

Provided that at a joint sitting --

(*a*) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

(*b*) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed;

and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

Special procedure in respect of Money Bills.

109. (1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

Definition of "Money Bills".

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under Article 109, and when it is presented to the President for assent under Article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

111. When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Assent to Bills.

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

Procedure in financial matters

Annual financial statement.

112. (1) The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the "annual financial statement."

(2) The estimates of expenditure embodied in the annual financial statement shall show separately —

(*a*) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of India; and

(*b*) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India,

and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India—

(*a*) the emoluments and allowances of the President and other expenditure relating to his office;

(*b*) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People;

(*c*) debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(*d*) (*i*) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court;

(*ii*) the pensions payable to or in respect of Judges of the Federal Court;

(*iii*) the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a Province corresponding to a State specified in Part A of the First Schedule;

(*e*) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India;

(*f*) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(*g*) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

Procedure in Parliament with respect to estimates.

113. (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the President.

Appropriation Bills.

114. (1) As soon as may be after the grants under Article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

(*a*) the grants so made by the House of the People; and

(*b*) the expenditure charged on the Consolidated Fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of Articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article.

Supplementary, additional or excess grants.

115. (1) The President shall—

(*a*) if the amount authorised by any law made in accordance with the provisions of Article 114 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or (*b*) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,

cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of Articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or grant.

Votes on account of credit and exceptional grants.

116. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power—

(*a*) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in Article 113 for the voting of such grant and the passing of the law in accordance with the provisions of Article 114 in relation to that expenditure;

(*b*) to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;

(*c*) to make an exceptional grant which forms no part of the current service of any financial year;

and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of Articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure.

Special provisions as to financial Bills.

117. (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (*a*) to (*f*) of clause (1) of Article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States :

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

Procedure Generally

Rules of procedure.

118. (1) Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside.

Regulation by law of procedure in Parliament in relation to financial business.

119. Parliament may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of India, and, if and so far as any provision of any law so made is inconsistent with any rule made by a House of Parliament under clause (1) of Article 118 or with any rule or standing order having effect in relation to Parliament under clause (2) of that article, such provision shall prevail.

Language to be used in Parliament.

120. (1) Notwithstanding anything in Part XVII, but subject to the provisions of Article 348, business in Parliament shall be transacted in Hindi or in English:

Provided that the Chairman of the Council of States or Speaker of the House of the People, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.

(2) Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

Restriction on discussion in Parliament.

121. No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.

Courts not to inquire into proceedings of Parliament.

122. (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

CHAPTER III. — LEGISLATIVE POWERS OF THE PRESIDENT

Power of President to promulgate Ordinances during recess of Parliament.

123. (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(*a*) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(*b*) may be withdrawn at any time by the President.

Explanation. — Where the Houses of Parliament are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

CHAPTER IV. — THE UNION JUDICIARY

Establishment and constitution of Supreme Court.

124. (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years :

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted :

Provided further that—

(*a*) a Judge may, by writing under his hand addressed to the President, resign his office ;

(*b*) a Judge may be removed from his office in the manner provided in clause (4).

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

(*a*) has been for at least five years a Judge of a High Court or of two or more such Courts in succession ; or

(*b*) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession ; or

(*c*) is, in the opinion of the President, a distinguished jurist.

Explanation I.—In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II. — In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

Salaries etc., of Judges.

125. (1) There shall be paid to the Judges of the Supreme Court such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule :

Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Appointment of acting Chief Justice.

126. When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

Appointment of *ad hoc* Judges.

127. (1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an *ad hoc* Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court.

Attendance of retired Judges at sittings of the Supreme Court.

128. Notwithstanding anything in this Chapter, the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the

Federal Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

Supreme Court to be a Court of record.

129. The Supreme Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself.

Seat of Supreme Court.

130. The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

Original jurisdiction of the Supreme Court.

131. Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute—

(*a*) between the Government of India and one or more States; or

(*b*) between the Government of India and any State or States on one side and one or more other States on the other; or

(*c*) between two or more States,

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to—

(*i*) a dispute to which a State specified in Part B of the First Schedule is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution and has, or has been, continued in operation after such commencement;

(*ii*) a dispute to which any State is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which provides that the said jurisdiction shall not extend to such a dispute.

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.

132. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

Explanation.—For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

133. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(*a*) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(*b*) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(*c*) that the case is a fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (*c*), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything in Article 132, any party appealing to the Supreme Court under clause (*1*) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Appellate jurisdiction of Supreme Court in regard to criminal matters.

134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(*a*) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (*b*) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(*c*) certifies that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub-clause (*c*) shall lie subject to such provisions as may be made in that behalf under clause (*1*) of Article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.

135. Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of Article 133 or Article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

Special leave to appeal by the Supreme Court.

136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.

(2) Nothing in clause (*1*) shall apply to any judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces.

Review of judgments or orders by the Supreme Court.

137. Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

Enlargement of the jurisdiction of the Supreme Court.

138. (1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

Conferment on the Supreme Court of powers to issue certain writs.

139. Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for any purposes other than those mentioned in clause (2) of Article 32.

Ancillary powers of Supreme Court.

140. Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

Law declared by Supreme Court to be binding on all courts.

141. The law declared by the Supreme Court shall be binding on all courts within the territory of India.

Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

142. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Power of President to consult Supreme Court.

143. (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in clause (*i*) of the proviso, to Article 131, refer a dispute of the kind mentioned in the said clause to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

Civil and judicial authorities to act in aid of the Supreme Court.

144. All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

145. (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including:—

Rules of Court, etc.

(*a*) rules as to the persons practising before the Court;

(*b*) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;

(*c*) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;

(*d*) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of Article 134;

(*e*) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;

(*f*) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

(*g*) rules as to the granting of bail;

(*h*) rules as to stay of proceedings;

(*i*) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

(*j*) rules as to the procedure for inquiries referred to in clause (1) of Article 317.

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under Article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

Officers and servants and the expenses of the Supreme Court.

146. (1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct :

Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

Interpretation.

147. In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

CHAPTER V. — COMPTROLLER AND AUDITOR-GENERAL OF INDIA

Comptroller and Auditor-General of India.

148. (1) There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court.

(2) Every person appointed to be the Comptroller and Auditor-General of India shall, before he enters upon his office, make and subscribe before the

President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(3) The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule:

Provided that neither the salary of a Comptroller and Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(4) The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.

(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

(6) The administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in repect of persons serving in that office, shall be charged upon the Consolidated Fund of India.

Duties and powers of the Comptroller and Auditor-General.

149. The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

Power of Comptroller and Auditor-General to give directions as to accounts.

150. The accounts of the Union and of the States shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.

Audit reports.

151. (1) The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor or Rajpramukh of the State, who shall cause them to be laid before the Legislature of the State.

PART VI

THE STATES IN PART A OF THE FIRST SCHEDULE

CHAPTER I.—GENERAL

Definition.

152. In this Part, unless the context otherwise requires, the expression "State" means a State specified in Part A of the First Schedule.

CHAPTER II.—THE EXECUTIVE

The Governor

Governors of States.

153. There shall be a Governor for each State.

Executive power of State.

154. (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Nothing in this article shall—

(*a*) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority ; or

(*b*) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

Appointment of Governor.

155. The Governor of a State shall be appointed by the President by warrant under his hand and seal.

Term of office of Governor.

156. (1) The Governor shall hold office during the pleasure of the President.

(2) The Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters upon his office :

Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

Qualifications for appointment as Governor.

157. No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years.

Conditions of Governor's Office.

158. (1) The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor.

(2) The Governor shall not hold any other office of profit.

(3) The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office.

Oath or affirmation by the Governor.

159. Every Governor and every person discharging the functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of the High Court exercising jurisdiction in relation to the State, or, in his absence, the seniormost Judge of that Court available, an oath or affirmation in the following form, that is to say—

> swear in the name of God
> "I, A.B., do ——————————————
> solemnly affirm
> that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of ——————— (*name of the State*) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of ——————— (*name of the State*)."

Discharge of the functions of the Governor in certain contingencies.

160. The President may make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter.

Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

161. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

Extent of executive power of State.

162. Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

Council of Ministers

Council of Ministers to aid and advise Governor.

163. (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

Other provisions as to Ministers.

164. (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor :

Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

The Advocate-General for the State

Advocate-General for the State.

165. (1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State.

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

Conduct of Government Business

Conduct of business of the Government of a State.

166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

Duties of Chief Minister as respects the furnishing of information to Governor, etc.

167. It shall be the duty of the Chief Minister of each State—

(*a*) to communicate to the Governor of the State all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation ;

(*b*) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for ; and

(*c*) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

CHAPTER III.—THE STATE LEGISLATURE

General

Constitution of Legislatures in States.

168. (1) For every State there shall be a Legislature which shall consist of the Governor, and

(*a*) in the States of Bihar, Bombay, Madras, Punjab, Uttar Pradesh and West Bengal, two Houses;

(*b*) in other States, one House.

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

Abolition or creation of Legislative Councils in States.

169. (1) Notwithstanding anything in Article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (*1*) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

(3) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

Composition of the Legislative Assemblies.

170. (1) Subject to the provisions of Article 333, the Legislative Assembly of each State shall be composed of members chosen by direct election.

(2) The representation of each territorial constituency in the Legislative Assembly of a State shall be on the basis of the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published and shall, save in the case of the autonomous districts of Assam and the constituency comprising the cantonment and municipality of Shillong, be on a scale of not more than one member for every seventy-five thousand of the population:

Provided that the total number of members in the Legislative Assembly of a State shall in no case be more than five hundred or less than sixty.

(3) The ratio between the number of members to be allotted to each territorial constituency in a State and the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published shall, so far as practicable, be the same throughout the State.

(4) Upon the completion of each census, the representation of the several territorial constituencies in the Legislative Assembly of each State shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly.

Composition of the Legislative Councils.

171. (1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one-fourth of the total number of members in the Legislative Assembly of that State:

Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3).

(3) Of the total number of members of the Legislative Council of a State—

(*a*) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;

(*b*) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;

(*c*) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;

(*d*) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;

(*e*) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5).

(4) The members to be elected under sub-clauses (*a*), (*b*) and (*c*) of clause (3) shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (*d*) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote.

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art, co-operative movement and social service.

Duration of State Legislatures.

172. (1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly :

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Qualification for membership of the State Legislature.

173. A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he —

(*a*) is a citizen of India ;

(*b*) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council not less than thirty years of age ; and

(*c*) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

Sessions of the State Legislature, prorogation and dissolution.

174. (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Governor may from time to time —

(*a*) prorogue the House or either House ;

(*b*) dissolve the Legislative Assembly.

Right of Governor to address and send messages to the House or Houses.

175. (1) The Governor may address the Legislative Assembly or, in the case of a State having a Legislative Council, either House of the Legislature of the State, or both Houses assembled together, and may for that purpose require the attendance of members.

(2) The Governor may send messages to the House or Houses of the Legislature of the State, whether with respect to a Bill then pending in the Legislature or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

Special address by the Governor at the commencement of every session.

176. (1) At the commencement of the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year the Governor shall address the Legislative Assembly or, in the case of a State having a Legislative Council, both Houses assembled together and inform the Legislature of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of the House or either House for the allotment of time for discussion of the matters referred to in such address.

Rights of Ministers and Advocate-General as respects the Houses.

177. Every Minister and the Advocate-General for a State shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in, and otherwise to take part in the proceedings of, any committee of the Legislature of which he may be named a member, but shall not, by virtue of this article, be entitled to vote.

Officers of the State Legislature

The Speaker and Deputy Speaker of the Legislative Assembly.

178. Every Legislative Assembly of a State shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be.

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

179. A member holding office as Speaker or Deputy Speaker of an Assembly—

(*a*) shall vacate his office if he ceases to be a member of the Assembly ;

(*b*) may at any time by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office ; and

(*c*) may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly :

Provided that no resolution for the purpose of clause (*c*) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution :

Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

180. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the Governor may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

The Speaker and the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.

181. (1) At any sitting of the Legislative Assembly, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of Article 180 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in Article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

The Chairman and Deputy Chairman of the Legislative Council.

182. The Legislative Council of every State having such Council shall, as soon as may be, choose two members of the Council to be respectively Chairman and Deputy Chairman thereof and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Council shall choose another member to be Chirman or Deputy Chairman, as the case may be.

Vacation and resignation of and removal from, the offices of Chairman and Deputy Chairman.

183. A member holding office as Chairman or Deputy Chairman of a Legislative Council—

(a) shall vacate his office if he ceases to be a member of the Council;

(b) may at any time by writing under his hand addressed, if such member is the Chairman, to the Deputy Chairman, and if such member is the Deputy Chairman, to the Chairman, resign his office; and (*c*) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (*c*) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.

184. (1) While the office of Chairman is vacant, the duties of the office shall be performed by the Deputy Chairman or, if the office of Deputy Chairman is also vacant, by such member of the Council as the Governor may appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council the Deputy Chairman or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

185. (1) At any sitting of the Legislative Council, while any resolution for the removal of the Chairman from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of Article 184 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman or, as the case may be, the Deputy Chairman is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Council while any resolution for his removal from office is under consideration in the Council and shall, notwithstanding anything in Article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

Salaries and allowances of the Speaker and Deputy Speaker and the Chairman and Deputy Chairman.

186. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly, and to the Chairman and the Deputy Chairman of the Legislative Council, such salaries and allowances as may be respectively fixed by the Legislature of the State by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

Secretariat of State Legislature.

187. (1) The House or each House of the Legislature of a State shall have a separate secretarial staff:

Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

Conduct of Business

Oath or affirmation by members.

188. Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

189. (1) Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature of a State shall be determined by a majority of votes of the members present and voting, other than the Speaker or Chairman, or person acting as such.

The Speaker or Chairman, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A House of the Legislature of a State shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature of a State shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until the Legislature of the State by law otherwise provides, the quorum to constitute a meeting of a House of the Legislature of a State shall be ten members or one-tenth of the total number of members of the House, whichever is greater.

(4) If at any time during a meeting of the Legislative Assembly or the Legislative Council of a State there is no quorum, it shall be the duty of the Speaker or Chairman, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

Disqualifications of Members

Vacation of seats.

190. (1) No person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States.

(3) If a member of a House of the Legislature of a State—

(*a*) becomes subject to any of the disqualifications mentioned in clause (1) of Article 191; or

(*b*) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

Disqualifications for membership.

191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(*a*) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(*b*) if he is of unsound mind and stands so declared by a competent court;

(*c*) if he is an undischarged insolvent;

(*d*) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(*e*) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

Decision on questions as to disqualifications of members.

192. (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

Penalty for sitting and voting before making oath or affirmation under Article 188 or when not qualified or when disqualified.

193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of Article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

Powers, Privileges and Immunities of State Legislatures and their Members

Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof.

194. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

Salaries and allowances of members.

195. Members of the Legislative Assembly and the Legislative Council of a State shall be entitled to receive such salaries and allowances as may from time to time be determined by the Legislature of the State by law and, until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province.

Legislative Procedure

Provisions as to introduction and passing of Bills.

196. (1) Subject to the provisions of Articles 198 and 207 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature of a State which has a Legislative Council.

(2) Subject to the provisions of Articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof.

(4) A Bill pending in the Legislative Council of a State which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Legislative Assembly of a State, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

Restriction on powers of Legislative Council as to Bills other than Money Bills.

197. (1) If after a Bill has been passed by the Legislative Assembly of a State having a Legislative Council and transmitted to the Legislative Council—

(*a*) the Bill is rejected by the Council ; or

(*b*) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it ; or

(*c*) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council —

(*a*) the Bill is rejected by the Council ; or

(*b*) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it ; or

(*c*) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative

Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

(3) Nothing in this article shall apply to a Money Bill.

Special procedure in respect of Money Bills.

198. (1) A Money Bill shall not be introduced in a Legislative Council.

(2) After a Money Bill has been passed by the Legislative Assembly of a State having a Legislative Council, it shall be transmitted to the Legislative Council for its recommendations, and the Legislative Council shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the Legislative Assembly with its recommendations, and the Legislative Assembly may thereupon either accept or reject all or any of the recommendations of the Legislative Council.

(3) If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Legislative Council and accepted by the Legislative Assembly.

(4) If the Legislative Assembly does not accept any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly without any of the amendments recommended by the Legislative Council.

(5) If a Money Bill passed by the Legislative Assembly and transmitted to the Legislative Council for its recommendations is not returned to the Legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the Legislative Assembly.

Definition of "Money Bills".

199. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

(*a*) the imposition, abolition, remission, alteration or regulation of any tax;

(*b*) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;

(*c*) the custody of the Consolidated Fund or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund;

(*d*) the appropriation of moneys out of the Consolidated Fund of the State ;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure ;

(*f*) the receipt of money on account of the Consolidated Fund of the State or the public account of the State or the custody or issue of such money ; or

(*g*) any matter incidental to any of the matters specified in sub-clauses (*a*) to (*f*).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under Article 198, and when it is presented to the Governor for assent under Article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.

Assent to Bills.

200. When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President :

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom :

Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.

Bills reserved for consideration.

201. When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom :

Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to Article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration.

Procedure in Financial Matters

Annual financial statement.

202. (1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(*a*) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State; and

(*b*) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State;

and shall distinguish expenditure on revenve account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State—

(*a*) the emoluments and allowances of the Governor and other expenditure relating to his office;

(*b*) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having a Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council;

(*c*) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(*d*) expenditure in respect of the salaries and allowances of Judges of any High Court;

(e) any sums required to satisfy any judgment, decree or award of any Court or arbitral tribunal;

(f) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.

Procedure in Legislature with respect to estimates.

203. (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed as preventing the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

Appropriation Bills.

204. (1) As soon as may be after the grants under Article 203 have been made by the Assembly, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet—

(a) the grants so made by the Assembly; and

(b) the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

(2) No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of Articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

Supplementary, additional or excess grants.

205. (1) The Governor shall—

(a) if the amount authorised by any law made in accordance with the provisions of Article 204 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(*b*) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,

cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative Assembly of the State a demand for such excess, as the case may be.

(2) The provisions of Articles 202, 203 and 204 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

Votes on account, votes of credit and exceptional grants.

206. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the Legislative Assembly of a State shall have power—

(*a*) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in Article 203 for the voting of such grant and the passing of the law in accordance with the provisions of Article 204 in relation to that expenditure ;

(*b*) to make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement ;

(*c*) to make an exceptional grant which forms no part of the current service of any financial year ;

and the Legislature of the State shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of Articles 203 and 204 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure.

Special provisions as to financial Bills.

207. (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of Article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council :

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of a State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill.

Procedure Generally

Rules of procedure.

208. (1) A House of the Legislature of a State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the corresponding Province shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be.

(3) In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

Regulation by law of procedure in the Legislature of the State in relation to financial business.

209. The Legislature of a State may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, the House or Houses of the Legislature of the State in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the State, and, if and so far as any provision of any law so made is inconsistent with any rule made by the House or either House of the Legislature of the State under clause (1) of Article 208 or with any rule or standing order having effect in relation to the Legislature of the State under clause (2) of that article, such provision shall prevail.

210. (1) Notwithstanding anything in Part XVII, but subject to the provisions of Article 348, business in the Legislature of a State shall be transacted in the official language or languages of the State or in Hindi or in English :

Language to be used in the Legislature.

Provided that the Speaker of the Legislative Assembly or Chairman of the Legislative Council, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in any of the languages aforesaid to address the House in his mother-tongue.

(2) Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

211. No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

Restriction on discussion in the Legislature.

212. (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

Courts not to inquire into proceedings of the Legislature.

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

CHAPTER IV. — LEGISLATIVE POWER OF THE GOVERNOR

213. (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Power of Governor to promulgate Ordinances during recess of Legislature.

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature ; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President ; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council ; and

(*b*) may be withdrawn at any time by the Governor.

Explanation.—Where the Houses of the Legislature of a State having a Legislative Council are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void :

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

CHAPTER V. — THE HIGH COURTS IN THE STATES

High Courts for States.

214. (1) There shall be a High Court for each State.

(2) For the purposes of this Constitution the High Court exercising jurisdiction in relation to any Province immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State.

(3) The provisions of this Chapter shall apply to every High Court referred to in this article.

High Courts to be Courts of record.

215. Every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself.

Constitution of High Courts.

216. Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint:

Provided that the Judges so appointed shall at no time exceed in number such maximum number as the President may, from time to time, by order fix in relation to that Court.

Appointment and conditions of the office of a Judge of a High Court.

217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office until he attains the age of sixty years:

Provided that —

(*a*) a Judge may, by writing under his hand addressed to the President, resign his office;

(*b*) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(*c*) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and —

(*a*) has for at least ten years held a judicial office in the territory of India; or

(*b*) has for at least ten years been an advocate of a High Court in any State specified in the First Schedule or of two or more such Courts in succession.

Explanation. — For the purposes of this clause —

(*a*) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office after he became an advocate;

(*b*) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

Application of certain provisions relating to Supreme Court to High Courts.

218. The provisions of clauses (4) and (5) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

Oath or affirmation by Judges of High Courts.

219. Every person appointed to be a Judge of a High Court in a State shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Prohibition of practising in courts or before any authority by Judges.

220. No person who has held office as a Judge of a High Court after the commencement of this Constitution shall plead or act in any Court or before any authority within the territory of India.

Salaries, etc., of Judges.

221. (1) There shall be paid to the Judges of each High Court such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule :

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Transfer of a Judge from one High Court to another.

222. (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court within the territory of India.

(2) When a Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

Appointment of acting Chief Justice.

223. When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

Attendance of retired Judges at sittings of High Courts.

224. Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court :

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.

Jurisdiction of existing High Courts.

225. Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution :

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

Power of High Courts to issue certain writs.

226. (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (*1*) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

Power of superintendence over all Courts by the High Court.

227. (1) Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(*a*) call for returns from such Courts;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts; and (*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such Courts and to attorneys, advocates and pleaders practising therein :

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any Court or tribunal constituted by or under any law relating to the Armed Forces.

Transfer of certain cases to High Court.

228. If the High Court is satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

(*a*) either dispose of the case itself, or

(*b*) determine the said question of law and return the case to the Court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said Court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

Officers and servants and the expenses of High Courts.

229. (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct :

Provided that the Governor of the State in which the High Court has its principal seat may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose :

Provided that the rules made under this clause shall so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State in which the High Court has its principal seat.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers

and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

Extension of or exclusion from the jurisdiction of High Courts.

230. Parliament may by law—

(*a*) extend the jurisdiction of a High Court to, or

(*b*) exclude the jurisdiction of a High Court from,

any State specified in the First Schedule other than, or any area not within, the State in which the High Court has its principal seat.

Restrictions on the powers of the Legislatures of States to make laws with respect to jurisdiction of a High Court in a State having jurisdiction outside that State.

231. Where a High Court exercises jurisdiction in relation to any area outside the State in which it has its principal seat, nothing in this Constitution shall be construed—

(*a*) as empowering the Legislature of the State in which the Court has its principal seat to increase, restrict or abolish that jurisdiction;

(*b*) as empowering the Legislature of a State specified in Part A or Part B of the First Schedule in which any such area is situate, to abolish that jurisdiction; or

(*c*) as preventing the Legislature having power to make laws in that behalf for any such area, from passing, subject to the provisions of clause (*b*), such laws with respect to the jurisdiction of the Court in relation to that area as it would be competent to pass if the principal seat of the Court were in that area.

Interpretation.

232. Where a High Court exercises jurisdiction in relation to more than one State specified in the First Schedule or in relation to a State and an area not forming part of the State—

(*a*) references in this Chapter to the Governor in relation to the Judges of a High Court shall be construed as references to the Governor of the State in which the Court has its principal seat;

(*b*) the reference to the approval by the Governor of rules, forms and tables for subordinate Courts shall be construed as a reference to the approval thereof by the Governor or the Rajpramukh of the State in which the subordinate Court is situate, or if it is situate in an area not forming part of any State specified in Part A or Part B of the First Schedule, by the President; and

(*c*) references to the Consolidated Fund of the State shall be construed as references to the Consolidated Fund of the State in which the Court has its principal seat.

CHAPTER VI. — SUBORDINATE COURTS

Appointment of district judges.

233. (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

Recruitment of persons other than district judges to the judicial service.

234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

Control over subordinate courts.

235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court; but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Interpretation.

236. In this Chapter —

(*a*) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(*b*) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

Application of the provisions of this Chapter to certain class or classes of magistrates.

237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

PART VII

THE STATES IN PART B OF THE FIRST SCHEDULE

Application of provisions of Part VI to States in Part B of the First Schedule.

238. The provisions of Part VI shall apply in relation to the States specified in Part B of the First Schedule as they apply in relation to the States specified in Part A of that Schedule subject to the following modifications and omissions, namely :—

(1) For the word "Governor" wherever it occurs in the said Part VI, except where it occurs for the second time in clause (*b*) of Article 232, the word "Rajpramukh" shall be substituted.

(2) In Article 152, for the word and letter "Part A" the word and letter "Part B" shall be substituted.

(3) Articles 155, 156 and 157 shall be omitted.

(4) In Article 158,—

(*i*) in clause (1), for the words "be appointed" the word "becomes" shall be substituted ;

(*ii*) for clause (3), the following clause shall be substituted, namely:—

"(3) The Rajpramukh shall, unless he has his own residence in the principal seat of Government of the State, be entitled without payment of rent to the use of an official residence and shall be also entitled to such allowances and privileges as the President may, by general or special order, determine." ;

(*iii*) in clause (4), the words "emoluments and" shall be omitted.

(5) In Article 159, after the words "seniormost Judge of that Court available" the words "or in such other manner as may be prescribed in that behalf by the President" shall be inserted.

(6) In Article 164, for the proviso to clause (1) the following proviso shall be substituted, namely :—

"Provided that in the State of Madhya Bharat there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work."

(7) In Article 168, for clause (1) the following clause shall be substituted, namely :—

"(1) For every State there shall be a Legislature which shall consist of the Rajpramukh and—

(*a*) in the State of Mysore, two Houses ;

(*b*) in other States, one House."

(8) In Article 186, for the words "as are specified in the Second Schedule" the words "as the Rajpramukh may determine" shall be substituted.

(9) In Article 195, for the words "as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province" the words "as the Rajpramukh may determine" shall be substituted.

(10) In clause (3) of Article 202—

(*i*) for sub-clause (*a*), the following sub-clause shall be substituted, namely :—

"(*a*) the allowances of the Rajpramukh and other expenditure relating to his office as determined by the President by general or special order;"

(*ii*) for sub-clause (*f*) the following sub-clauses shall be substituted, namely :—

"(*f*) in the case of the State of Travancore-Cochin, a sum of fiftyone lakhs of rupees required to be paid annually to the Devaswom fund under the covenant entered into before the commencement of this Constitution by the Rulers of the Indian States of Travancore and Cochin for the formation of the United State of Travancore and Cochin ;

(*g*) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged."

(11) In Article 208, for clause (2), the following clause shall be substituted, namely :—

"(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the State or, where no House of the Legislature for the State existed, the rules of procedure and standing orders in force immediately before such commencement with respect to the Legislative Assembly of such Province as may be specified in that behalf by the Rajpramukh of the State, shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be."

(12) In clause (2) of Article 214, for the word "Province" the words "Indian State" shall be substituted.

(13) For Article 221, the following article shall be substituted, namely :—

"221. (1) There shall be paid to the Judges of each High Court such salaries as may be determined by the President after consultation with the Rajpramukh.

Salaries, etc., of Judges.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as may be determined by the President after consultation with the Rajpramukh :

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

PART VIII

THE STATES IN PART C OF THE FIRST SCHEDULE

239. (1) Subject to the other provisions of this Part, a State specified in Part C of the First Schedule shall be administered by the President acting, to such extent as he thinks fit, through a Chief Commissioner or a Lieutenant-Governor to be appointed by him or through the Government of a neighbouring State :

Administration of States in Part C of the First Schedule.

Provided that the President shall not act through the Government of a neighbouring State save after—

(*a*) consulting the Government concerned; and

(*b*) ascertaining in such manner as the President considers most appropriate the views of the people of the State to be so administered.

(2) In this article, references to a State shall include references to a part of a State.

240. (1) Parliament may by law create or continue for any State specified in Part C of the First Schedule and administered through a Chief Commissioner or Lieutenant-Governor—

Creation or continuance of local Legislatures or Council of Advisers or Ministers.

(*a*) a body, whether nominated, elected or partly nominated and partly elected, to function as a Legislature for the State ; or

(*b*) a Council of Advisers or Ministers,

or both with such constitution, powers and functions, in each case, as may be specified in the law.

(2) Any such law as is referred to in clause (*1*) shall not be deemed to be an amendment of this Constitution for the purposes of Article 368

notwithstanding that it contains any provision which amends or has the effect of amending the Constitution.

High Courts for States in Part C of the First Schedule.

241. (1) Parliament may by law constitute a High Court for a State specified in Part C of the First Schedule or declare any Court in any such State to be a High Court for all or any of the purposes of this Constitution.

(2) The provisions of Chapter V of Part VI shall apply in relation to every High Court referred to in clause (*1*) as they apply in relation to a High Court referred to in Article 214 subject to such modifications or exceptions as Parliament may by law provide.

(3) Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by or under this Constitution, every High Court exercising jurisdiction immediately before the commencement of this Constitution in relation to any State specified in Part C of the First Schedule or any area included therein shall continue to exercise such jurisdiction in relation to that State or area after such commencement.

(4) Nothing in this article derogates from the power of Parliament to extend or exclude the jurisdiction of a High Court in any State specified in Part A or Part B of the First Schedule to, or from, any State specified in Part C of that Schedule or any area included within that State.

Coorg.

242. (1) Until Parliament by law otherwise provides, the Constitution, powers and functions of the Coorg Legislative Council shall be the same as they were immediately before the commencement of this Constitution.

(2) The arrangements with respect to revenues collected in Coorg and expenses in respect of Coorg shall, until other provision is made in that behalf by the President by order, continue unchanged.

PART IX

THE TERRITORIES IN PART D OF THE FIRST SCHEDULE AND OTHER TERRITORIES NOT SPECIFIED IN THAT SCHEDULE

Administration of territories specified in Part D of the First Schedule and other territories not specified in that Schedule.

243. (1) Any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule shall be administered by the President acting, to such extent as he thinks fit, through a Chief Commissioner or other authority to be appointed by him.

(2) The President may make regulations for the peace and good government of any such territory and any regulation so made may repeal

or amend any law made by Parliament or any existing law which is for the time being applicable to such territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to such territory.

PART X

THE SCHEDULED AND TRIBAL AREAS

Administration of Scheduled Areas and tribal areas.

244. (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State specified in Part A or Part B of the First Schedule other than the State of Assam.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam.

PART XI

RELATIONS BETWEEN THE UNION AND THE STATES

CHAPTER I. — LEGISLATIVE RELATIONS

Distribution of Legislative Powers

Extent of laws made by Parliament and by the Legislatures of States.

245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Subject-matter of laws made by Parliament and by the Legislatures of States.

246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State specified in Part A or Part B of the First Schedule also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B

of the First Schedule notwithstanding that such matter is a matter enumerated in the State List.

Power of Parliament to provide for the establishment of certain additional Courts.

247. Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

Residuary powers of legislation.

248. (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Power of Parliament to legislate with respect to a matter in the State List in the national interest.

249. (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (*1*), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.

250. (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make

shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

Inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States.

251. Nothing in Articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

252. (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

Legislation for giving effect to international agreements.

253. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, (or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2),) the law made by Parliament, whether passed before or after the law made by the Legislature of such State, (or, as the case may be, the existing law) shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

255. No Act of Parliament or of the Legislature of a State specified in Part A or Part B of the First Schedule, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

(*a*) where the recommendation required was that of the Governor, either by the Governor or by the President ;

(*b*) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President ;

(*c*) where the recommendation or previous sanction required was that of the President, by the President.

CHAPTER II. — ADMINISTRATIVE RELATIONS

General

Obligation of States and the Union.

256. The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Control of the Union over States in certain cases.

257. (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of

communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

Power of the Union to confer powers, etc., on States in certain cases.

258. (1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

Armed Forces in States in Part B of the First Schedule.

259. (1) Notwithstanding anything in this Constitution, a State specified in Part B of the First Schedule having any Armed Forces immediately before the commencement of this Constitution may, until Parliament by law otherwise provides, continue to maintain the said Forces after such commencement subject to such general or special orders as the President may from time to time issue in that behalf.

(2) Any such Armed Forces as are referred to in clause (1) shall form part of the Armed Forces of the Union.

Jurisdiction of the Union in relation to territories outside India.

260. The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

Public acts, records and judicial proceedings.

261. (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

Disputes relating to Waters

Adjudication of disputes relating to waters of inter-State rivers or river valleys.

262. (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

Co-ordination between States

Provisions with respect to an Inter-State Council.

263. If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

(*a*) inquiring into and advising upon disputes which may have arisen between States;

(*b*) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or

(*c*) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

PART XII

FINANCE, PROPERTY, CONTRACTS AND SUITS

CHAPTER I. — FINANCE

General

Interpretation.

264. In this Part, unless the context otherwise requires,—

(*a*) "Finance Commission" means a Finance Commission constituted under Article 280;

(*b*) "State" does not include a State specified in Part C of the First Schedule;

(*c*) references to States specified in Part C of the First Schedule shall include references to any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule.

Taxes not to be imposed save by authority of law.

265. No tax shall be levied or collected except by authority of law.

Consolidated Funds and public accounts of India and of the States.

266. (1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State".

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

Contingency Fund.

267. (1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of India" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under Article 115 or Article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor or Rajpramukh of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under Article 205 or Article 206.

Distribution of Revenues between the Union and the States

Duties levied by the Union but collected and appropriated by the States.

268. (1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected —

(*a*) in the case where such duties are leviable within any State specified in Part C of the First Schedule, by the Government of India, and

(*b*) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

Taxes levied and collected by the Union but assigned to the States.

269. (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely :—

(*a*) duties in respect of succession to property other than agricultural land ;

(*b*) estate duty in respect of property other than agricultural land;

(*c*) terminal taxes on goods or passengers carried by railway, sea or air ;

(*d*) taxes on railway fares and freights ;

(*e*) taxes other than stamp duties on transactions in stock-exchanges and futures markets ;

(*f*) taxes on the sale or purchase of newspapers and on advertisements published therein.

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

Taxes levied and collected by the Union and distributed between the Union and the States.

270. (1) Taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule or to taxes payable in respect of Union emoluments, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.

(3) For the purposes of clause (2), in each financial year such percentage as may be prescribed of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent proceeds attributable to States specified in Part C of the First Schedule.

(4) In this article—

(*a*) "taxes on income" does not include a corporation tax;

(*b*) "prescribed" means—

(*i*) until a Finance Commission has been constituted, prescribed by the President by order, and

(*ii*) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission;

(*c*) "Union emoluments" includes all emoluments and pensions payable out of the Consolidated Fund of India in respect of which income-tax is chargeable.

Surcharge on certain duties and taxes for purposes of the Union.

271. Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

Taxes which are levied and collected by the Union and may be distributed between the Union and the States.

272. Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but, if Parliament by law so provides, there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law.

Grants in lieu of export duty on jute and jute products.

273. (1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression "prescribed" has the same meaning as in Article 270.

Prior recommendation of President required to Bills affecting taxation in which States are interested.

274. (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means—

(*a*) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(*b*) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

Grants from the Union to certain States.

275. (1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States:

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State:

Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to—

(*a*) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the tribal areas specified in Part A of the table appended to Paragraph 20 of the Sixth Schedule; and

(*b*) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament:

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

Taxes on professions, trades, callings and employments.

276. (1) Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority

in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum :

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

Savings.

277. Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

Agreement with States in Part B of the First Schedule with regard to certain financial matters.

278. (1) Notwithstanding anything in this Constitution, the Government of India may, subject to the provisions of clause (2), enter into an agreement with the Government of a State specified in Part B of the First Schedule with respect to—

(a) the levy and collection of any tax or duty leviable by the Government of India in such State and for the distribution of the proceeds thereof otherwise than in accordance with the provisions of this Chapter ;

(b) the grant of any financial assistance by the Government of India to such State in consequence of the loss of any revenue which that State used to derive from any tax or duty leviable under this Constitution by the Government of India or from any other sources ;

(c) the contribution by such State in respect of any payment made by the Government of India under clause (1) of Article 291,

and, when an agreement is so entered into, the provisions of this Chapter shall in relation to such State have effect subject to the terms of such agreement.

(2) An agreement entered into under clause (1) shall continue in force for a period not exceeding ten years from the commencement of this Constitution:

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if after consideration of the report of the Finance Commission he thinks it necessary to do so.

Calculation of "net proceeds", etc.

279. (1) In the foregoing provisions of this Chapter, "net proceeds" means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate shall be final.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or an order of the President may, in any case where under this Part the proceeds of any duty or tax are, or may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

Finance Commission.

280. (1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to —

(*a*) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(*b*) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;

(*c*) the continuance or modification of the terms of any agreement entered into by the Government of India with the Government of any State specified in Part B of the First Schedule under clause (1) of Article 278 or under Article 306; and

(*d*) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

Recommendations of the Finance Commission.

281. The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Miscellaneous Financial Provisions

Expenditure defrayable by the Union or a State out of its revenues.

282. The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.

Custody, etc., of Consolidated Funds, Contingency Funds and moneys credited to the public accounts.

283. (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President.

(2) The custody of the Consolidated Fund of a State and the Contingency Fund of a State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such funds received by or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor or Rajpramukh of the State.

Custody of suitors' deposits and other moneys received by public servants and Courts.

284. All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, or

(*b*) any Court within the territory of India to the credit of any cause, matter, account or persons,

shall be paid into the public account of India or the public account of the State, as the case may be.

285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

Exemption of property of the Union from State taxation.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

Restrictions as to imposition of tax on the sale or purchase of goods.

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of

the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

Exemption from taxes on electricity.

287. Save in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is —

(*a*) consumed by the Government of India, or sold to the Government of India for consumption by that Government ; or

(*b*) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway,

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

Exemption from taxation by States in respect of water or electricity in certain cases.

288. (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Explanation. — The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

Exemption of property and income of a State from Union taxation.

289. (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament

may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

Adjustment in respect of certain expenses and pensions.

290. Where under the provisions of this Constitution the expenses of any court or Commission, or the pension payable to or in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—

(*a*) in the case of a charge on the Consolidated Fund of India, the court or Commission serves any of the separate needs of a State, or the person has served wholly or in part in connection with the affairs of a State; or

(*b*) in the case of a charge on the Consolidated Fund of a State, the court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State,

there shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

Privy purse sums of Rulers.

291. (1) Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(*a*) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and

(*b*) the sums so paid to any Ruler shall be exempt from all taxes on income.

(2) Where the territories of any such Indian State as aforesaid are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on, and paid out of, the Consolidated Fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any

agreement entered into in that behalf under clause (1) of Article 278, be determined by order of the President.

CHAPTER II. — BORROWING

Borrowing by the Government of India.

292. The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

Borrowing by States.

293. (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under Article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

CHAPTER III. — PROPERTY, CONTRACTS, RIGHTS, LIABILITIES, OBLIGATIONS AND SUITS

Succession to property, assets, rights, liabilities and obligations in certain cases.

294. As from the commencement of this Constitution —

(*a*) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(*b*) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,

subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

Succession to property, assets, rights, liabilities and obligations in other cases.

295. (1) As from the commencement of this Constitution —

(a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

Property accruing by escheat or lapse or as *bona vacantia.*

296. Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

Explanation. — In this article, the expressions "Ruler" and "Indian State" have the same meanings as in Article 363.

297. All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union.

Things of value lying within territorial waters to vest in the Union.

298. (1) The executive power of the Union and of each State shall extend, subject to any law made by the appropriate Legislature, to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

Power to acquire property.

(2) All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State, as the case may be.

299. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor or the Rajpramukh of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor or the Rajpramukh by such persons and in such manner as he may direct or authorise.

Contracts.

(2) Neither the President nor the Governor nor the Rajpramukh shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

Suits and Proceedings.

(2) If at the commencement of this Constitution —

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and (*b*) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

PART XIII

TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

Freedom of trade, commerce and intercourse.

301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Power of Parliament to impose restrictions on trade, commerce and intercourse.

302. Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

Restrictions on the legislative powers of the Union and of the States with regard to trade and Commerce.

303. (1) Notwithstanding anything in Article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

Restrictions on trade, commerce and intercourse among States.

304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—

(*a*) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(*b*) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest :

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Effect of Articles 301 and 303 on existing laws.

305. Nothing in Articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide.

Power of certain States in Part B of the First Schedule to impose restrictions on trade and commerce.

306. Notwithstanding anything in the foregoing provisions of this Part or in any other provisions of this Constitution, any State specified in Part B of the First Schedule which before the commencement of this Constitution was levying any tax or duty on the import of goods into the State from other States or on the export of goods from the State to other States may, if an agreement in that behalf has been entered into between the Government of India and the Government of that State, continue to levy and collect such tax or duty subject to the terms of such agreement and for such period not exceeding ten years from the commencement of this Constitution as may be specified in the agreement :

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if, after consideration of the report of the Finance Commission constituted under Article 280, he thinks it necessary to do so.

Appointment of authority for carrying out the purposes of Articles 301 to 304.

307. Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of Articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

PART XIV

SERVICES UNDER THE UNION AND THE STATES

CHAPTER I. — SERVICES

Interpretation.

308. In this Part, unless the context otherwise requires, the expression "State" means a State specified in Part A or Part B of the First Schedule.

Recruitment and conditions of service of persons serving the Union or a State.

309. Subject to the provision of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor or Rajpramukh of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

Tenure of office of persons serving the Union or a State.

310. (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor or Rajpramukh of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor or the Rajpramukh, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

311. (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this clause shall not apply —

(*a*) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

(*b*) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(*c*) where the President or Governor or Rajpramukh, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity.

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final.

All-India services.

312. (1) Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

Transitional provisions.

313. Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

Provision for protection of existing officers of certain services.

314. Except as otherwise expressly provided by this Constitution, every person who having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India continues on and after the commencement of this Constitution to serve under the Government of India or of a State shall be entitled to receive from the Government of India and the Government of the State, which he is from time to time serving, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before such commencement.

CHAPTER II.—PUBLIC SERVICE COMMISSIONS

Public Service Commissions for the Union and for the States.

315. (1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for

the appointment of a Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.

(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.

(4) The Public Service Commission for the Union, if requested so to do by the Governor or Rajpramukh of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.

(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.

Appointment and term of office of members.

316. (1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor or Rajpramukh of the State:

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission, the age of sixty years, whichever is earlier:

Provided that—

(*a*) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor or Rajpramukh of the State, resign his office;

(*b*) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of Article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

317. (1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under Article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

Removal and suspension of a member of a Public Service Commission.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor or Rajpramukh, in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be,—

(*a*) is adjudged an insolvent; or

(*b*) engages during his term of office in any paid employment outside the duties of his office; or

(*c*) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour.

318. In the case of the Union Commission or a Joint Commission, the President and, in the case of a State Commission, the Governor or Rajpramukh of the State may by regulations —

Power to make regulations as to conditions of service of members and staff of the Commission.

(*a*) determine the number of members of the Commission and their conditions of service; and

(*b*) make provision with respect to the number of members of the staff of the Commission and their conditions of service :

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

Prohibition as to the holding of offices by members of Commission on ceasing to be such members.

319. On ceasing to hold office —

(*a*) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;

(*b*) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(*c*) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(*d*) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

Functions of Public Service Commissions.

320. (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted —

(*a*) on all matters relating to methods of recruitment to civil services and for civil posts ;

(*b*) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers ;

(*c*) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters ;

(*d*) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State ;

(*e*) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor or Rajpramukh of the State, may refer to them :

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor or Rajpramukh, as the case may be, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor or Rajpramukh of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

Power to extend functions of Public Service Commissions.

321. An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

Expenses of Public Service Commissions.

322. The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

Reports of Public Service Commissions.

323. (1) It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

(2) It shall be the duty of a State Commission to present annually to the Governor or Rajpramukh of the State a report as to the work done by the Commission, and it shall be the duty of a Joint Commission to present annually to the Governor or Rajpramukh of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor or Rajpramukh, as the case may be, shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

PART XV

ELECTIONS

Superintendence, direction and control of elections to be vested in an Election Commission.

324. (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election

Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine :

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment :

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor or Rajpramukh of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

325. There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.

326. The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

Power of Parliament to make provision with respect to elections to legislature.

327. Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or, in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Power of Legislature of a State to make provision with respect to elections to such Legislature.

328. Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

Bar to interference by courts in electoral matters.

329. Notwithstanding anything in this Constitution—

(*a*) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any Court;

(*b*) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

PART XVI

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES

Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.

330. (1) Seats shall be reserved in the House of the People for—

(*a*) the Scheduled Castes;

(*b*) the Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam; and

(*c*) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as

may be, the same proportion to the total number of seats allotted to that State in the House of the People as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

Representation of the Anglo-Indian community in the House of the People.

331. Notwithstanding anything in Article 81, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

332. (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly of every State specified in Part A or Part B of the First Schedule.

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district except in the case of the constituency comprising the cantonment and municipality of Shillong.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district except from the constituency comprising the cantonment and municipality of Shillong.

Representation of the Anglo-Indian community in the Legislative Assemblies of the States.

333. Notwithstanding anything in Article 170, the Governor or Rajpramukh of a State may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate such number of members of the community to the Assembly as he considers appropriate.

Reservation of seats and special representation to cease after ten years.

334. Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to—

(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and

(b) the representation of the Ango-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination,

shall cease to have effect on the expiration of a period of ten years from the commencement of this Constitution:

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

Claims of Scheduled Castes and Scheduled Tribes to services and posts.

335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Special provision for Anglo-Indian community in certain services.

336. (1) During the first two years after the commencement of this Constitution, appointments of members of the Anglo-Indian community to posts in the railway, customs, postal and telegraph services of the Union shall be made on the same basis as immediately before the fifteenth day of August, 1947.

During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less by ten per cent than the numbers so reserved during the immediately preceding period of two years:

Provided that at the end of ten years from the commencement of this Constitution all such reservations shall cease.

(2) Nothing in clause (1) shall bar the appointment of members of the Anglo-Indian community to posts other than, or in addition to, those reserved for the community under that clause if such members are found qualified for appointment on merit as compared with the members of other communities.

Special provision with respect to educational grants for the benefit of Anglo-Indian community.

337. During the first three financial years after the commecement of this Constitution, the same grants, if any, shall be made by the Union and by each State specified in Part A or Part B of the First Schedule for the benefit of the Anglo-Indian community in respect of education as were made in the financial year ending on the thirty-first day of March, 1948.

During every succeeding period of three years the grants may be less by ten per cent than those for the immediately preceding period of three years :

Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease :

Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.

Special Officer for Scheduled Castes, Scheduled Tribes, etc.

338. (1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

(3) In this article, references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of Article 340, by order specify and also to the Anglo-Indian community.

Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes.

339. (1) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States specified in Part A and Part B of the First Schedule.

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable.

(2) The executive power of the Union shall extend to the giving of directions to any such State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

Appointment of a Commission to investigate the conditions of backward classes.

340. (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

Scheduled Castes.

341. (1) The President may with respect to any State, and where it is a State specified in Part A or Part B of the First Schedule, after consultation with the Governor or Rajpramukh thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

Scheduled Tribes.

342. (1) The President may with respect to any State, and where it is a State specified in Part A or Part B of the First Schedule, after consultation with the Governor or Rajpramukh thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

PART XVII

OFFICIAL LANGUAGE

CHAPTER I — LANGUAGE OF THE UNION

Official language of the Union.

343. (1) The official language of the Union shall be Hindi in Devanagari script.

The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement:

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of—

(*a*) the English language, or

(*b*) the Devanagari form of numerals,

for such purposes as may be specified in the law.

Commission and Committee of Parliament on official language.

344. (1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

(*a*) the progressive use of the Hindi language for the official purposes of the Union;

(*b*) restrictions on the use of the English language for all or any of the official purposes of the Union;

(*c*) the language to be used for all or any of the purposes mentioned in Article 348;

(*d*) the form of numerals to be used for any one or more specified purposes of the Union;

(*e*) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively

by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in Article 348, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

CHAPTER II. — REGIONAL LANGUAGES

Official language or languages of a State.

345. Subject to the provisions of Articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State :

Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

Official language for communication between one State and another or between a State and the Union.

346. The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union :

Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.

Special provision relating to language spoken by a section of the population of a State.

347. On a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

CHAPTER III. — LANGUAGE OF THE SUPREME COURT, HIGH COURTS, ETC.

Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.

348. (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(*a*) all proceedings in the Supreme Court and in every High Court,

(*b*) the authoritative texts—

(*i*) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State, (*ii*) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor or Rajpramukh of a State, and

(*iii*) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor or Rajpramukh of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State :

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor or Rajpramukh of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor or Rajpramukh of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

Special procedure for enactment of certain laws relating to language.

349. During the period of fifteen years from the commencement of this Constitution, no Bill or amendment making provision for the language to be used for any of the purposes mentioned in clause (1) of Article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of the Commission constituted under clause (1) of Article 344 and the report of the Committee constituted under clause (4) of that article.

CHAPTER IV. — SPECIAL DIRECTIVES

Language to be used in representations for redress of grievances.

350. Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

Directive for development of the Hindi Language.

351. It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.

PART XVIII

EMERGENCY PROVISIONS

Proclamation of Emergency.

352. (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

(2) A Proclamation issued under clause (1) —

(*a*) may be revoked by a subsequent Proclamation;

(*b*) shall be laid before each House of Parliament;

(*c*) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

Effect of Proclamation of Emergency.

353. While a Proclamation of Emergency is in operation, then —

(*a*) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;

(*b*) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers, and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

354. (1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of Articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.

(2) Every order made under clause (1) shall as soon as may be after it is made, be laid before each House of Parliament.

355. It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

Duty of the Union to protect States against external aggression and internal disturbance.

356. (1) If the President, on receipt of a report from the Governor or Rajpramukh of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

Provisions in case of failure of constitutional machinery in States.

(*a*) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or Rajpramukh, as the case may be, or any body or authority in the State other than the Legislature of the State;

(*b*) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(*c*) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State :

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3) :

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years :

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

Exercise of legislative powers under Proclamation issued under Article 356.

357. (1) Where by a Proclamation issued under clause (1) of Article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;

(*b*) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

(*c*) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under Article 356, have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period, unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by Act of the appropriate Legislature.

Suspension of provisions of Article 19 during emergencies.

358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Suspension of the enforcement of the rights conferred by Part III during emergencies.

359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

Provisions as to financial emergency.

360. (1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

(2) The provisions of clause (2) of Article 352 shall apply in relation to a Proclamation issued under this article as they apply in relation to a Proclamation of Emergency issued under Article 352.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution —

(*a*) any such direction may include —

(*i*) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State ;

(*ii*) a provision requiring all Money Bills or other Bills to which the provisions of Article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State ;

(*b*) it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

PART XIX

MISCELLANEOUS

Protection of President and Governors and Rajpramukhs.

361. (1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties :

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61 :

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor or Rajpramukh of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor or Rajpramukh of a State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor or Rajpramukh of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor or Rajpramukh of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor or the Rajpramukh, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

Rights and privileges of Rulers of Indian States.

362. In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in clause (1) of Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State.

Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.

363. (1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, argeement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument.

(2) In this article—

(a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State ; and

(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

Special provisions as to major ports and aerodromes.

364. (1) Notwithstanding anything in this Constitution, the President may by public notification direct that as from such date as may be specified in the notification—

(a) any law made by Parliament or by the Legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or

(b) any existing law shall cease to have effect in any major port or aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification.

(2) In this article—

(a) "major port" means a port declared to be a major port by or under any law made by Parliament or any existing law and includes all areas for the time being included within the limits of such port;

(b) "aerodrome" means aerodrome as defined for the purposes of the enactments relating to airways, aircraft and air navigation.

Effect of failure to comply with, or to give effect to, directions given by the Union.

365. Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.

Definitions.

366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(1) "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;

(2) "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only;

(3) "article" means an article of this Constitution;

(4) "borrow" includes the raising of money by the grant of annuities, and "loan" shall be construed accordingly;

(5) "clause" means a clause of the article in which the expression occurs ;

(6) "corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled :—

(*a*) that it is not chargeable in respect of agricultural income ;

(*b*) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals ;

(*c*) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals ;

(7) "corresponding Province", "corresponding Indian State" or "corresponding State" means in cases of doubt such Province, Indian State or State as may be determined by the President to be the corresponding Province, the corresponding Indian State or the corresponding State, as the case may be, for the particular purpose in question ;

(8) "debt" includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and "debt charges" shall be construed accordingly ;

(9) "estate duty" means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass ;

(10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation ;

(11) "Federal Court" means the Federal Court constituted under the Government of India Act, 1935 ;

(12) "goods" includes all materials, commodities, and articles ;

(13) "guarantee" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount ;

(14) "High Court" means any court which is deemed for the purposes of this Constitution to be a High Court for any State and includes —

(*a*) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and

(*b*) any other Court in the territory of India which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution ;

(15) "Indian State" means any territory which the Government of the Dominion of India recognised as such a State ;

(16) "Part" means a Part of this Constitution ;

(17) "pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund ;

(18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of Article 352 ;

(19) "public notification" means a notification in the Gazette of India, or, as the case may be, the Official Gazette of a State ;

(20) "railway" does not include—

(*a*) a tramway wholly within a municipal area, or

(*b*) any other line of communication wholly situate in one State and declared by Parliament by law not to be a railway ;

(21) "Rajpramukh" means—

(*a*) in relation to the State of Hyderabad, the person who for the time being is recognised by the President as the Nizam of Hyderabad ;

(*b*) in relation to the State of Jammu and Kashmir or the State of Mysore, the person who for the time being is recognised by the President as the Maharaja of that State ; and

(*c*) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President as the Rajpramukh of that State,

and includes in relation to any of the said States any person for the time being recognised by the President as competent to exercise the powers of the Rajpramukh in relation to that State ;

(22) "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of Article 291 was entered into and who for the time being is recognised by the President as the Ruler of

the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler;

(23) "Schedule" means a Schedule to this Constitution;

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution;

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;

(26) "securities" includes stock;

(27) "sub-clause" means a sub-clause of the clause in which the expression occurs;

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

(29) "tax on income" includes a tax in the nature of an excess profits tax;

(30) "Uparajpramukh" in relation to any State specified in Part B of the First Schedule means the person who for the time being is recognised by the President as the Uparajpramukh of that State.

Interpretation.

367. (1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State specified in Part A or Part B of the First Schedule, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor or Rajpramukh, as the case may be.

(3) For the purposes of this Constitution "foreign State" means any State other than India:

Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order.

PART XX

AMENDMENT OF THE CONSTITUTION

Procedure for amendment of the Constitution.

368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(*b*) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(*c*) any of the Lists in the Seventh Schedule, or

(*d*) the representation of States in Parliament, or

(*e*) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

PART XXI

TEMPORARY AND TRANSITIONAL PROVISIONS

Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List.

369. Notwithstanding anything in this Constitution, Parliament shall, during a period of five years from the commencement of this Constitution, have power to make laws with respect to the following matters as if they were enumerated in the Concurrent List, namely:—

(*a*) trade and commerce within a State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or *kapas*), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil-cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica;

(*b*) offences against laws with respect to any of the matters mentioned in clause (*a*), jurisdiction and powers of all courts except the Supreme Court with respect to any of those matters, and fees in respect of any of those matters but not including fees taken in any court;

but any law made by Parliament, which Parliament would not but for the provisions of this article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof.

Temporary provisions with respect to the State of Jammu and Kashmir.

370. (1) Notwithstanding anything in this Constitution,—

(*a*) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(*b*) the power of Parliament to make laws for the said State shall be limited to —

(*i*) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(*ii*) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(*c*) the provisions of Article 1 and of this article shall apply in relation to that State;

(*d*) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (*i*) of sub-clause (*b*) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (*ii*) of sub-clause (*b*) of clause (1) or in the second proviso to sub-clause (*d*) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify :

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

Temporary provisions with respect to States in Part B of the First Schedule.

371. Notwithstanding anything in this Constitution, during a period of ten years from the commencement thereof, or during such longer or shorter period as Parliament may by law provide in respect of any State, the Government of every State specified in Part B of the first Schedule shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by, the President :

Provided that the President may by order direct that the provisions of this article shall not apply to any State specified in the order.

Continuance in force of existing laws and their adaptation.

372. (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law.

(3) Nothing in clause (2) shall be deemed—

(*a*) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution ; or

(*b*) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I. — The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II. — Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III. — Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV. — An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

Power of President to make order in respect of persons under preventive detention in certain cases.

373. Until provision is made by Parliament under clause (7) of Article 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President.

Provisions as to Judges of the Federal Court and proceedings pending in the Federal Court or before His Majesty in Council.

374. (1) The Judges of the Federal Court holding office immediately before the commencement of this constitution shall, unless they have elected otherwise, become on such commencement the Judges of the Supreme Court and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 125 in respect of the Judges of the Supreme Court.

(2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court.

(3) Nothing in this Constitution shall operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court within the territory of India in so far as the exercise of such jurisdiction is authorised by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect as if it were an order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on such Court by this Constitution.

(4) On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.

(5) Further provision may be made by Parliament by law to give effect to the provisions of this article.

Courts, authorities and officers to continue to function subject to the provisions of the Constitution.

375. All courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this constitution.

Provisions as to Judges of High Courts.

376. (1) Notwithstanding anything in clause (2) of Article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221 in respect of the Judges of such High Court.

Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court.

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in clauses (1) and (2) of Article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge.

Provisions as to Comptroller and Auditor-General of India.

377. The Auditor-General of India holding office immediately before the commencement of this Constitution shall, unless he has elected otherwise, become on such commencement the Comptroller and Auditor-General of India and shall thereupon be entitled to such salaries and to such rights in respect of leave of absence and pension as are provided for under clause (3) of Article 148 in respect of the Comptroller and Auditor-General of India and be entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him immediately before such commencement.

Provisions as to Public Service Commissions.

378. (1) The members of the Public Service Commission for the Dominion of India holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the Union and shall, notwithstanding anything in clauses (1) and (2) of Article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

(2) The members of a Public Service Commission of a Province or of a Public Service Commission serving the needs of a group of Provinces holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the corresponding State or the members of the Joint State Public Service Commission serving the needs of the corresponding States, as the case may be, and shall, notwithstanding anything in clauses (1) and (2) of Article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

Provisions as to provisional Parliament and the Speaker and Deputy Speaker thereof.

379. (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution shall be the provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.

Explanation.—For the purposes of this clause, the Constituent Assembly of the Dominion of India includes—

(*i*) the members chosen to represent any State or other territory for which representation is provided under clause (2), and (*ii*) the members chosen to fill casual vacancies in the said Assembly.

(2) The President may by rules provide for—

(*a*) the representation in the provisional Parliament functioning under clause (1) of any State or other territory which was not represented in the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution,

(*b*) the manner in which the representatives of such States or other territories in the provisional Parliament shall be chosen, and

(*c*) the qualifications to be possessed by such representatives.

(3) If a member of the Constituent Assembly of the Dominion of India was, on the sixth day of October, 1949, or thereafter at any time before the commencement of this Constitution, a member of a House of the Legislature of a Governor's Province or of an Indian State corresponding to any State specified in Part B of the First Schedule or a Minister for any such State, then, as from the commencement of this Constitution the seat of such member in the Constituent Assembly shall, unless he has ceased to be a member of that Assembly earlier, become vacant and every such vacancy shall be deemed to be a casual vacancy.

(4) Notwithstanding that any such vacancy in the Constituent Assembly of the Dominion of India as is mentioned in clause (3) has not occurred under that clause, steps may be taken before the commencement of this Constitution for the filling of such vacancy, but any person chosen before such commencement to fill the vacancy shall not be entitled to take his seat in the said Assembly until after the vacancy has so occurred.

(5) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Constituent Assembly when functioning as the Dominion Legislature under the Government of India Act, 1935, shall on such commencement be the Speaker or, as the case may be, the Deputy Speaker of the provisional Parliament functioning under clause (1).

Provision as to President.

380. (1) Such person as the Constituent Assembly of the Dominion of India shall have elected in that behalf shall be the President of India until a President has been elected in accordance with the provisions contained in Chapter I of Part V and has entered upon his office.

(2) In the event of the occurrence of any vacancy in the office of the President so elected by the Constituent Assembly of the Dominion of India by reason of his death, resignation, or removal, or otherwise, it shall be filled by a person elected in that behalf by the provisional Parliament functioning

under Article 379, and until a person is so elected, the Chief Justice of India shall act as President.

Council of Ministers of the President.

381. Such persons as the President may appoint in that behalf shall become members of the Council of Ministers of the President under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the Dominion of India immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the President under this Constitution.

Provisions as to provisional Legislatures for States in Part A of the First Schedule.

382. (1) Until the House or Houses of the Legislature of each State specified in Part A of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the House or Houses of the Legislature of the corresponding Province functioning immediately before the commencement of this Constitution shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of such State.

(2) Notwithstanding anything in clause (1), where a general election to reconstitute the Legislative Assembly of a Province has been ordered before the commencement of this Constitution, the election may be completed after such commencement as if this Constitution had not come into operation, and the Assembly so reconstituted shall be deemed to be the Legislative Assembly of that Province for the purposes of that clause.

(3) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Legislative Assembly or President or Deputy President of the Legislative Council of a Province shall on such commencement be the Speaker or Deputy Speaker of the Legislative Assembly or the Chairman or Deputy Chairman of the Legislative Council, as the case may be, of the corresponding State specified in Part A of the First Schedule while such Assembly or Council functions under clause (1):

Provided that where a general election has been ordered for the reconstitution of the Legislative Assembly of a Province before the commencement of this Constitution and the first meeting of the Assembly as so reconstituted is held after such commencement, the provisions of this clause shall not apply and the Assembly as reconstituted shall elect two members of the Assembly to be respectively the Speaker and Deputy Speaker thereof.

Provision as to Governors of Provinces.

383. Any person holding office as Governor in any Province immediately before the commencement of this Constitution shall on such commencement be the Governor of the corresponding State specified in Part A of the First Schedule until a new Governor has been appointed in accordance with the provisions of Chapter II of Part VI and has entered upon his office.

Council of Ministers of Governors.

384. Such persons as the Governor of a State may appoint in that behalf shall become members of the Council of Ministers of the Governor under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the corresponding Province immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the Governor of the State under this Constitution.

Provision as to provisional Legislatures in States in Part B of the First Schedule.

385. Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified.

Council of Ministers for States in Part B of the First Schedule.

386. Such persons as the Rajpramukh of a State specified in Part B of the First Schedule may appoint in that behalf shall become members of the Council of Ministers of such Rajpramukh under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the corresponding Indian State immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of such Rajpramukh under this Constitution.

Special provision as to determination of population for the purposes of certain elections.

387. For the purposes of elections held under any of the provisions of this Constitution during a period of three years from the commencement of this Constitution, the population of India or of any part thereof may, notwithstanding anything in this Constitution, be determined in such manner as the President may by order direct, and different provisions may be made for different States and for different purposes by such order.

Provisions as to the filling of casual vacancies in the provisional Parliament and provisional Legislatures of the States.

388. (1) Casual vacancies in the seats of members of the provisional Parliament functioning under clause (1) of Article 379, including vacancies referred to in clauses (3) and (4) of that article, shall be filled, and all matters in connection with the filling of such vacancies (including the decision of doubts and disputes arising out of, or in connection with, elections to fill such vacancies) shall be regulated—

(a) in accordance with such rules as may be made in that behalf by the President, and (*b*) until rules are so made, in accordance with the rules relating to the filling of casual vacancies in the Constituent Assembly of the Dominion of India and matters connected therewith in force at the time of the filling of such vacancies or immediately before the commencement of this Constitution, as the case may be, subject to such exceptions and modifications as may be made therein before such commencement by the President of that Assembly and thereafter by the President of India :

Provided that where any such seat as is mentioned in this clause was, immediately before it became vacant, held by a person belonging to the Scheduled Castes or to the Muslim or the Sikh community and representing a Province or, as the case may be, a State specified in Part A of the First Schedule, the person to fill such seat shall, unless the President of the Constituent Assembly or the President of India, as the case may be, considers it necessary or expedient to provide otherwise, be of the same community :

Provided further that at an election to fill any such vacancy in the seat of a member representing a Province or a State specified in Part A of the First Schedule, every member of the Legislative Assembly of that Province or of the corresponding State or of that State, as the case may be, shall be entitled to participate and vote.

Explanation.—For the purposes of this clause—

(*a*) all such castes, races or tribes or parts of or groups within castes, races or tribes as are specified in the Government of India (Scheduled Castes) Order, 1936, to be Scheduled Castes in relation to any Province shall be deemed to be Scheduled Castes in relation to that Province or the corresponding State until a notification has been issued by the President under clause (1) of Article 341 specifying the Scheduled Castes in relation to that corresponding State ;

(*b*) all the Scheduled Castes in any Province or State shall be deemed to be a single community.

(2) Casual vacancies in the seats of members of a House of the Legislature of a State functioning under Article 382 or Article 385 shall be filled, and all matters in connection with the filling of such vacancies (including the decision of doubts and disputes arising out of, or in connection with, elections to fill such vacancies) shall be regulated in accordance with such provisions governing the filling of such vacancies and regulating such matters as were in force immediately before the commencement of this Constitution subject to such exceptions and modifications as the President may by order direct.

Provision as to Bills pending in the Dominion Legislature and in the Legislatures of Provinces and Indian States.

389. A Bill which immediately before the commencement of this Constitution was pending in the Legislature of the Dominion of India or in the Legislature of any Province or Indian State may, subject to any provision to the contrary which may be included in rules made by Parliament or the Legislature of the corresponding State under this Constitution, be continued in Parliament or the Legislature of the corresponding State, as the case may be, as if the proceedings taken with reference to the Bill in the Legislature of the Dominion of India or in the Legislature of the Province or Indian State had been taken in Parliament or in the Legislature of the corresponding State.

Moneys received or raised or expenditure incurred between the commencement of the Constitution and the 31st day of March, 1950.

390. The provisions of this Constitution relating to the Consolidated Fund of India or the Consolidated Fund of any State and the appropriation of moneys out of either of such Funds shall not apply in relation to moneys received or raised or expenditure incurred by the Government of India or the Government of any State between the commencement of this Constitution and the thirty-first day of March, 1950, both days inclusive, and any expenditure incurred during that period shall be deemed to be duly authorised if the expenditure was specified in a schedule of authorised expenditure authenticated in accordance with the provisions of the Government of India Act, 1935, by the Governor-General of the Dominion of India or the Governor of the corresponding Province or is authorised by the Rajpramukh of the State in accordance with such rules as were applicable to the authorisation of expenditure from the revenues of the corresponding Indian State immediately before such commencement.

Power of the President to amend the First and Fourth Schedules in certain contingencies.

391. (1) If at any time between the passing of this Constitution and its commencement any action is taken under the provisions of the Government of India Act, 1935, which in the opinion of the President requires any amendment in the First Schedule and the Fourth Schedule, the President may, notwithstanding anything in this Constitution, by order, make such amendments in the said Schedules as may be necessary to give effect to the action so taken, and any such order may contain such supplemental, incidental and consequential provisions as the President may deem necessary.

(2) When the First Schedule or the Fourth Schedule is so amended, any reference to that Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

Power of the President to remove difficulties.

392. (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient :

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(2) Every order made under clause (1) shall be laid before Parliament.

(3) The powers conferred on the President by this article, by Article 324, by clause (3) of Article 367 and by Article 391 shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

PART XXII

SHORT TITLE, COMMENCEMENT AND REPEALS

Short title.

393. This Constitution may be called the Constitution of India.

Commencement.

394. This article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 shall come into force at once, and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

Repeals.

395. The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed.

FIRST SCHEDULE

(Articles 1, 4 and 391)

THE STATES AND THE TERRITORIES OF INDIA

PART A

Names of States	*Names of corresponding Provinces*
1. Andhra	
2. Assam	Assam
3. Bihar	Bihar
4. Bombay	Bombay
5. Madhya Pradesh	The Central Provinces and Berar
6. Madras	Madras
7. Orissa	Orissa
8. Punjab	East Punjab
9. Uttar Pradesh	The United Provinces
10. West Bengal	West Bengal

TERRITORIES OF STATES

The territory of the State of Andhra shall comprise the territories specified in sub-section (1) of Section 3 of the Andhra State Act, 1953.

The territory of the State of Assam shall comprise the territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas but shall not include the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951.

The territory of each of the other States in this Part shall comprise the territories which immediately before the commencement of this Constitution were comprised in the corresponding Province and the territories which, by virtue of an order made under section 290A of the Government of India Act, 1935, were immediately before such commencement being administered as if they formed part of that Province; but in the case of the State of Madras shall not include the territories specified in sub-section (1) of section 3 and sub-section (1) of section 4 of the Andhra State Act, 1953.

PART B

NAMES OF STATES

1. Hyderabad.
2. Jammu and Kashmir.
3. Madhya Bharat.
4. Mysore.

5. Patiala and East Punjab States Union.
6. Rajasthan.
7. Saurashtra.
8. Travancore-Cochin.

TERRITORIES OF STATES

The territory of each of the States in this Part shall comprise the territory which, immediately before the commencement of this Constitution, was comprised in, or administered by the Government of, the corresponding Indian State, and in the case of the State of Madhya Bharat, shall also comprise the territory which, immediately before such commencement, was comprised in the Chief Commissioner's Province of Panth Piploda, and in the case of the State of Mysore shall also comprise the territory specified in sub-section (1) of Section 4 of the Andhra State Act, 1953.

PART C

NAMES OF STATES

1. Ajmer.
2. Bhopal.
3. Bilaspur.
4. Coorg.
5. Delhi.
6. Himachal Pradesh.
7. Kutch.
8. Manipur.
9. Tripura.
10. Vindhya Pradesh.

TERRITORIES OF STATES

The territory of each of the States of Ajmer, Coorg and Delhi shall comprise the territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioners' Provinces of Ajmer-Merwara, Coorg and Delhi, respectively.

The territory of each of the other States in this Part shall comprise the territories which, by virtue of an order made under section 290A of the Government of India Act, 1935, were immediately before the commencement of this Constitution being administered as if they were a Chief Commissioner's Province of the same name.

PART D

The Andaman and Nicobar Islands.

SECOND SCHEDULE

[Articles 59 (3), 65 (3), 75 (6), 97, 125, 148 (3), 158 (3), 164 (5), 186 and 221]

PART A

PROVISIONS AS TO THE PRESIDENT AND THE GOVERNORS OF STATES SPECIFIED IN PART A OF THE FIRST SCHEDULE

1. There shall be paid to the President and to the Governors of the States specified in Part A of the First Schedule the following emoluments per mensem, that is to say :—

The President	10,000 rupees
The Governor of a State	5,500 rupees

2. There shall also be paid to the President and to the Governors of the States so specified such allowances as were payable respectively to the Governor-General of the Dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution.

3. The President and the Governors of such States throughout their respective terms of office shall be entitled to the same privileges to which the Governor-General and the Governors of the corresponding Provinces were respectively entitled immediately before the commencement of this Constitution.

4. While the Vice-President or any other person is discharging the functions of, or is acting as, President, or any person is discharging the functions of the Governor, he shall be entitled to the same emoluments, allowances and privileges as the President or the Governor whose functions he discharges or for whom he acts, as the case may be.

PART B

PROVISIONS AS TO THE MINISTERS FOR THE UNION AND FOR THE STATES IN PART A AND PART B OF THE FIRST SCHEDULE.

5. There shall be paid to the Prime Minister and to each of the other Ministers for the Union such salaries and allowances as were payable respectively to the Prime Minister and to each of the other Ministers for the Dominion of India immediately before the commencement of this Constitution.

6. There shall be paid to the Ministers for any State specified in Part A or Part B of the First Schedule such salaries and allowances as were payable to such Ministers for the corresponding Province or the corresponding Indian State, as the case may be, immediately before the commencement of this Constitution.

PART C

PROVISIONS AS TO THE SPEAKER AND THE DEPUTY SPEAKER OF THE HOUSE OF THE PEOPLE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE COUNCIL OF STATES AND THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY OF A STATE IN PART A OF THE FIRST SCHEDULE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE LEGISLATIVE COUNCIL OF ANY SUCH STATE.

7. There shall be paid to the Speaker of the House of the People and the Chairman of the Council of States such salaries and allowances as were payable to the Speaker of the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution, and there shall be paid to the Deputy Speaker of the House of the People and to the Deputy Chairman of the Council of States such salaries and allowances as were payable to the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such commencement.

8. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly of a State specified in Part A of the First Schedule and to the Chairman and the Deputy Chairman of the Legislative Council of such State such salaries and allowances as were payable respectively to the Speaker and the Deputy Speaker of the Legislative Assembly and the President and the Deputy President of the Legislative Council of the corresponding Province immediately before the commencement of this Constitution and, where the corresponding Province had no Legislative Council immediately before such commencement, there shall be paid to the Chairman and the Deputy Chairman of the Legislative Council of the State such salaries and allowances as the Governor of the State may determine.

PART D

PROVISIONS AS TO THE JUDGES OF THE SUPREME COURT AND OF THE HIGH COURTS IN STATES IN PART A OF THE FIRST SCHEDULE.

9. (1) There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say :—

The Chief Justice ...	5,000 rupees
Any other Judge ...	4,000 rupees

Provided that if a Judge of the Supreme Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court shall be reduced by the amount of that pension.

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution,—

(a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of Article 374, or

(b) was holding office as any other Judge of the Federal Court and has on such commencement become a Judge (other than the Chief Justice) of the Supreme Court under the said clause,

during the period he holds office as such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(5) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

10. (1) There shall be paid to the Judges of the High Court of each State specified in Part A of the First Schedule, in respect of time spent on actual service, salary at the following rates per mensem, that is to say :

The Chief Justice	... 4,000 rupees
Any other Judge	... 3,500 rupees

(2) Every person who immediately before the commencement of this Constitution—

(a) was holding office as the Chief Justice of a High Court in any Province and has on such commencement become the Chief Justice of the High Court in the corresponding State under clause (1) of Article 376, or

(b) was holding office as any other Judge of a High Court in any Province and has on such commencement become a Judge (other than the Chief Justice) of the High Court in the corresponding State under the said clause, shall, if he was immediately before such commencement drawing a salary at a rate higher than that specified in sub-paragraph (1) of this paragraph, be entitled to receive in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, in addition to the salary specified in the said sub-paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(3) Every Judge of a High Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(4) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the High Court of any State shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the High Court in the corresponding Province.

11. In this Part, unless the context otherwise requires,—

(a) the expression "Chief Justice" includes an acting Chief Justice, and a "Judge" includes an *ad hoc* Judge;

(b) "actual service" includes—

(i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge;

(ii) vacations, excluding any time during which the Judge is absent on leave; and

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

PART E

PROVISIONS AS TO THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA

12. (1) There shall be paid to the Comptroller and Auditor-General of India a salary at the rate of four thousand rupees per mensem.

(2) The person who was holding office immediately before the commencement of this Constitution as Auditor-General of India and has become on such commencement the Comptroller and Auditor-General of India under Article 377 shall in addition to the salary specified in sub-paragraph (1) of this paragraph be entitled to receive as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing as Auditor-General of India immediately before such commencement.

(3) The rights in respect of leave of absence and pension and the other conditions of service of the Comptroller and Auditor-General of India shall be governed or shall continue to be governed, as the case may be, by the provisions which were applicable to the Auditor-General of India immediately before the commencement of this Constitution and all references in those provisions to the Governor-General shall be construed as references to the President.

THIRD SCHEDULE

[Articles 75 (4), 99, 124 (6), 148 (2), 164 (3), 188 and 219]

FORMS OF OATHS OR AFFIRMATIONS

I

Form of oath of office for a Minister for the Union :—

"I, A.B., do $\frac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will bear true faith and allegiance to the Constitution of India as by law established, that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or illwill."

II

Form of oath of secrecy for a Minister for the Union :—

"I, A.B., do $\frac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."

III

Form of oath or affirmation to be made by a member of Parliament :—

"I, A.B., having been elected (or nominated) a member of the Council of States (or the House of the People) do $\frac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

IV

Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India :—

"I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do
swear in the name of God
——————————— that I will bear true faith and allegiance to the
solemnly affirm
Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

V

Form of oath of office for a Minister for a State :—

swear in the name of God
"I, A.B., do ——————————— that I will bear true faith
solemnly affirm
and allegiance to the Constitution of India as by law established, that I will faithfully and conscientiously discharge my duties as a Minister for the State of..........................and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill."

VI

Form of oath of secrecy for a Minister for a State :—

swear in the name of God
"I, A.B., do ——————————— that I will not directly or
solemnly affirm
indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State of..............................except as may be required for the due discharge of my duties as such Minister."

VII

Form of oath or affirmation to be made by a member of the Legislature of a State :—

"I, A.B., having been elected (or nominated) a member of the
swear in the name of God
Legislative Assembly (or Legislative Council), do ———————————
solemnly affirm
that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

VIII

Form of oath or affirmation to be made by the Judges of a High Court :—

"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of)...... do $\frac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will bear true faith and allegiance to the Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

FOURTH SCHEDULE

[Articles 4 (1), 80 (2) and 391]

ALLOCATION OF SEATS IN THE COUNCIL OF STATES

To each State or group of States specified in the first column of the table of seats appended to this Schedule there shall be allotted the number of seats specified in the second column of the said table opposite to that State or group of States, as the case may be.

TABLE OF SEATS

THE COUNCIL OF STATES

REPRESENTATIVES OF STATES SPECIFIED IN PART A OF THE FIRST SCHEDULE

1 States	2 Total Seats
1. Andhra	12
2. Assam	6
3. Bihar	21
4. Bombay	17
5. Madhya Pradesh	12
6. Madras	18
7. Orissa	9
8. Punjab	8
9. Uttar Pradesh	31
10. West Bengal	14
TOTAL ...	148

REPRESENTATIVES OF STATES SPECIFIED IN PART B OF THE FIRST SCHEDULE

1	2
States	Total Seats
1. Hyderabad	11
2. Jammu and Kashmir	4
3. Madhya Bharat	6
4. Mysore	6
5. Patiala and East Punjab States Union	3
6. Rajasthan	9
7. Saurashtra	4
8. Travancore-Cochin	6
TOTAL ...	49

REPRESENTATIVES OF STATES SPECIFIED IN PART C OF THE FIRST SCHEDULE

1	2
States and Groups of States	Total Seats
1. Ajmer 2. Coorg	1
3. Bhopal	1
4. Bilaspur 5. Himachal Pradesh	1
6. Delhi	1
7. Kutch	1
8. Manipur 9. Tripura	1
10. Vindhya Pradesh	4
TOTAL ...	10
TOTAL OF ALL SEATS ...	207

FIFTH SCHEDULE

[Article 244 (1)]

PROVISIONS AS TO THE ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

PART A

GENERAL

Interpretation.

1. In this Schedule, unless the context otherwise requires, the expression "State" means a State specified in Part A or Part B of the First Schedule but does not include the State of Assam.

Executive power of a State in Scheduled Areas.

2. Subject to the provisions of this Schedule, the executive power of a State extends to the Scheduled Areas therein.

Report by the Governor or Rajpramukh to the President regarding the administration of Scheduled Areas.

3. The Governor or Rajpramukh of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

PART B

ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

Tribes Advisory Council.

4. (1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State :

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor or Rajpramukh, as the case may be.

(3) The Governor or Rajpramukh may make rules prescribing or regulating, as the case may be,—

(*a*) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers and servants thereof ;

(*b*) the conduct of its meetings and its procedure in general ; and

(*c*) all other incidental matters.

Law applicable to Scheduled Areas.

5. (1) Notwithstanding anything in this Constitution, the Governor or Rajpramukh, as the case may be, may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor or Rajpramukh, as the case may be, may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

(*a*) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area ;

(*b*) regulate the allotment of land to members of the Scheduled Tribes in such area ;

(*c*) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor or Rajpramukh may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor or the Rajpramukh making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

PART C

SCHEDULED AREAS

Scheduled Areas.

6. (1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order—

(*a*) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area ;

(*b*) alter, but only by way of rectification of boundaries, any Scheduled Area ;

(*c*) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area ;

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

PART D

AMENDMENT OF THE SCHEDULE

Amendment of the Schedule.

7. (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

SIXTH SCHEDULE

[Articles 244 (2) and 275 (1)]

PROVISIONS AS TO THE ADMINISTRATION OF TRIBAL AREAS IN ASSAM

Autonomous districts and autonomous regions.

1. (1) Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the table appended to Paragraph 20 of this Schedule shall be an autonomous district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,—

(*a*) include any area in Part A of the said table,

(*b*) exclude any area from Part A of the said table,

(*c*) create a new autonomous district,

(*d*) increase the area of any autonomous district,

(*e*) diminish the area of any autonomous district,

(*f*) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

(*g*) define the boundaries of any autonomous district :

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of Paragraph 14 of this Schedule.

Constitution of District Councils and Regional Councils.

2. (1) There shall be a District Council for each autonomous district consisting of not more than twenty-four members, of whom not less than three-fourths shall be elected on the basis of adult suffrage.

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of Paragraph 1 of this Schedule.

(3) Each District Council and each Regional Council shall be a body corporate by the name respectively of "the District Council of (*name of district*)" and "the Regional Council of (*name of region*)", shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the Regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.

(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions concerned, and such rules shall provide for—

(a) the composition of the District Councils and Regional Councils and the allocation of seats therein;

(b) the delimitation of territorial constituencies for the purpose of elections to those Councils;

(c) the qualifications for voting at such elections and the preparation of electoral rolls therefor;

(d) the qualifications for being elected at such elections as members of such Councils;

(e) the term of office of members of such Councils;

(f) any other matter relating to or connected with elections or nominations to such Councils;

(g) the procedure and the conduct of business in the District and Regional Councils;

(h) the appointment of officers and staff of the District and Regional Councils.

(7) The District or the Regional Council may after its first constitution make rules with regard to the matters specified in sub-paragraph (6) of this paragraph and may also make rules regulating—

(a) the formation of subordinate local Councils or Boards and their procedure and the conduct of their business; and

(b) generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be:

Provided that until rules are made by the District or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council:

Provided further that the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, of the North Cachar and Mikir Hills shall be the Chairman *ex officio* of the District Council in respect of the territories included in Items 5 and 6 respectively of Part A of the table appended to Paragraph 20 of this Schedule and shall have power for a period of six years after the first constitution of the District Council, subject to the control of the Governor, to annul or modify any resolution or decision of the District Council or to issue such instructions to the District Council, as he may consider appropriate, and the District Council shall comply with every such instruction issued.

Powers of the District Councils and Regional Councils to make laws.

3. (1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the authority of Regional Councils, if any, within the district shall have power to make laws with respect to—

(a) the allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town:

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the Government of Assam in accordance with the law for the time being in force authorising such acquisition;

(b) the management of any forest not being a reserved forest;

(c) the use of any canal or water-course for the purpose of agriculture;

(d) the regulation of the practice of *jhum* or other forms of shifting cultivation;

(e) the establishment of village or town committees or councils and their powers;

(f) any other matter relating to village or town administration, including village or town police and public health and sanitatino;

(g) the appointment or succession of Chiefs or Headmen;

(h) the inheritance of property;

(i) marriage;

(j) social customs.

(2) In this paragraph, a "reserved forest" means any area which is a reserved forest under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

Administration of justice in autonomous districts and autonomous regions.

4. (1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village Councils or presiding officers of such Courts, and may also appoint such officers as may be necessary for the administration of the laws made under Paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any court constituted in that behalf by the Regional Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any court constituted in that behalf by the District Council, shall exercise the powers of a Court of appeal in respect of all suits and cases triable by a village council or Court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of Paragraph 5 of this Schedule apply, and no other court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court of Assam shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.

(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating—

(a) the constitution of village councils and courts and the powers to be exercised by them under this paragraph;

(b) the procedure to be followed by village councils or Courts in the trial of suits and cases under sub-paragraph (1) of this paragraph;

(c) the procedure to be followed by the Regional or District Council or any court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph;

(d) the enforcement of decisions and orders of such Councils and Courts;

(e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.

Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.

5. (1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said Council, court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, court or officer under sub-paragraph (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

Powers of the District Council to establish primary schools, etc.

6. The District Council for an autonomous district may establish, construct, or manage primary schools, dispensaries markets, cattle pounds, ferries, fisheries, roads and waterways in the district and, in particular, may prescribe the language and the manner in which primary education shall be imparted in the primary schools in the district.

District and Regional Funds.

7. (1) There shall be constituted for each autonomous district, a District Fund and for each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that district and the Regional Council for that region, in the course of the administration of such district or region as the case may be, in accordance with the provisions of this Constitution.

(2) Subject to the approval of the Governor, rules may be made by the District Council and by the Regional Council for the management of the District Fund or as the case may be, the Regional Fund, and the rules so made may prescribe the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.

Powers to assess and collect land revenue and to impose taxes.

8. (1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed by the Government of Assam in assessing lands for the purpose of land revenue in the State of Assam generally.

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say —

(*a*) taxes on professions, trades, callings and employments;

(*b*) taxes on animals, vehicles and boats;

(*c*) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries; and

(*d*) taxes for the maintenance of schools, dispensaries or roads.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraphs (2) and (3) of this paragraph.

Licences or leases for the purpose of prospecting for, or extraction of, minerals.

9. (1) Such share of the royalties accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of Assam in respect of any area within an autonomous district as may be agreed upon between the Government of Assam and the District Council of such district shall be made over to that District Council.

(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for deter-

mination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

Power of District Council to make regulations for the control of money-lending and trading by non-tribals.

10. (1) The District Council of an autonomous district may make regulations for the regulation and control of money-lending or trading within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of money-lending ;

(b) prescribe the maximum rate of interest which may be charged or be recovered by a money-lender ;

(c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council ;

(d) prescribe that no person who is not a member of the Scheduled tribes resident in the district shall carry on wholesale or retail business in any commodity except under a license issued in that behalf by the District Council :

Provided that no regulations may be made under this paragraph unless they are passed by a majority of not less than three-fourths of the total membership of the District Council :

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

Publication of laws, rules and regulations made under the Schedule.

11. All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

Application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions.

12. (1) Notwithstanding anything in this Constitution—

(a) no Act of the Legislature of the State in respect of any of the matters specified in Paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the Legislature of the State prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications at it thinks fit;

(b) the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.

(2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.

13. The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State of Assam shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State under Article 202.

Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions.

14. (1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (*c*), (*d*), (*e*) and (*f*) of sub-paragraph (3) of Paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(*a*) the provision of educational and medical facilities and communications in such districts and regions;

(*b*) the need for any new or special legislation in respect of such districts and regions; and

(*c*) the administration of the laws, rules and regulations made by the District and Regional Councils;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State.

Annulment or suspension of acts and resolutions of District and Regional Councils.

15. (1) If at any time the Governor is satisfied that an act or resolution of a District or a Regional Council is likely to endanger the safety of India, he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council) to prevent the commission or continuance of such act, or the giving of effect to such resolution.

(2) Any order made by the Governor under sub-paragraph (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made:

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall unless cancelled by the Governor continue in force for a further period of twelve months from the date on which under this paragraph it would otherwise have ceased to operate.

Dissolution of a District or a Regional Council.

16. The Governor may on the recommendation of a Commission appointed under Paragraph 14 of this Schedule by public notification order the dissolution of a District or a Regional Council and—

(*a*) direct that a fresh general election shall be held immediately for the reconstitution of the Council, or

(*b*) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months:

Provided that when an order under clause (*a*) of this paragraph has been made, the Governor may take the action referred to in clause (*b*) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election:

Provided further that no action shall be taken under clause (*b*) of this paragraph without giving the District or the Regional Council, as the case may be, an opportunity of placing its views before the Legislature of the State.

Exclusion of areas from autonomous districts in forming constituencies in such districts.

17. For the purposes of elections to the Legislative Assembly of Assam, the Governor may by order declare that any area within an autonomous district shall not form part of any constituency to fill a seat or seats in the Assembly reserved for any such district but shall form part of a constituency to fill a seat or seats in the Assembly not so reserved to be specified in the order.

Application of the provisions of this Schedule to areas specified in Part B of the table appended to Paragraph 20.

18. (1) The Governor may —

(*a*) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to Paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions, and

(*b*) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.

(2) Until a notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of Part IX shall apply thereto as if such area or part thereof were a territory specified in Part D of the First Schedule.

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion.

Transitional provisions.

19. (1) As soon as possible after the commencement of this Constitution the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until a District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the administration of the areas within such district instead of the foregoing provisions of this Schedule, namely :—

(a) no Act of Parliament or of the Legislature of the State shall apply to any such area unless the Governor by public notification so directs; and the Governor in giving such a direction with respect to any Act may direct that the Act shall, in its application to the area or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit ;

(b) the Governor may make regulations for the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

20. (1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam.

Tribal areas.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Mylliem :

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) of Paragraph 3, Paragraph 4, Paragraph 5, Paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of Paragraph 8, and clause (d) of sub-paragraph (2) of Paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District) or administrative area shall be construed as a reference to that district or area at the commencement of this Constitution :

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

TABLE

PART A

1. The United Khasi-Jaintia Hills District.
2. The Garo Hills District.
3. The Lushai Hills District.
4. The Naga Hills District.
5. The North Cachar Hills.
6. The Mikir Hills.

PART B

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

2. The Naga Tribal Area.

Amendment of the Schedule.

21. (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

SEVENTH SCHEDULE

[Article 246]

List I — Union List

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

2. Naval, military and air forces; any other armed forces of the Union.

3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

4. Naval, military and air force works.

5. Arms, firearms, ammunition and explosives.

6. Atomic energy and mineral resources necessary for its production.

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

8. Central Bureau of Intelligence and Investigation.

9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.

10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

15. War and peace.

16. Foreign jurisdiction.

17. Citizenship, naturalisation and aliens.

18. Extradition.

19. Admission into, and emigration and expulsion from India; passports and visas.

20. Pilgrimages to places outside India.

21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.

22. Railways.

23. Highways declared by or under law made by Parliament to be national highways.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

32. Property of the Union and the revenue therefrom, but as regards property situated in a State specified in Part A or Part B of the First Schedule subject to legislation by the State, save in so far as Parliament by law otherwise provides.

33. Acquisition or requisitioning of property for the purposes of the Union.

34. Courts of wards for the estates of Rulers of Indian States.

35. Public debt of the Union.

36. Currency, coinage and legal tender; foreign exchange.

37. Foreign loans.

38. Reserve Bank of India.

39. Post Office Savings Bank.

40. Lotteries organised by the Government of India or the Government of a State.

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

42. Inter-State trade and commerce.

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

45. Banking.

46. Bills of exchange, cheques, promissory notes and other like instruments.

47. Insurance.

48. Stock exchanges and futures markets.

49. Patents, inventions and designs; copyright; trade marks and merchandise marks.

50. Establishment of standards of weight and measure.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

55. Regulation of labour and safety in mines and oilfields.

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

57. Fishing and fisheries beyond territorial waters.

58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

59. Cultivation, manufacture, and sale for export, of opium.

60. Sanctioning of cinematograph films for exhibition.

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by parliament by law to be institutions of natitional importance.

65. Union agencies and institutions for—

(*a*) professional, vocational or technical training, including the training of police officers; or

(*b*) the promotion of special studies or research; or

(*c*) scientific or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

67. Ancient and historical monuments and records, and archaeological sites and remains, declared by Parliament by law to be of national importance.

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations.

69. Census.

70. Union public services; all-India services; Union Public Service Commission.

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

78. Constitution and organisation of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.

79. Extension of the jurisdiction of a High Court having its principal seat in any State to, and exclusion of the jurisdiction of any such High Court from, any area outside that State.

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

81. Inter-State migration; inter-State quarantine.

82. Taxes on income other than agricultural income.

83. Duties of customs including export duties.

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry.

85. Corporation tax.

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

93. Offences against laws with respect to any of the matters in this List.

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

96. Fees in respect of any of the matters in this List, but not including fees taken in any court.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

List II — State List

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).

2. Police, including railway and village police.

3. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all courts except the Supreme Court.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement

authorities and other local authorities for the purpose of local self-government or village administration.

6. Public health and sanitation; hospitals and dispensaries.

7. Pilgrimages, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

9. Relief of the disabled and unemployable.

10. Burials and burial grounds; cremations and cremation grounds.

11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III.

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by Parliament by law to be of national importance.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.

16. Pounds and the prevention of cattle trespass.

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

19. Forests.

20. Protection of wild animals and birds.

21. Fisheries.

22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

24. Industries subject to the provisions of entry 52 of List I.

25. Gas and gas-works.

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

28. Markets and fairs.

29. Weights and measures except establishment of standards.

30. Money-lending and money-lenders ; relief of agricultural indebtedness.

31. Inns and inn-keepers.

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

33. Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

34. Betting and gambling.

35. Works, lands and buildings vested in or in the possession of the State.

36. Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

40. Salaries and allowances of Ministers for the State.

41. State public services ; State Public Service Commission.

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

43. Public debt of the State.

44. Treasure trove.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

46. Taxes on agricultural income.

47. Duties in respect of succession to agricultural land.

48. Estate duty in respect of agricultural land.

49. Taxes on lands and buildings.

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

53. Taxes on the consumption or sale of electricity.

54. Taxes on the sale or purchase of goods other than newspapers.

55. Taxes on advertisements other than advertisements published in the newspapers.

56. Taxes on goods and passengers carried by road or on inland waterways.

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.

58. Taxes on animals and boats.

59. Tolls.

60. Taxes on professions, trades, callings and employments.

61. Capitation taxes.

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

64. Offences against laws with respect to any of the matters in this List.

65. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.

66 Fees in respect of any of the matters in this List, but not including fees taken in any Court.

List III — Concurrent List

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences

against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

5. Marriage and Divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

8. Actionable wrongs.

9. Bankruptcy and insolvency.

10. Trust and Trustees.

11. Administrators-general and official trustees.

12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

14. Contempt of court, but not including contempt of the Supreme Court.

15. Vagrancy; nomadic and migratory tribes.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

17. Prevention of cruelty to animals.

18. Adulteration of foodstuffs and other goods.

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

20. Economic and social planning.

21. Commercial and industrial monopolies, combines and trusts.

22. Trade Unions; industrial and labour disputes.

23. Social security and social insurance; employment and unemployment.

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

25. Vocational and technical training of labour.

26. Legal, medical and other professions.

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

30. Vital statistics including registration of births and deaths.

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

33. Trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union is declared by Parliament by law to be expedient in the public interest.

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

39. Newspapers, books and printing presses.

40. Archaeological sites and remains other than those declared by Parliament by law to be of national importance.

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given.

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

47. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

EIGHTH SCHEDULE

[Articles 344 (1) and 351]

LANGUAGES

1. Assamese.
2. Bengali.
3. Gujarati.
4. Hindi.
5. Kannada.
6. Kashmiri.
7. Malayalam.
8. Marathi.
9. Oriya.
10. Punjabi.
11. Sanskrit.
12. Tamil.
13. Telugu.
14. Urdu.

NINTH SCHEDULE

[Article 31B]

1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).
2. The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).
3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).
4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).

5. The Panch Mahals Mehwassi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).
6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).
7. The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950).
8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).
9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).
10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F. (No. LXIX of 1358, Fasli).
13. The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli).

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THE
CONSTITUTION OF INDIA[a]

[AUTHENTICATED BY THE PRESIDENT
OF THE CONSTITUENT ASSEMBLY ON
THE 26TH OF NOVEMBER, 1949.]

Preamble.

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

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[a] The Constitution of India as passed by the Constituent Assembly has been authenticated by the President of the Assembly by affixing his signature thereto on 26-11-1949.—Notfn. No. CA/83/Cons./49, dated 26-11-1949, Gazette of India, 1949, Extraordinary, page 2347.

By Proclamations made by the Rajpramukhs of the respective Part B States of Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin, it is declared and directed that this Constitution shall be the Constitution for those states, shall be enforced as such in accordance with the tenor of its provisions and shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in those States.—See Notifn. No. 12-P dated 24-1-1950, Gaz. Ind., 1950, Extra., page 437.

Preamble
Note 1

Synopsis

1. Preamble.
2. "We, the People of India."
3. Sovereign Democratic Republic.
4. Aims and Ideals of the Constitution.
5. Interpretation of the Constitution—General.
6. Unconstitutionality of Legislation.
7. Proceedings of Constituent Assembly.
8. English, American and other foreign decisions.
9. Retrospective effect.
10. Rules as to interpretation of statutes—General.

1. Preamble. — The Preamble is not the source of any substantive power conferred on the Government.[1] In *Jacobson* v. *Massachusetts*[2] the Supreme Court of America observed as follows :

> "We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (S. 137, Chap. 75) is in derogation of rights secured by the Preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom."

It is a general principle about construction of statutes that when words of an Act are clear in themselves, their meaning cannot be cut down or enlarged or otherwise affected by reference to the preamble. But when the meaning of any provision is not clear or is doubtful or is ambiguous, the preamble may be referred to for the purpose of ascertaining the aim and object of the legislation if the knowledge of such aim and object will remove the ambiguity of a provision.[3]

Thus, in the *Sussex Peerage case*,[4] Lord Chief Justice Tindal observed as follows :

> "My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the

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Preamble — Note 1

[1] (1905) 197 U S 11 (22) : 49 Law Ed 643 (648), *Jacobson* v. *Massachusetts.*

[2] (1905) 197 U S 11 (22) : 49 Law Ed 643 (648).

[3] 1952 Cal 150 (Pr. 68) [A I R V 39 C 63] : 1952 Cri L Jour 450 (FB), *Anwar Ali* v. *State of West Bengal.*
[*See also* 1950 F C 67 (Pr 8) [A I R V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC), *Rex* v. *Basudeva.* (Statement in preamble may be useful-as throwing light on nature of matter legislated upon is not conclusive on question of *vires.*)]

[4] (1844) 8 E R 1034 (1057) : 11 Cl & Fin 85 (143).
[*See also* (1904) 1 K B 811 (815, 816) : 73 L J K B 556, *Hill* v. *Pannifer.* (Preamble may be seen in case of ambiguity of Act.)]

intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (*Stowel* v. *Lord Zouch*[5]) is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress'."

Thus, although the preamble to an Act may show the motive for an Act, it does not follow that the enacting portion must be limited to carrying out the motive.[6]

The above principles apply also to the interpretation of the Constitution. Thus, in *Gopalan* v. *State of Madras*,[7] Patanjali Sastri, J. (as he then was), observed as follows :

> "There can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the Legislature, the Executive and the Judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model. Madison (who played a prominent part in framing the First Amendment of the American Constitution) pointing out the distinction, due to historical reasons, between the American and the British ways of securing 'the great and essential rights of the people' observed : Here they are secured not by laws paramount to prerogative but by Constitutions paramount to laws': Report on the Virginia Resolutions, quoted in *Near* v. *Minnesota*.[8] This has been translated into positive law in Part III of the Indian Constitution, and I agree that in construing these provisions the high purpose and spirit of the Preamble as well as the constitutional significance of a Declaration of Fundamental Rights should be borne in mind. This, however, is not to say that the language of the provisions should be stretched to square with this or that constitutional

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[5] (1797) 1 Plowden 353 (369) : 75 E R 536.

[6] 1952 Cal 150 (Pr. 68) [AIR V 39 C 63] : 1952 Cri L Jour 450 (FB), *Anwar Ali* v. *State of West Bengal*. ('Cases' in S. 5 (1) of West Bengal Special Courts Act, 1950, cannot be interpreted as cases requiring speedier trials, by looking at the Preamble to the Act.)

[7] 1950 S C 27 (72) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[8] (1931) 75 Law Ed 1357 (1366) : 283 U S 697 (714).

theory in disregard of the cardinal rule of interpretation of any enactment, constitutional or other, that its spirit no less than its intendment should be collected primarily from the natural meaning of the words used."

Hence, when two interpretations are possible, the object and intention of the Constitution should be considered and that interpretation which fulfils such object should be followed.[9] In this sense, the Preamble to the Constitution can be regarded as a key to it.[10]

When considering for the purpose of ART. 14 whether a legislative enactment is based on a reasonable classification with reference to the objects of the legislation the Preamble to the enactment may be looked at to see what is the subject of the legislation.[11]

2. **"We, the people of India."** — It is the people of India that are the authors of the Constitution. The Constitution is not an imposed Constitution like the Government of India Act, 1935, which was passed by the British Parliament for the governance of this country. Although the Constitution was not directly voted on by the people of the country as it was practically impossible for all the people to take part in the voting, it is clear from the Preamble that the framers of the Constitution attached importance to the sovereignty of the people[1] and the Constitution is promulgated in the name of the people. The members of the Constituent Assembly also represented directly the people and not the different States or Provinces. In other words, the Constitution is not one based on the authority of the several States which constitute the units of which the Union has been formed. In this sense also, the Constitution is one given by the people of the country to themselves. Even the American Constitution, in spite of the fact that it was actually born out of the agreement between a number of independent States, professes to be established by the *people* of the United States and not by the federating *States* in their sovereign capacities.[2]

3. **Sovereign Democratic Republic.** — According to the Preamble, the Constitution has been established in pursuance of the solemn resolution of the people of India to constitute India into a Sovereign

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[9] 1951 Mad 1015 (Pr. 5) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*

[10] 1951 Mad 1015 (1020) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*

[11] 1952 Mad 203 (213) [AIR V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras.*

Preamble — Note 2

[1] 1951 All 257 (Prs. 185, 187, 188, 200) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Govt.*

[2] (1869) 19 Law Ed 101 (104) : 7 Wall 71, *Lane Co.* v. *Oregon.* (The U. S. Constitution of 1787 substituted National Government acting directly upon the citizens instead of the *Confederate* Government which acted only upon the States.)
(1819) 4 Wheat 316 (429) : 4 Law Ed 579 (607), *M'Culloch* v. *The State of Maryland.*
(1816) 1 Wheat 304 (324) : 4 Law Ed 97 (102), *Martin* v. *Hunter's Lessee.*

Democratic Republic, and to secure certain objects set forth in the Preamble.

Sovereign

Sovereign power is that which is absolute and uncontrolled within its own sphere.[1] Full sovereignty implies independence from foreign control. Hence, the question naturally arises as to what is the effect of the declaration by India at the Prime Ministers' Conference in London in April 1949, that she will continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of the independent member nations and, as such, the head of the Commonwealth. This declaration does not find a place in the Constitution. Further, the declaration itself says that India will continue her membership of the Commonwealth notwithstanding her becoming a Sovereign Democratic Republic. This means that the declaration assumes that India will continue her membership of the Commonwealth as a sovereign, independent republic. Further, the declaration says that the Commonwealth of Nations is to be the *free* association of nations which means that no obligation is involved and that India may withdraw her membership at any time. The declaration also says that it is the free association of *independent* nations, which again means that the independence of the members is in no way affected. The only ground on which the question can be raised whether India's sovereignty is affected by her continuance as a member of the Commonwealth is her acceptance of the King of England, which is a foreign country, as the head of the Commonwealth. But as to this, it must be noted that the King is only accepted as the *symbol* of the free association of the independent nations of the Commonwealth and it is only in his capacity as such symbol he is accepted as the head of the Commonwealth. Hence, the King is only accepted as the symbolical head of the Commonwealth. He has not been given any function or power as such head. Hence, the above declaration does not affect the real sovereignty of India.

What are the benefits to India accruing as a result of her deciding to be a member of the Commonwealth in spite of her republican status?

(i) Under the India (Consequential Provision) Act, 1949, passed by the British Parliament immediately after the Constituent Assembly had adopted the Constitution, the British Parliament has virtually provided that no national of India shall suffer any disadvantage in Britain by reason of the creation of the Republic but shall be in exactly the same position as citizens of other members of the Commonwealth like Canada or Australia when on a visit to the United Kingdom or with regard to any property which he may own there. (see ART. 5, NOTE 3.)

(ii) The Act further secures that everything in the law of the United Kingdom is to remain as it would have been if the change due to the formation of the Republic had not been made.

Preamble— Note 3

[1] Salmond's Jurisprudence, 9th Edn., 1937, p. 188.

(iii) Like any other resident coming from a member State of the Commonwealth, an Indian is eligible to hold any public office and to sit in Parliament.

(iv) Those professions which normally are closed to foreigners are open to Indians.

(v) As regards eligibility to take part in public life of the United Kingdom or to practise a profession, the door remains wide open for those Indians who are able to take advantage of it.

(vi) Indians will be free from the restrictions upon entry into and length of stay in the United Kingdom which are applicable to foreigners including such close neighbours of the English as the French, and the citizens of the United States. Indians will have the same right to enter or to leave the United Kingdom as have the citizens of all other States which are associated with the Commonwealth.

(vii) Indians are free to take up any employment they choose, while this matter in the case of foreigners is subject to strict control by Government.

(viii) In common with all foreigners, Indians will be entitled to full protection of the law as regards freedom of speech and freedom from arrest, except on a specified charge of breaking the law.[2]

The Sovereignty of India is a single and undivided sovereignty which is vested in the Republic as a whole. Under the Constitution of the United States of America sovereignty is divided between the Union and the States. (See ART. 1, NOTE 3.)

Democratic Republic

The Preamble uses both the words "democratic" and "republic" although each of them conveys the meaning of the Government by the people either directly or through elected representatives. But the expression "democratic republic" cannot be said to be mere tautology. For, democracy does not necessarily mean the republican form of government. Even under a monarchy there can be democracy as in England. But the characteristic of a republic is that the head of the State is appointed by the people directly or through their representatives.[3] So, the expression "democratic republic" indicates that not only in *substance* political power must vest in the people but also that the *form* of the Government must be republican.

4. Aims and ideals of the Constitution.—The objects which are intended to be secured by the Constitution are set forth in the Preamble. Those objects are expressed by the words "Justice", "Liberty", "Equality" and "Fraternity". These blessings are to be secured for all the citizens. Each of these words "Justice" etc., is amplified by phrases showing what kind of justice, etc., are intended. The Directive Principles of State Policy, set forth in Part IV of the Constitution, further amplify the aims and objectives of the framers of the Constitution. These high ideals are also expressed in the Objectives Resolution adopted by the Constituent Assembly on 22nd January 1947.

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[2] ('50) 54 Cal W N xlv (xlvi). (Article by E. C. S. Wade, Downing Professor of the Laws of England Cambridge University, in the British Information Services.)

[3] *See* Principles of Political Science by R. N. Gilchrist, 2nd Edn. 1923, p. 234. *See* Introduction to Political Science by Sir J. R. Seeley, (1896) pp. 173-174.

It is evident from the Preamble and the Directive Principles and from the other provisions of the Constitution that the object of the framers of the Constitution was to establish what is known as the welfare or the social service State.[1] The framers of the Constitution took a comprehensive view of the State activities and were not dominated by the *laissez faire* thought of the nineteenth century.[2] The Constitution reflects the tendency of modern civilisation to shift the emphasis from the individual to the community.[3] But the Constitution has not ignored the individual but has endeavoured to harmonize the individual interest with the paramount interest of the community.[4] Thus, for instance, the Constitution protects the freedom of the citizen by ART. 19 (1) (a) to (e) and (g), but empowers the State, even while those freedoms last, to impose reasonable restrictions on them in the interest of the State or public order or morality or of the general public as mentioned in cls. (2) to (6). Further, the moment even this regulated freedom of the individual becomes incompatible with and threatens the freedom of the community, the State is given power by ART. 21 to deprive the individual of his life and personal liberty in accordance with the procedure established by law subject to the provisions of ART. 22. Likewise, the Constitution gives protection to the right of private property by ART. 19 (1) (f) not absolutely but subject to reasonable restrictions to be imposed by law in the interest of the general public under cl. (5). And what is more important, as soon as the interest of the community so requires, the State may, under ART. 31, deprive the owner of his property by authority of law subject to payment of compensation if the deprivation is by way of acquisition or requisition of the property by the State.[5] Thus the Constitution has struck a balance between the rights and privileges of the citizen and

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Preamble — Note 4

1. 1951 All 257 (Prs 185, 187, 188, 200) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government*.
2. 1951 All 257 (Prs 185, 187, 188, 200) [AIR V 38 C 51] : I L R (1951) All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government*.
3. 1952 S C 252 (Pr 106) [AIR V 39] : 1952 S C R 889, (1020, 1056) : 31 Pat 595 (SC), *State of Bihar* v. *Kameshwar Singh*.
4. 1952 S C 252 (Pr 106) [AIR V 39] : 1952 S C R 889 (1020, 1056) : 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.
5. 1952 S C 252 (Pr 106) [AIR V 39] : 1952 S C R 889, (1020, 1056) : 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*. (Per S. R. Das J..)

   [*See also* 1951 S C 41 (54) (Pr 49) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

   1950 S C 27 (Pr 113) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.]

the powers of the Government.[6] In other words, the Constitution has accommodated and defined the spheres of operation of the two competing doctrines namely, the right of the individual citizen to life, liberty and property and the power of the State to impose restraints on the exercise and enjoyment of those rights in the interests of good government and the welfare of the State as a whole.[7]

5. Interpretation of the Constitution—General.—By interpretation or construction is meant the process by which the Courts seek to ascertain the meaning of the Legislature through the medium of the authoritative forms in which it is expressed.[1] The Constitution contains an interpretation clause in ART. 366 and unless the context otherwise requires the expressions defined in ART. 366 should be understood in the sense defined, wherever those expressions may occur in the Constitution. Under ART. 367, cl. (1), the General Clauses Act, 1897, is made applicable for the interpretation of the Constitution.[2]

In interpreting a constitution, the same principles apply as in interpreting a statute.[3] The general rule about interpretation of statutes is that the intention of the Legislature is to be gathered primarily from the words used in the enactment. And this rule equally applies to the construction of a constitution.[4] Hence, the Constitution must be interpreted according to the plain and natural meaning of the words used.[5] Where the text is explicit, it is conclusive alike in what it directs and in what it forbids.[6] Where the intention of a constitutional provision is clear, there is no room for construction and no excuse for interpretation or addition.[7] The Court has no right to stretch or twist the language of the Constitution in the interests of any political, social or constitutional theory.[8]

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[6] 1951 Mad 120 (130) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.*

[7] 1951 Mad 120 (130) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.*

Preamble — Note 5

[1] Salmond's Jurisprudence, Ninth Edition, 1937. p. 220.

[2] 1953 Assam 35 (Pr 6) [AIR V 40 C 13] : 1953 Cri L Jour 395 : I L R (1953) 5 Assam 24 (FB), *State* v. *Judhabir.*

[3] 1950 S C 27 (93) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1953 Assam 35 (36) (Pr 6) [AIR V 40 C 13] : 1953 Cri L Jour 395 : ILR (1953) 5 Assam 24 (FB), *State* v. *Judhabir.*

1951 Nag 58 (Pr 135) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.*

1952 Bhopal 1 (Prs 8, 9) [AIR V 39 C 1] : 1952 Cri L Jour 660, *Govind Prasad* v. *State of Bhopal.*

1950 Madh B 46 (Pr 9) [AIR V 37 C 25] : ILR (1952) Madh B 231 (DB), *Harendranath* v. *State of Madhya Bharat.*

[4] 1950 S C 27 (Pr 112) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1952 Bhopal 1 (Prs 8, 9) [AIR V 39 C 1] : 1952 Cri L Jour 660, *Govind Prasad* v. *State of Bhopal.*

1951 Mad 1015 (Pr 4) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*

('48) 1948 Bur L R (SC) 541 (553) (SC), *U Htwe* v. *U Tun Ohn.*

[5] 1952 Tra Co 205 (Pr 9) [AIR V 39] (DB), *Nesamani* v. *Varghese.*

1951 Mad 979 (Pr 7) [AIR V 38 C 339] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras.*

1950 Madh B 107 (Pr 5) [AIR V 37 C 40] (SB), *Krishnaji* v. *Madhya Bharat State.*

In construing an article of the Constitution, a meaning must be given to every word used in the article.[9] It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage if they can have appropriate application in circumstances conceivably within the contemplation of the statute.[9a] Similarly, the Court should not read in the Constitution words which are not there, when the words used in the article under construction are plain.[10]

With regard to the American Constitution it has been held that it was written to be understood by the voters and hence, words and phrases in the Constitution are used in their ordinary and not in their technical meaning.[11] The same may be said about the Indian Constitution. In this connection, the following observations of Bose, J., in *State of West Bengal* v. *Anwar Ali*[11a] may be quoted :—

> "The law of the Constitution is not only for those who govern or for the theorist, but also for the bulk of the people, for the common man for whose benefit and pride and safeguard the Constitution has also been written. Unless and until these fundamental provisions are altered by the Constituent processes of Parliament they must be interpreted in a sense which the common man, not versed in the niceties of grammar and dialectical logic, can understand and appreciate so that he may have faith and confidence and unshaken trust in that which has been enacted for his benefit and protection."

In interpreting the Indian Constitution, Courts should go by the plain words used therein without the importation of expressions like "Police Power," etc.[12] The expression "Police Power" is a term of

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[6] 1950 Pat 19 (Pr 6) [AIR V 37 C 6] : 28 Pat 775 : 51 Cri L Jour 256 (DB), *Bidya Chaudhary* v. *Province of Bihar.* (1912 App Cas 571, *A. G. for Ontario* v. *A. G. for Canada*, Rel. on.)

[7] (1931) 75 Law Ed. 640 (644) : 282 U S 716 (731), *United States* v. *Sprague.* 155 A L R 412 : 144 Neb 584, *Platte Valley Pub-Power and Irrig. Dist.* v. *Lincoln County.*

[8] 1951 Mad 120 (Pr 31) [AIR V 38 C 14] : I L R (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.*

[9] 1950 S C 27 (Pr 8) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[9a] 1952 S C 369 (Pr 26) [AIR V 39] : 1953 S C R 1 (SC), *Aswini Kumar* v. *Arabinda Bose.*

[10] 1952 Madh B 31 (41) (Pr 37) [AIR V 39 C 16] : I L R (1952) Madh B 145, *Anand Bihari* v. *Ram Sahay.*

[11] (1931) 75 Law Ed. 640 (644) : 282 U S 716 (731), *United States* v. *Sprague.*

[11a] 1952 S C 75 (104) (Pr 92) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC).

[12] 1951 S C 41 (Pr 56) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India.*

Preamble
Note 5

variable and indefinite connotation in American law and the importation of such expressions will make the task of interpretation more difficult.[13]

In the undermentioned case,[14] it was held by the Supreme Court of America that the fact that the framers of the Federal Constitution could not possibly have been familiar with a certain subject-matter is of little significance in determining whether a provision in the Constitution applies thereto. In contrast to this, it may be mentioned that it was held by the Judicial Committee of the Privy Council in the *Labour Relations Board of Saskatchewan* v. *John East Iron Works*[15] that the words "superior District or County Court" in S. 96 of the British North America Act of 1867 could not apply to a tribunal exercising a jurisdiction absolutely foreign to the conception of judicial power which must have been in vogue at the time of the enactment of the British North America Act, 1867.

Too great a stress must not be laid in construing an article of the Constitution, on grounds of analogy.[16] When the same words are not used, it is against the ordinary canons of construction to interpret a provision in the Constitution in accordance with the interpretation put upon a somewhat analogous provision in the Constitution of another country.[17]

If the language of the article in the Constitution is plain and unambiguous and admits of only one meaning, then the duty of the Court is to adopt that meaning irrespective of the inconvenience that such a construction may produce.[18] If, however, two constructions are possible, then the Court may adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory.[19]

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[13] 1951 S C 41 (Pr 56) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India*.

[14] (1940) 313 U S 299 (316) : 85 Law Ed 1368 (1378), *United States* v. *Classic*.

[15] 1949 P C 129 (134) [AIR V 36 C 42) (PC).

[16] 1952 Tra Co 205 (Pr 9) [AIR V 39], *Nesamani* v. *Varghese*. (Such a course may lead to absurd consequences.)

[17] 1950 S C 27 (Pr 192) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[See however 1951 Punj 18 (26) (Pr 44) [AIR V 38 C 6] : 52 Cri L Jour 261 (SB), *Amar Nath* v. *The State*. (The presumption that a local Legislature must be deemed to have known the interpretation put on a statute (which is re-enacted) by a Court of competent jurisdiction though not applicable in terms the principle of that rule might well be looked at while interpreting the Constitution of India. Hence where the framers of the Indian Constitution have adopted essentially the language of the Amendments to the American Constitution which has received judicial interpretation in the American Supreme Court, the Indian Courts should govern themselves with that interpretation.)]

[18] 1953 S C 10 (Pr 15) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (S C), *State of Punjab* v. *Ajaib Singh*.

1951 S C 124 (126) (Pr 4) [AIR V 38 C 19] : 1950 S C R 940 : 52 Cri L Jour 391 (S C), *Janardhan Reddy* v. *The State*. (The question of hardship cannot be and should not be allowed to affect the true meaning of the words used in the Constitution. The proper way is to approach the Articles irrespective of considerations of hardship.)

Spirit of the Constitution

In *Sturges* v. *Crowninshield*,[20] Chief Justice Marshall of the United States observed as follows :—

> "Although the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

Thus, the spirit no less than the intendment of an enactment, constitutional or otherwise, should be collected from the natural meaning of the words used.[21] As observed by Kania, C. J., in *Gopalan* v. *State of Madras*[22], "the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words."

Broad and liberal construction

In construing a Constitution a narrow and technical view should not be taken, but the Constitution should, consistently with the words

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[19] 1953 S C 10 (14) (Pr 15) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (S C). *State of Punjab* v. *Ajaib Singh*. (If the words used are *unqualified* and if unless taken with a qualification they lead to an absurd result if literally construed the necessary qualification may be implied (e.g.) *arrest* in Art. 22 (1) & (2) does not include each and every case of physical restraint (e. g.) arrest under Civil Courts' warrant—It only includes arrest by (1) executive (2) on an *accusation* of some conduct past or future but intended.)

[20] (1819) 4 Law Ed. 529 (550) : 4 Wheat 122.
[*See also* (1905) 49 Law Ed. 643 (648) : 197 U S 11, *Jacobson* v. *Massachusetts*. (Chief Justice Marshall's words were quoted and adopted.)]

[21] 1950 S C 27 (72) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*.

[22] 1950 S C 27 (42) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C). [*See also* 1952 S C 252 (309, 315) (Prs 201, 231) [AIR V 39] : 1952 S C R 889 (1020, 1056) : 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh*. (In this case also the Supreme Court rejected an argument based on the "spirit" of the constitution when there was no foundation for it in the actual words of the constitution.)]

Preamble Note 5

used, receive a broad and liberal construction.[23] *In re C. P. Motor Spirit Act,*[24] Gwyer, C. J., of the Federal Court observed as follows:—

> "The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense: Per Lord Wright in *James* v. *Commonwealth of Australia.*[24a] The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself, and I respectfully adopt the words of a learned Australian Judge:
>
> > 'Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be:' Per Higgins, J., in *Attorney General* v. *Brewery Employees Union.*[24b]
>
> "Especially is this true of a federal constitution, with its nice balance of jurisdiction. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but

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[23] 1950 Pat 322 (Pr 16) [AIR V 37 C 87] : 29 Pat 461 : 52 Cri L Jour 610 (F B), *Brajnandan Sharma* v. *State of Bihar.*

(1940) 313 U S 299 (320):85 Law Ed. 1368 (1380), *United States* v. *Classic.* (Words of a constitution are not to be read with stultifying narrowness.)

[*See also* 1951 Mad 1015 (1019) [AIR V 38 C 354] (D B), *Venkataraman* v. *Commr of Police, Madras.* (The fundamental canons of constitutional construction have to be gathered from the rules in Heydon's case ((1584) 3 Co. Rep 8 (a) p. 93) and it is not always a literary construction of the words that should be adopted but a construction that a statute made for the public good should be liberally construed and in the interests of the public. The object and intention of this statute have first to be gathered and that interpretation which fulfils such object should be followed remembering that it is a constitution newly made for the welfare of the people whose safety is the supreme law. The Court has to find out what was the existing law and consider the reason for the change, bearing in mind the object intended to be fulfilled. The historical aspect and perspective have also to be placed in the forefront.)

(1922) 1922-2 App Cas 339 (365) : 92 L J P C 81, *Viscountees Rhondda's Claim.* (The words of the statute are to be construed so as to ascertain the mind of the Legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied, and the defects to be amended, may legitimately be looked at together with the general scheme of the Act.)]

[24] 1939 F C 1 (4, 5) [AIR V 26] (F C).

[24a] (1936) 1936 App Cas 578 (614) : 105 L J P C 115.

[24b] (1908) 6 Commonwealth L R 469 (611).

declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat.*"

See the undermentioned cases[25] also which have adopted the above principles.

As observed in *Gompers* v. *United States*,[26] "the provisions of a Constitution are not mathematical formulas . . . . . ; their significance is not formal but vital." In *James* v. *Commonwealth of Australia*,[27] Lord Wright observed as follows:

> "It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. . . . . The true test must, as always, be the actual language used."

The Constitution is not to be read as a legislative Code subject to continuous revision with the changing course of events but rather as a revelation of the great purposes which were intended to be achieved by it as a continuing instrument of Government.[28] In *Ramhari* v. *Nilmoni Das*[29] P. B. Mukharji, J., observed as follows:

> "Constitutional provisions are not to be interpreted and crippled by narrow technicalities but as embodying the working principles for practical Government.

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[25] 1950 S C 27 (Pr 26) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*
1951 Mad 120 (Pr 31) [AIR V 38 C 14] : I L R (1951) Mad 149 (F B), *Dorairajan* v. *State of Madras.*
1952 Bhopal 1 (Prs 8, 9) [AIR V 39 C 1]: 1952 Cri L Jour 660, *Govind Prasad* v. *State of Bhopal.*
1952 Cal 799 (802) (Pr 13) [AIR V 39], *Biman Chandra* v. *Governor, West Bengal.*
1952 Mad 27 (Pr 5) [AIR V 39 C 11] (DB), *Kolandayammal* v. *Sinnavelappa.*
1952 Nag 330 (334) (Pr 16) [AIR V 39] : I L R (1952) Nag 409, *G. D. Karkare* v *T. L. Shevde.*
1951 Mad 1015 (Pr 4) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*
1950 Madh B. 46 (Pr 9) [A I R V 37 C 25] : I L R (1952) Madh B. 231 (DB), *Harendranath* v. *State of Madhya Bharat.*
(1897) 165 U S 275 (281, 282) : 41 Law Ed. 715 (717, 718), *Robertson* v. *Baldwin.*

[26] (1913) 233 U S 604 (610) : 58 Law Ed. 1115 (1120).

[27] (1936) 1936 App Cas 578 (614) : 105 L J P C 115 (121) (P C).

[28] (1940) 313 U S 299 (316) : 85 Law Ed. 1368 (1378), *United States* v. *Classic.*
[*See also* 1951 Pat 29 (Pr 52) [AIR V 38 C 5] : 30 Pat 174 (F B), *Tobacco Manufacturers (India)* v. *The State.* (An article in the Constitution should not be construed like the clauses in the Letters Patent which should be construed strictly.)
1950 Pat 179 (Pr 2) [AIR V 37 C 38], *Kameshwar Singh* v. *Province of Bihar.* (Principles to be applied are not same as would apply in construing ordinary documents.)]

[29] 1952 Cal 184 (Prs 13, 13a) [AIR V 39 C 67] (DB).

The Constitution is not the home for legal curiosities. It is the epitome of the national aspirations of a free political society. It must be so rendered in construction as to be able to receive and reflect the organ tomes of national life."

In interpreting an organic statute like the Constitution, that construction most beneficial to the widest possible amplitude of its powers must be adopted.[30]

In construing the Constitution, a construction which avoids a result unjust or injurious to the nation should be preferred.[31] Constitutional provisions designed for the security of the elementary rights of life, liberty and property should be construed liberally in favour of the citizen.[32] In other words, if there are two interpretations possible of a provision in the Constitution, the one which leans in favour of the liberty of the people should be adopted in preference to one that curtails that liberty.[33] The principle laid down in *British Coal Corporation* v. *King*,[34] namely, that the construction most beneficial to the widest possible amplitude of its powers must be adopted, may not be helpful where the section is a constitutional guarantee of rights analogous to the rights of religious freedom or of equal right of all residents in all States.[35] The canon of construction which warrants a large and liberal construction to be put upon the various provisions of the Constitution should be modified by the canon of construction which lays down that a strict construction should be put on those provisions which go to curtail the liberties of the subject or impose burdens or obligations upon him.[35a]

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[30] 1935 P C 158 (162) [A I R V 22] (P C), *British Coal Corporation* v. *King*. ((1930) 1930 App Cas 124: 99 L J P C 27, *Edwards* v. *A.G. for Canada*, Rel. on.)
1952 Cal 610 (Pr 18) [AIR V 39], *D. Parraju* v. *General Manager, B. N. Railway*. (('35) 1935 App Cas 500 (518): 1935 P C 158 [AIR V 22] (P C), *British Coal Corporation* v. *King*, Foll.)
(1936) 105 L J P C 115 (121) : 1936 App Cas 578, *James* v. *Commonwealth of Australia*.
('49) 1949 Bur L R (S C) 170 (185), *Bo Thein Swe* v. *The Union of Burma*.
('48) 1948 Bur L R (S C) 541 (553), *U Htwe* v. *U Tun Ohn*.

[31] 1951 Mad 120 (Pr 31) [AIR V 38 C 14] : I L R (1951) Mad 149 (F B), *Dorairajan* v. *State of Madras*. (The framers of the constitution could not have meant to enact a measure leading to manifestly unjust or injurious results to the nation and a construction which avoids such results ought to be preferred.)
1952 Trav. Co. 205 (206) (Pr 9) [AIR V 39] (D B), *Nesamani* v. *Varghese*. (That construction most agreeable to justice and reason should be adopted.)

[32] 19 A L R 118 : 206 Ala 254, *Randle* v. *Winona Coal Co.*

[33] 1950 Pat 332 (Pr 46) [AIR V 37 C 88] : 29 Pat 410 : 51 Cri L Jour 1251, *Ratan Roy* v. *State of Bihar*.
1950 Orissa 157 (Pr 27) [AIR V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (F B), *Prahalad Jena* v. *State*.

[34] 1935 P C 158 (162) [AIR V 22] (P C).

[35] (1936) 1936 App Cas 578:105 L J P C 115 (121), *James* v. *Commonwealth of Australia*.

[35a] 1946 Bom 216 (234) [AIR V 33 C 59], *Tan Bug Taim* v. *Collector of Bombay*.

Preamble Note 5

When two constructions are possible that construction must be adopted which will implement what appears to be the intention of the makers of the Constitution in preference to the one which will retard that intention.[36]

In interpreting a constitution, the Court is entitled, when necessary, to take into consideration the history behind it.[37] It is legitimate in construing a statute to take into account existing laws and the manner in which they ~~they~~ were acted upon and enforced. This rule is even more appropriate in the case of the Constitution because the Constitution itself continues in force all the laws which were in existence at the date when it came into being except those which are inconsistent with itself.[38] When there is doubt as to the interpretation of the constitutional amendment, the amendment must be interpreted in the light of the circumstances which gave occasion for the amendment, and the amendment must receive an interpretation which will forward the purpose for which it was made.[39]

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[36] 1952 S C 252 (Pr 95) [AIR V 39] : 1952 S C R 889 (1020, 1056) : 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

(1940) 313 U S 299 (316) : 85 L Ed. 1368 (1378), *United States* v. *Classic.* (Court should prefer that meaning which will effectuate rather than defeat the constitutional purpose.)

(1899) 176 U S 581 (602) : 44 Law Ed. 597 (605), *Maxwell* v. *Dow.* (Constitutional amendment — Doubt as to interpretation of the words used — Circumstances which occasioned the amendment to be seen and the amendment to be construed in such a way as to advance the purpose for which it was made.)

[*See* 1952 Bhopal 1 (Prs 8, 9) [A I R V 39 C 1] : 1952 Cri L Jour 660, *Govind Prasad* v. *State of Bhopal.* (Where any particular provision is open to more than one construction it is only the logical one and the one that naturally flows from it which has to be accepted. For this purpose, it is often necessary to enter the mind of the framers of the Constitution, and to achieve this, it is dangerous to import anything not inherently present in it.)]

[*See also* 1950 Madh B. 107 (Pr 5) [AIR V 37 C 40] (S B), *Krishnaji* v. *Madhya Bharat State.* (Orders of the Sovereign and other like Constitutional instruments must be construed according to the natural and plain meaning of the words used. If there is a reasonable doubt as to the meaning of the words used, a construction which will carry into effect the plain intention of the authority responsible for the order rather than one which will defeat that intention should be preferred.)]

[37] 1951 Mys 72 (93) (Pr 58) [AIR V 38 C 33] : I L R (1951) Mys 284 : 52 Cri L Jour 992 (F B), *Abdul Khader* v. *State of Mysore.*

1950 Lah 177 (Pr 20) [AIR V 37 C 57] : Pak L R 1950 Lah 658 : 51 Cri L Jour 1378 (F B), *Sarfraz Khan* v. *The Crown.*

[*See also* 1951 Mad 1015 (1019) (Pr 5) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.* (The state of circumstances which existed before the Constitution which necessitated the change must be seen to gather its object and intention and in doing so, some bit of historical perspective is also necessary.)

(1920) 1 K B 773 (791) : 89 L J K B 1178, *Attorney-General* v. *Brown.* (In construing an Act of Parliament it is legitimate to consider the state of the law at the time the Act was passed, and the changes it was passed to effect.)]

[38] 1953 S C 252 (Pr 40) [A I R V 40 C 62] (SC), *State of Bombay* v. *United Motors Ltd.* (Per *Bose J.*)

[39] (1899) 176 U S 581 (602) : 44 Law Ed 597 (605), *Maxwell* v. *Dow.*

The words in the Constitution should be given the meaning they were intended to bear when that instrument was framed and adopted.[40] In regard to the Constitution of the United States it has been held that the language of the Constitution cannot be interpreted safely except by reference to the Common law of England and British institutions as they were when the instrument was framed and adopted.[41] Similarly, expressions based on the English law, which have been used in the Constitution, as for instance, *certiorari, habeas corpus, mandamus*, etc., should be interpreted in the light of the English law and the law which was in force in India, immediately prior to the Constitution, which must be presumed to have been known to the members of the Constituent Assembly. See in this connection the notes on ARTS. 32 and 226.

Help from extraneous facts existing at the time of the framing of the Constitution might be obtained in ascertaining the intention of its framers though that intention must primarily or in the ultimate resort be ascertained from the language of the enacted words.[42]

Definitions given by eminent text book writers may be referred to as being likely to be present to the minds of the framers of the Constitution, because such definitions embody the common understanding of those who know the subject.[43]

The Constitution must be read as a whole, taking into consideration the different parts in trying to hormonize the same.[44] The presumption should be that no conflict or repugnancy between the different parts of the Constitution was intended by the framers.[45] In *James* v. *Commonwealth of Australia*,[46] Lord Wright observed as follows :—

> "The question then is one of construction and in the ultimate resort must be determined upon the actual words used, read not *in vacuo* but as occurring in a single complex instrument in which one part may throw light on another. The Constitution has been described as the federal compact and the construction must hold a balance between all its parts."

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[40] 1949 P C 129 (Prs 31 to 36) [AIR V 36 C 42] (PC), *L. R. Board* v. *J. E. I. Works*.
(1857) 19 How 393 (404) : 15 Law Ed. 691 (700), *Dred Scott* v. *Sandford*.

[41] (1925) 69 Lwa Ed. 527 (530) : 267 U S 87, *Ex parte Grossman*.

[42] 1951 Mad 120 (Pr 28) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras*.

[43] 1939 F C 1 (35) [AIR V 26] (FC), *In re C. P. Motor Spirit Act*. (('34) 1934 App Cas 45: 103 L J P C 1, *Attorney-General for British Columbia* v. *Kingoome Navigation Co. Ltd.*, Rel. on.)

[44] 1950 S C 27 (93) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[45] 1950 S C 27 (93) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.
1952 Mad 395 (396) [AIR V 39 C 105 (35)] : ILR (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras*.

[46] (1936) 105 L J P C 115 (121) : 1936 App Cas 578 (PC).

The same words must *prima facie* be presumed to carry the same meaning wherever they occur in the Constitution.[46a] When two different expressions are used in the Constitution they must *prima facie* be assumed to have different meanings and not the same meaning.[47] But this is not conclusive and instances are not unknown when two different expressions are used to convey the same meaning.[48]

Marginal notes may be referred to when the meaning of the words used is ambiguous.[49] But where the meaning of the words of an article is clear, it cannot be controlled by reference to the marginal notes.[50] The marginal notes to the articles in the Constitution were inserted with the knowledge and authority of the Constituent Assembly and hence may be referred to in interpreting the articles and elucidating their meaning.[51] The view regarding the inadmissibility of marginal notes expressed by the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh*[52] should be taken to have undergone a change both in India and in England and it must be held that marginal notes inserted with the knowledge and authority of the Legislature are admissible for elucidating the Act.[53]

The rule of *ejusdem generis* should never be invoked where its application appears to defeat the general intent of the instrument.[54]

The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.[55]

6. Unconstitutionality of legislation. — The Constitution is superior to the will of the Legislature.[1] A Legislature which is subject to a written Constitution cannot have absolutely sovereign powers.[2] Herein lies the distinction between the British Parliament and the Legislatures under the Indian Constitution. The Constitution is the fundamental law of the land to which all other laws must conform.[3] The validity of laws passed by the Legislatures, therefore, must be tested according to the provisions of the Constitution.[4] An Act of the Legislature, which is repugnant to the Constitution, is void.[5]

[46a] *See* 118 A L R 789 : 278 N Y 200, *Judd* v. *Board of Education.* (Written Constitutions are to receive uniform and unvarying interpretations.)

[47] 1952 Bom 16 (Pr 18) [A I R V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.*

[48] 1952 Bom 16 (Pr 18) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.*

[49] 1952 Bom 16 (Pr 19] [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman, Santal.*

[50] 1952 Bom 16 (Pr 19) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.*

[51] 1952 All 788 (Pr. 9) [A I R V 39] : 1952 Cri L Jour 1282, *Jodhey* v. *State.* (In this case the Court compared the marginal notes of the corresponding provisions in Government of India Acts for elucidating the meaning of Art. 227, Constitution of India.)

[52] ('04) ILR 26 All 393 (406) : 31 Ind App 132 (PC).

[53] 1952 All 788 (Pr 9) [AIR V 39] : 1952 Cri L Jour 1282, *Jodhey* v. *State.* 1952 Bom 16 (25) (Pr 19) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.*

[54] 1952 Nag 330 (Pr 15) [AIR V 39] : ILR (1952) Nag 409 (DB), *G. D. Karkare* v. *T. L. Shevde.* (1938 Bom 41 [AIR V 25], *I. T. Commr.* v. *Laxmidas Devidas,* Foll.)

[55] 1950 Pat 392 (422) (Pr 57) [A I R V 37 C 108) (SB), *Kameshwar Singh* v. *Province of Bihar.* ((1935) 297 U S 288: 80 Law Ed 688, *Ashwander* v. *Tennessee Valley Authority,* Foll.)

Preamble — Note 6

[1] 1951 All 257 (Prs 191, 192) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Govt.*

The Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted "due process clause" in the Fifth and Fourteenth Amendments of the American Constitution.[5a] This is especially true as regards Fundamental Rights as to which the Supreme Court has been assigned the role of a sentinel on the *qui vive.*[5b]

1950 Orissa 157 (Pr 15) [A I R V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

2. 1951 All 257 (Prs 191, 192) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Govt.*

1950 Orissa 157 (Pr 22) [AIR V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

3. (1803) 2 Law Ed 60 (73) : 1 Cranch 137, *Marbury* v. *Madison.*

1950 Orissa 157 (Pr 15) [AIR V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

(1935) 297 U S 1 (62) : 80 Law Ed 477 (486), *United States* v. *Butler.*

168 A L R 621, *Egbert* v. *Dunseith.* (The Constitution of the State is its paramount law, being a self-imposed restraint upon the people of the State in the exercise of their Governmental sovereign power.)

112 A L R 660, *Float* v. *Board of Examiners.* (Disobedience or evasion of Constitutional mandate may not be tolerated even though such disobedience may at least temporarily promote in some respects the best interests of the public.)

53 A L R 463, *Jelke Company* v. *Emery.* (Constitution is the mandate of a sovereign people to its servants and representatives and no one of them has a right to ignore or disregard its mandates.)

96 A L R 802 : 124 Tex 45, *Travelers' Ins. Co.* v. *Marshall.* (Neither the Legislature, the executive officers nor the judiciary can lawfully act beyond the limitations to the Constitution.)

4. 1950 Orissa 157 (Pr 22) [AIR V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

5. 1951 All 257 (Prs 191, 192) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Govt.*

1951 Hyd 11 (Pr 35) [AIR V 38 C 2] : I L R (1951) Hyd 1 : 52 Cri L Jour 1333 (FB), *Abdur Rahim* v. *J. A. Pinto.*

1951 Bom 33 (Pr 4) [AIR V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.*

81 ALR 580 : 162 S C 413, *State* v. *Wilson.*

87 A L R 1298 : 88 Fla 249, *Nuveen* v. *Greer.*

(1803) 1 Cr 137 (178) : 2 Law Ed 60 (74), *Marbury* v. *Madison.*

5a. 1952 S C 196 (199) (Pr 13) [A I R V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (SC), *The State of Madras* v. *V. G. Raw.*

5b. 1952 S C 196 (199) (Pr 13) [A I R V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (SC), *The State of Madras* v. *V. G. Raw.*

1950 S C 124 (126) (Pr 5) [A I R V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras.*

Preamble
Note 6

Two tests for determining the constitutionality of a statute are : (i) whether it falls within the legislative jurisdiction of the particular Legislature, and (ii) whether it does not conflict with any restriction imposed on legislative power by the Constitution.[6]

In construing an Act of the Legislature with a view to see whether it is unconstitutional, the meaning and intention of the Legislature must primarily be gathered from the language of the enactment itself.[7] An Act should not be declared void merely because in the opinion of the Court it is opposed to the spirit of the Constitution, when the provisions of the Constitution are explicit in respect of the matter in question.[8] But when the provisions of an enactment are not clear in themselves the Court is entitled to construe the provisions according to the established principles.

One of the matters which can be taken into consideration by the Court in interpreting the provisions of a Constitution in regard to the powers of a Legislature is the legislative practice in vogue at the time of enactment of the Constitution. Because, very often a Constitution embodies a great deal of practice with regard to a particular legislation which has been built up in the country in the past.[9]

The meaning and scope of the articles in the Constitution are not controlled by the various entries in the lists in Sch. VII, but on the contrary the scope and meaning of various items in the legislative lists in Sch. VII are controlled by the articles.[10]

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[6] 1951 Pat 91 (Pr 8) [A I R V 38 C 15] : 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

1950 Pat 19 (20) (Pr 6) [A I R V 37 C 6] : 28 Pat 775 : 51 Cri L Jour 256 (DB), *Bidya Chaudhary* v. *Province of Bihar.* (('78) 5 Ind App 178 : 4 Cal 172, (P C), Foll.)

[7] 1939 F C 1 (4) [AIR V 26] (F C), *In re C. P. Motor Spirit Act.*

[8] 1952 S C 252 (309, 316) (Prs. 201, 231) [A I R V 39] : 1952 S C R 889 (1020, 1056) : 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

1950 S C 27 (42) (Pr 26) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

1951 Mys 72 (85) (Pr 37) [AIR V 38 C 33] : I L R (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.*

(1905) 197 U S 11 (22) : 49 Law Ed 643 (648), *Jacobson* v. *Massachusetts.*

[9] 1952 Bom 261 (266, 270) (Prs 8, 14) [A I R V 39]: I L R (1953) Bom 446 (DB), *J. N. Duggan* v. *I. T. Commr. Bombay City.* (*Chagla C. J.*— Interpretation of entries in legislative lists must be consistent with and in conformity with legislative practice—*Tendolkar J.* — Where language used is ambiguous legislative practice may be seen.)

1952 Mad 27 (Pr 5) [A I R V 39 C 11] (DB), *Kolandayammal* v. *Sinnavelappa.* (When a power is conferred to legislate on a particular topic, it is important in determining the scope of the power to have regard to what is ordinarily treated as empowering within that topic in the legislative practice and particularly in the legislative practice of the State which has conferred the power. Case law discussed.)

1950 Bom 221 (Pr 7) [A I R V 37 C 60] : I L R (1950) Bom 290 : 51 Cri L Jour 1207 (DB), *Kishori Shetty* v. *Emperor.*

[10] 1951 Madh B 121 (Pr 119) [A I R V 38 C 58]: I L R (1952) Madh B 454 : 52 Cri L Jour 1305 (FB), *Dayabhai* v. *R. T. Authority.*

The Constitution is a very detailed one, unlike the American Constitution, and the whole has to be read with the same sanctity without giving undue weight to Part III or ART. 246 except to the extent one is legitimately and clearly limited by the other.[11]

The pith and substance of the impugned legislation is the true test of its constitutionality.[12] In order to see whether a particular statute is within the legislative competence of a Legislature as regards the subject of legislation, the operative part of the statute and not the Preamble is the determining factor.[13] To see the operation of an Act it is the pith and substance of the Act which must be considered.[14]

In interpreting the powers conferred on the Legislature, as liberal a construction as possible should be adopted.[15] In *British Coal*

1950 Madh B 46 (Pr 10) [A I R V 37 C 25] : I L R (1952) Madh B 231 (DB), *Harendranath* v. *State of Madhya Bharat.*

[*See also* 1952 S C 252 (264, 265) (Prs 13. 15) [AIR V 39] : 1952 S C R 889, 1020, 1056 : 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*]

[11] 1950 S C 27 (38) (Pr 14) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per Kania C. J.)

[12] 1953 S C 375 (Pr 9) [AIR V 40 C 85] (SC), *K. C. G. Narayan Deo* v. *State of Orissa.* (It is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that Legislature to legislate upon, the form in which the law is clothed would not save it from condemnation — The Legislature cannot violate the constitutional prohibitions by employing an indirect method ; the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority.)

1952 Punj 9 (Pr 22, 119) [A I R V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*

1951 Mad 979 (Pr 7) [AIR V 38 C 239] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras.*

1950 F C 67 (Pr 8) : [AIR V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC), *Rex* v. *Vasudeva.* (Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of *vires*, where the Legislature concerned has powers to legislate on certain specified matters only—The Court must still see, in such cases, whether the subject-matter of the impugned legislation is really within those powers.)

[13] 1949 All 513 (Pr 22) [AIR V 36 C 189] : ILR (1950) All 615 : 50 Cri L Jour 798 (FB), *Basudeva* v. *Rex.*

[14] 1949 All 513 (Pr 22) [A I R V 36 C 189] : I L R (1950) All 615 : 50 Cri L Jour 798 (FB), *Basudeva* v. *Rex.*

1952 Mad 27 (Pr 5) [AIR V 39 C 11] (DB), *Kolandayammal* v. *Sinnavelappa.*

[15] 1951 Nag 58 (Pr 135) [A I R V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.*

1949 Pat 1 (4) (Pr 4) [AIR V 36 C 1] : 50 Cri L Jour 44 : 27 Pat 773 (FB), *Nek Mohammad* v. *Province of Bihar.*

1949 Lah 207 (Prs 5 & 6) [A I R V 36 C 41] : Pak L R (1949) Lah 205 : 50 Cri L Jour 976, *Muhammad Ali* v. *The Crown.* (The entries in the lists must be given the most liberal construction, the reason being that the allocation of the subject in the three lists is not by way of scientific definition but by way of mere enumeration of broad categories—Subjects must still overlap and where they do, the question must be asked what in pith and substance is the effect of enact-

Corporation v. *The King*,[16] Lord Sankey delivering the judgment of the Privy Council observed as follows: "In interpreting a constituent or organic statute . . . . that construction most beneficial to the widest possible amplitude of its powers must be adopted." The powers of the Legislature should not be restricted unless there is a provision in the Constitution which justifies such restriction.[17] The Legislature must be held to possess an unrestricted and even a sovereign power when legislating within its own ambit.[18] In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, if the text says nothing expressly it is not to be presumed that the Constitution withholds a particular power altogether.[19] Each general word used in the Constitution should be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.[20] A wide meaning should be given to the words conferring legislative power.[21] See also NOTE 5.

The presumption is in favour of the constitutionality of a statute.[22] In the case of a limited Legislature there is a presumption that it

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ment of which complaint is made, and in what list is its nature and character to be found. If these questions could not be asked, much beneficient legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with : A I R 1941 F C 16 and A I R 1947 P C 60, Rel. on.)

[*See* 1950 Orissa 157 (Pr 20) [AIR V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State*. (Though astute interpretation or strict adherence to technical rules are foreign to the interpretation of the constitution the same doctrine cannot be invoked in favour of law purporting to have been made in obedience to the Constitution.)]

[*See also* 1952 Cal 740 (748) (Prs 61, 68) [A I R V 39] (SB), *Bhuwalka Bros. Ltd.* v. *Dunichand*. (The Court should give such a construction to the words as would produce harmony and reconcile the respective powers given to the Union and the State.)]

[16] 1935 P C 158 (162) [AIR V 22] (PC). ((1930) 1930 App Cas 124 (136) : 99 L J P C 27, *Edwards* v. *A. G. for Canada*, Rel. on.)

[17] 1952 Nag 139 (142) (Pr 26) [AIR V 39]:ILR (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India*.

[18] ('51) 52 Cri L Jour 243 (Pr 17) : Pak L R (1950) F C 541, *Mohd. Ali* v. *The Crown*.

[19] 1952 Cal 118 (Pr 9) [A I R V 39 C 42], *Abhimanyu Adak* v. *State of West Bengal*.

[20] ('51) 52 Cri L Jour 243 (Pr 17) : Pak L R (1950) F C 541, *Mohd. Ali* v. *The Crown*.

[21] ('51) 52 Cri L Jour 243 (Pr 17) : Pak L R (1950) F C 541, *Mohd. Ali* v. *The Crown*.

[22] 1939 F C 1 (4, 5) [AIR V 26] (FC), *In re C. P. Motor Spirit Act*.
1953 Mad 729 (731) (Pr 7) [A I R V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon*.
1952 Bom 16 (Pr 21) [A I R V 39 C 2] (DB), *State of Bombay* v. *Heman Santal*. (If possible a construction should be placed upon a statute which would put it within the limits of the competence of the Legislature rather than outside those limits : 1941 F C 72, Rel. on.)
1952 Nag 378 (381) (Pr 13) [A I R V 39] : I L R (1953) Nag 332 (DB), *Shriram* v. *Board of Revenue*.
1952 Pat 166 (169) (Pr 14) [A I R V 39 C 55 C 12] : 30 Pat 1085 (DB), *Bankey Singh* v. *Jhingan Singh*. (AIR 1939 F C 1 (FC) and AIR 1950 S C 27 (SC), Ref.)

intends to keep within its powers.[23] Apart from the presumption of validity, Courts should be reluctant to pronounce too readily that an enactment is invalid.[24] Hence, as far as possible without doing violence to the language used, a statute must be so construed as to make it constitutional.[25] Where two constructions of a provision in an Act are possible, one which will make it *ultra vires* and the other *intra vires*,

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1952 Punj 9 (Prs 22, 119) [A I R V 39 C 2]: I L R (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*

1951 All 746 (Prs 66, 67) [AIR V 38 C 194]: I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.*

1951 Cal 85 (Pr 51) [A I R V 38 C 25] (DB), *Subodh Gopal* v. *Behari Lal.* (AIR 1951 S C 41, Rel. on.)

1951 Mys 72 (81) (Pr 23) [AIR V 38 C 33] : I L R (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party, attacking its validity.)

1951 Nag 43 (Pr 8) [A I R V 38 C 13] : I L R (1951) Nag 552 : 1952 Cri L Jour 580 (DB), *Atau Raheman* v. *State of Madhya Pradesh.*

1951 Pat 570 (Pr 24) [AIR V 38 C 161] : 30 Pat 735 (DB), *Gopeshwar Prasad* v. *State of Bihar.* (The principle is specially important when the issue of constitutionality before the Court is one depending on some question of degree—(1918) 249 U S 152 : 63 Law Ed., 527, *Middleton* v. *Texas Power & L. Co.*, Rel. on.)

('50) 1950 Nag L J 233 (Prs 13, 14) (DB), *A. S. Prasadrao* v. *Provincial Govt.*

19 A L R 118 : 206 Ala 254, *Randle* v. *Winona Coal Co.*

23. 1952 Nag 378 (Pr 13) [AIR V 39] : ILR (1953) Nag 332 (DB), *Shriram* v. *Board of Revenue.* (AIR 1939 F C 1, Rel. on.)

24. 1952 Nag 378 (Pr 14) [AIR V 39] : ILR (1953) Nag 332 (DB), *Shriram* v. *Board of Revenue.* (38 C L R 153 (Aus) (180), *The Federal Commissioner of Taxation* v. *Munro*, Ref.)

[*See* 79 A L R 983 : 121 Tex 94, *Jones* v. *Williams.* (The mistake of the Legislature as to the constitutional basis for an Act does not prevent the Act from being a valid one if it is constitutional for other reasons.)]

25. ('10) 3 Law Ed 162 (175) : 6 Cranch 87, *Fletcher* v. *Peck.*

1951 All 746 (Prs 66, 67) [AIR V 38 C 194] : ILR (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.* ((1827) 12 Wheat 213: 6 Law Ed. 606, *Ogden* v. *Saunders*, Ref.)

1952 Bom 16 (18) (Pr 2) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.* (The Court must always lean in favour of the validity of an Act rather than against it. There may be cases in which a law is alleged to contravene Fundamental Rights. In such cases, undoubtedly the Court must zealously scrutinize the provisions of the impugned Act in order to see that the Fundamental Rights are not violated. But where what is challenged is only the letter of the law and the substance is in the interest of a large body of citizens then as far as possible the Court must try to uphold the substance and not permit the letter to defeat the object of the Legislature.)

1950 Orissa 157 (Pr 27) [AIR V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.*

(1937) 301 U S 1 (30) : 81 Law Ed. 893 (908), *National L. R. Bd.* v. *Jones & Laughlin S. Corp.*

(1926) 271 U S 500 (518) : 70 Law Ed. 1059 (1066), *Yu Cong Eng* v. *Trinidad.*

[*See* (1891) 1891 App Cas 455 (457) : 60 L J P C 55 (PC), *Macleod* v. *Attorney General for New South Wales.* (Words which are unqualified and which are taken literally would make the Act unconstitutional may be limited by a qualification so as to make it valid.)]

the latter should be preferred.[26]

Where an Act gives powers which may and can offend against any provision of the Constitution, such an Act is *ultra vires*.[27] In such a case, the fact that an Act can be so administered as not to offend the provisions of the Constitution will not make the Act valid.[28] Hence, where an Act is *ultra vires*, the fact that the rules framed under the Act are not repugnant to the Constitution cannot save the Act.[29] Thus, in considering whether a taxing Act is *ultra vires* on the ground that it does not exempt subjects which are exempt from taxation under the Constitution, the fact that the rules framed under the Act contain such exemption will not make the Act constitutional.[30] But the rules framed under the Act may be seen in order to understand the scheme and purpose of a legislation.[31]

The Court cannot question a statute or statutory rules on the ground of unreasonableness.[32] Courts are not concerned with the wisdom or expediency of a provision,[33] nor with the reasonableness of a provi-

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[26] 1952 Pat 359 (363) (Pr 10) [AIR V 39] : 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.*

(1923) 261 U S 379 (383) : 67 Law Ed 705 (710), *Arkansas Natural Gas Co.* v. *Arkansas Railroad Com.*

[27] 1950 S C 124 (127) [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (S C), *Romesh Thappar* v. *State of Madras.*

1952 Cal 150 (Pr 75) [AIR V 39 C 63]: 1952 Cri L Jour 450 (FB), *Anwar Ali* v. *State of West Bengal.* (AIR 1950 S C 124 and AIR 1951 S C 118, Rel. on.)

[*See also* 1951 S C 118 (Pr 6, 9) [AIR V 38 C 17] : 1950 S C R 759 : ILR (1951) Hyd 221 (S C), *Chintaman Rao* v. *State of M. P.*]

[28] 1952 Cal 150 (Pr 75) [AIR V 39 C 63] : 1952 Cri L Jour 450 (FB), *Anwar Ali* v. *State of West Bengal.*

[29] 1953 S C 252 (Pr 65) [AIR V 40 C 62] (S C), *State of Bombay* v. *United Motors Ltd.* (Per *Bose J.*)

[30] 1953 S C 252 (Pr 65) [AIR V 40 C 62] (S C), *State of Bombay* v. *United Motors Ltd.*

[31] 1952 Pat 359 (365) (Pr 15) [AIR V 39]: 31 Pat 493 (S B), *Atma Ram* v. *State of Bihar.*

[32] 1952 Bom 296 (297) (Pr 2) [AIR V 39]: ILR (1952) Bom 766 (DB), *Mulchand* v. *Mukund.* (Though Court cannot question reasonableness of *statutory rules*, it can question reasonableness of *bye-laws*— Distinction between statutory rules and bye-laws explained — Validity of statutory rules can be questioned on the ground of their not being within the statutory authority.)

[33] 1939 F C 1 (4) [AIR V 26] (F C), *In re C. P. Motor Spirit Act.*

1951 Mad 120 (Pr 30) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.* (The Constitution must be regarded as an instrument which was fashioned with great deliberation, with full knowledge of the working of other republican constitutions and with an intimate appreciation of the peculiar local conditions.)

1952 Nag 139 (142) (Pr 26) [AIR V 39] : ILR (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

(1940) 310 U S 586 (596) : 84 Law Ed 1375 (1380), *Minersville School Dist.* v. *Gobitis.*

[*See* 1952 S C 196 (199) (Pr 13) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (S C), *The State of Madras* v. *V. G. Row.* (While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.)]

Preamble
Note 6

sion[34] except where the Constitution itself, as for instance under ART. 19, imposes a condition of reasonableness for the validity of a law. In *In re C. P. Motor Spirit Act*,[35] Gwyer, C. J., of the Federal Court observed as follows :

> "It is not for the Court to express or indeed to entertain any opinion on the expediency of a particular piece of legislation, if it is satisfied it was within the competence of the Legislature which enacted it; nor, will it allow itself to be influenced by any considerations of policy which lie wholly outside its sphere."

So also, the Court is not concerned with the motives of the Legislature.[36] Hence, though the motive of the Legislature in enacting a law may be laudable, the enactment will be void if it contravenes the Constitution.[37]

Where any provision in an Act is *ultra vires*, the whole Act does not necessarily become *ultra vires*. Where the part of the Act which is *ultra vires* is severable from the rest of it, it is only such part that will be void and not the whole of the Act.[38] But where the different

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[34] 1951 Bom 210 (Pr 18) [AIR V 38 C 42] : ILR (1951) Bom 17 : 52 Cri L Jour 80 (FB), *Fram Nusserwanji* v. *State of Bombay*.
1951 Hyd 11 (Pr 35) [AIR V 38 C 2] : ILR (1951) Hyd 1 : 52 Cri L Jour 1333 (FB), *Abdur Rahim* v. *J. A. Pinto*.
1950 Pat 322 (Pr 15) [AIR V 37 C 87] : 29 Pat 461 : 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar*.
1952 Bom 296 (297) (Pr 2) [AIR V 39] : ILR (1952) Bom 766 (DB), *Mulchand* v. *Mukund*.
1951 All 44 (Pr 10) [AIR V 38 C 7] : ILR (1952) 2 All 360 : 52 Cri L Jour 1191 (DB), *State* v. *Basdeo*.
('50) 1950 Nag L Jour 233 (240) (DB), *A. S. Prasadrao* v. *Provincial Govt.*

[35] 1939 F C 1 (4) [AIR V 26] (FC).

[36] 1939 F C 1 (4) [AIR V 26] (F C), *In re C. P. Motor Spirit Act*.
(1910) 3 Law Ed 162 (176) : 6 Cranch 87, *Fletcher* v. *Peck*. (Corruption alleged against Members of Legislature —Court cannot enter into question.)

[37] 1952 All 746 (Pr 12) [AIR V 39] (DB), *Craiknell* v. *State of Uttar Pradesh*. (Thus the fact that the U. P. Court of Wards Act (4 of 1912) is not a hostile legislation against the proprietors does not prevent a proprietor from raising an objection as to the validity of S. 8 (1) (b) of the Act.)

[38] 1950 S C 27 (Prs 93, 149) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*. (Section 14, Preventive Detention Act, 1950 is *ultra vires*, but its invalidity does not affect the rest of the provisions of the Act.)
1952 S C 75 (92) (Prs 50, 51) [AIR V 39 C 18]: 1952 S C R 284 : 1952 Cri L Jour 510 (S C), *State of West Bengal* v. *Anwar Ali*. (Section 5 (1) of the W. B. Special Courts Act (10 of 1950) offends against the provisions of Art. 14 and is *ultra vires*.)
1951 S C 318 (328) (Pr 25) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (S C), *State of Bombay* v. *F. N. Balsara*. (Case regarding validity of Bombay Prohibition Act, 1949—Restrictions as to a number of distinct categories followed by a general category The latter was held to be easily severable and constitutional objection applicable to it would not apply to the former categories.)
1952 Mad 27 (Pr 5) [AIR V 39 C 11] (DB), *Kolandayammal* v. *Sinnavelappa*. (If the Legislature purports to enact in regard to an item with a wide connotation, the enactment may be confined to the subject matter within its legal competence.)
1950 Bom 221 (Pr 6) [AIR V 37 C 60] : ILR (1950) Bom 290 : 51 Cri L Jour 1207 (DB), *Kishori Shetty* v. *Emperor*. (AIR 1948 P C 194 (199) (P C), Quoted.)
1950 Orissa 157 (Pr 21) [AIR V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State*.

Preamble
Note 6

parts of the statute are not severable, then the whole Act will become void if any part of it is *ultra vires.*[39] When any part of an Act is *ultra vires*, the test to see whether the whole Act is affected is whether what remains is so inextricably bound up with the part declared invalid that it cannot independently survive.[40] In *Attorney-General of Alberta* v. *Attorney-General of Canada,*[41] Viscount Simon delivering the judgment of the Privy Council observed as follows :

> "This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is *intra vires* 'either in whole or in part', but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the Legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

The above-mentioned principle of severability includes *separability in enforcement* in appropriate cases.[42] Hence, where a taxing statute imposing tax on subjects divisible in their nature does not expressly exempt subjects which are exempt from taxation under the Constitution, the whole Act should not be declared void. But only its enforcement against the exempted subjects should be prevented by injunction.[43]

Where an Act of the Legislature is attacked as contravening any Fundamental Right, the Court must jealously scrutinize the provisions of the impugned Act to see that Fundamental Rights are not violated.[44] Where a statute infringes *prima facie* any Fundamental Right granted by the Constitution, the burden will lie on those who support the validity of the Act to show that it comes within the exception provided by the Constitution.[45] The principle that in interpreting a constitution a construction beneficial to the exercise of legislative or executive power should be adopted, may not be of any great help when the statutory provisions that fall to be considered relate to constitutional gurantees of the freedom and civil rights of individual citizens against abuse of governmental power.[46]

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[39] 1950 Orissa 157 (Pr 21) [AIR V 37 C 26] : ILR (1950) Cut 222 : 51 Cri L Jour 1139 (FB), *Prahalad Jena* v. *State.*
1949 All 513 (Pr. 22) [AIR V 36 C 189] : ILR (1950) All 615 : 50 Cri L Jour 798 (FB), *Basudeva* v. *Rex.*
1950 Pat 35 (Pr 25) [AIR V 37 C 14] : 28 Pat 782 : 51 Cri L Jour 300 (DB), *Bhutnath* v. *Province of Bihar.*

[40] 1948 P C 194 (Pr 19) [AIR V 35 C 55] (PC), *A. G. of Alberta* v. *A. G. of Canada.* [*See also* 1951 Hyd 11 (Pr 114) [AIR V 38 C 2] : I L R (1951) Hyd 1 : 52 Cri L Jour 1333 (FB), *Abdur Rahim* v. *J. A. Pinto.* (Test of severability — Correct test of severability is to ascertain whether after the invalid portions of the statute in question are deleted a different law is created.)]

[41] 1948 P C 194 (199) (Pr 19) [AIR V 35 C 55] (PC).

[42] 1953 S C 252 (Pr 31) [AIR V 40 C 62] (SC), *State of Bombay* v. *United Motors Ltd.*
[*See also* 1951 S C 318 (329) (Pr 25) [AIRV 38 C 55]: 1951 S C R 682: 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.* (Bombay Prohibition Act, (1949) Validity — Restrictions on right to acquire, hold or dispose of liquids consisting of or containing alcohol — *Held* that the entire provision was not void but only so far as it applied to liquid toilet and medicinal preparations containing alcohol — A I R 1950 S C 124 (S C) and A I R 1951 S C 118 (SC), Distinguished.)]

[43] 1953 S C 252 (Pr 31) [AIR V 40 C 62] (S C), *State of Bombay* v. *United Motors Ltd.* (AIR 1946 PC 66 (PC), AIR 1950 S C 124 (SC) and 256 U S 642 : 65 L Ed 1139, Distinguished.)

Article 13 of the Constitution does not apply to the Constitution itself and no provision in the Constitution can be regarded as void as contravening the Fundamental Rights.[47]

In construing a constitution the principle must not be lost sight of, that the safety of the people is the supreme law.[48] Hence, in the case of emergency legislation a construction should be adopted which would carry out and not defeat the aim of the Legislature, namely, ensuring the safety of the realm.[49] Hence, war-time measures which often have to be enacted hastily to meet a grave pressing national emergency in which the very existence of the State is at stake should be construed more liberally in favour of the Crown or the State than peace-time legislation.[50]

With the initial presumption being in favour of the validity of a statute, investigations of validity of a given statute or any part thereof should be limited to the extent absolutely necessary for the disposal of the issue before the Court.[51] Where a case can be disposed of without

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44. 1952 Bom 16 (18) (Pr 2)[AIR V 39] (DB), *State of Bombay* v. *Heman Santal.* [*See* 64 A L R 1307 : 97 Fla 69, *Devis* v. *Stuart.* (The primacy of position accorded to the declaration of rights in the State Constitution emphasizes the importance of those basic and inalienable rights of personal liberty and private property.)]

45. 1951 Pat 12 (Pr 33) [AIR V 38 C 4] : 30 Pat 31 : 52 Cri L Jour 309 (SB), *In re Bharati Press.*

46. (1936) 1936 L J P C 115 (121): 1936 App Cas 578, *James* v. *Commonwealth of Australia.*

1951 Mad 120 (Pr 31) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.*, (The Court must assume that there was a sufficient and indeed a grave need, for the enactment of the chapter on Fundamental Rights as part of the Constitution.)

47. 1952 Mad 395 (396) [AIR V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.*

48. 1951 Mad 1015 (Pr 4) [AIRV 38 C 354]: 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*

49. 1952 S C 335 (Pr 18) [A I R V 39] : 1952 S C R 877 : 1952 Cri L Jour 1406 (SC), *State of Bombay* v. *Virkumar.*

1950 Pat 332 (Pr 47) [AIR V 37 C 88] : 29 Pat 410 : 51 Cri L Jour 1251, *Ratan Ray* v. *State of Bihar.*

50. 1952 SC 335 (Pr 18) [AIR V 39] : 1952 S C R 877 : 1952 Cri L Jour 1406 (SC), *State of Bombay* v. *Virkumar.*

51. 1953 Mad 729 (731) (Pr 7) [AIR V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re G. Menon.*

declaring an Act unconstitutional, the Court will not make any such declaration.[52] The Court will not declare an Act unconstitutional unless a question arises in the course of actual litigation involving rights of any party in which case the Court will say whether the Act or any part of it is to be disregarded on the ground of its unconstitutionality.[53] The Court cannot declare in advance that a particular proposed legislation is unconstitutional.[54] A person who has claimed the benefit of a statute cannot afterwards assail its validity.[55]

It has been held that the plea that an Act is *ultra vires* cannot be entertained by a Tribunal constituted under the very Act which is being questioned.[56]

See also Part III, General, ART. 13, NOTE 9 and ART. 19, NOTE 13.

7. Proceedings of Constituent Assembly. — The Court is entitled, when necessary for elucidating the meaning of the words used by the Legislature, to seek the aid of such historical material as reports of statutory Committees, Preambles, etc.[1] Hence, in case of ambiguity of meaning in the words used in the Constitution, the Report of the Drafting Committee of the Constituent Assembly may be seen for interpreting the words.[2] But such Report cannot be read

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1952 Cal 740 (748) (Prs 61, 68) [AIR V 39] (SB), *Bhuwalka Bros. Ltd.* v. *Dunichand.*

[52] 1952 Hyd 112 (Prs 9, 23) [A I R V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB), *Maqdoom* v. *State of Hyderabad.* (Detention of petitioner justifiable on ground of his violent activities — Question of validity of ban on Communist Party of which he was member, not decided as being unnecessary— Cooley's Constitutional Limitations cited.)

[53] 1951 All 228 (Prs 13, 23) [A I R V 38 C 25] : I L R (1951) 2 All 505 (DB), *Chotey Lal* v. *State of Uttar Pradesh.*

[54] 1951 All 228 (Prs 13, 23) [A I R V 38 C 25] : I L R (1951) 2 All 505 (DB), *Chotey Lal* v. *State of Uttar Pradesh.*

[55] 1951 Nag 90 (Pr 22) [AIR V 38 C 21] : ILR (1951) Nag 818 (DB), *Shridhar* v. *Collector of Nagpur.* (Where certain persons allow the Collector to take possession of their property and feeling dissatisfied with the compensation awarded by him proceed under the provisions of the Nagpur Improvement Trust Act and appear before the Tribunal to have the compensation enhanced and succeed to a certain extent in having the compensation increased, they cannot afterwards question the validity of the Nagpur Improvement Trust Act.—(1887) 124 U S 581 : 31 Law Ed 527, *Great Falls Mfg. Co.* v. *Garland* and (1917) 244 U S 407 : 61 Law Ed 1229, *Wall* v. *Parrot Silver & Copper Co.*, Rel. on.)

[56] 1953 Mad 105 (107) (Pr 3) [A I R V 40 C 35] : 1953 Cri L Jour 277 (DB), *V. M. S. Md. & Co.* v. *State of Madras.*

Preamble — Note 7

[1] 1950 S C 27 (Pr 112) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (But speech in legislature not admissible)

[2] 1950 S C 27 (Pr 17) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[*See also* 1950 All 11 (Prs 10, 51) [AIR V 37 C 7]: ILR (1950) All 845: 51 Cri L Jour 269(FB), *Gulab Singh* v. *District Magistrate, Dehra Dun.* (In interpreting a constitutional statute it is permissible to refer to the White Paper issued by Government as matter of history : A I R 1939 F C 1 (FC), Rel. on.)]

Preamble
Note 7

to control the meaning of an article where the language used is plain and unambiguous.[3]

Legislative proceedings cannot be referred to for the purpose of construing an Act or any of its provisions, but they are relevant for the proper understanding of the circumstances under which it was passed and the reasons which necessitated it.[4] Speeches made by members of the Constituent Assembly in the course of debates in the Draft Constitution cannot be used in interpreting an article of the Constitution.[5] The reason for this is tersely put in an American case:[6] "Those who did not speak may not have agreed with those who did and those who spoke might differ from each other." Hence, the speeches in the Constituent Assembly are of no value in determining the intention of the Assembly as a whole.[7] In *Gopalan* v. *State of Madras*,[8] Patanjali Sastri, J., (as he then was) observed as follows :

> "A speech made in the course of the debate on a Bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the Bill. Nor is it reasonable to assume that the minds of all those legislators were in accord."

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[3] 1950 S C 27 (Pr 17) [AIR V 37 C 6]:1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*
[*See also* 1943 All 345 (349) [A I R V 30] (DB), *Mohammad Zia* v. *United Provinces.* (Opinion of authors of Joint Parliamentary Committee Report cannot prevail where it is found to be at variance with the clear provisions of the Government of India Act, 1935.)]

[4] 1951 S C 41 (Pr 12) [A I R V 38 C 9]:1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*
1951 Mad 979 (Pr 11) [AIR V 38 C 339](DB) *Nasasaraopeta Electric Corporation* v. *State of Madras.* (Legislative proceedings cannot be called in aid to interpret a statute or its provisions. They are, however, certainly not excluded from consideration when one has to determine the object and purpose of an Act : AIR 1951 S C 41 (SC), Foll.)

[5] 1952 S C 366 [A I R V 39 Pr 16] : 1952 S C R 1112 : ILR (1953) T C 337 (SC), *State of Travancore-Cochin* v. *Bombay Co. Ltd.* (('95) ILR 22 Cal 788 : 22 Ind App 107 (PC), Rel. on.)
1952 S C 369 (Pr 31) [AIR V 39] : 1953 S C R 1 (SC), *Aswini Kumar* v. *Arabind Bose.* (Speeches by Members of House in course of debate are not admissible as extrinsic aids to interpretation of statutory provisions: AIR 1952 SC 366(SC), Foll.)
1950 S C 27 (Pr 17) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (It is not proper to take into consideration the individual opinions of members of Assembly to construe the meaning of any particular article.)

[6] (1897) 166 U S 290 (318) : 41 Law Ed 1007, *United States* v. *Trans-Missouri Freight Association.*

[7] 1950 S C 27 (73) [AIR V 37 C 6 Pr 112] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*
[*See also* 1952 Nag 172 (173) (Pr 6) [AIR V 39] : I L R (1952) Nag 118:1952 Cri L Jour 870 (DB), *Harnamsingh* v. *State of Madhya Pradesh.* (Whether or not it is permissible to refer to a statement made during a debate in Parliament, any statement made in any debate is not conclusive regarding the meaning to be attached to a word or a phrase used in Parliamentary enactments.)

[8] 1950 S C 27(73) (Pr 112) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

But reference to the debates in the Constituent Assembly may be permitted where the question is whether a certain phrase or expression came up for consideration or not.[9]

8. English, American and other foreign decisions. — As seen in NOTE 5, the Courts have to guard against being misled by decisions bearing on foreign Constitutions which may contain analogous provisions but the wording of which may be different in vital particulars. In considering the constitutionality of laws passed by Indian Legislatures under the Indian Constitution, English decisions are to be used with great caution inasmuch as the English Parliament is, unlike the Indian Legislatures, not subject to a written Constitution.[1] American decisions also should be used with great caution in interpreting the Indian Constitution, because the Indian Constitution is a very detailed one, unlike the American Constitution, and narrows the scope for judicial interpretation very much.[2] In making use of American decisions due regard must also be had to the difference in the language used in the two Constitutions.[3] American decisions have some bearing in construing ART. 14 but not in construing ART. 15 (1) or ART. 29 (2).[4] On questions of principles of natural justice, English decisions are to be followed in preference to American, because the American due process clause has not been adopted in India and the Indian Courts have so far been following the decisions of English Courts and no occasion has arisen for departing from that practice.[5] Decisions of Australian Courts may be referred to in construing the Indian Constitution but this should be done with great caution.[6]

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[9] 1950 S C 27 (Pr 17) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

Preamble — Note 8

[1] 1951 Hyd 1 (5) (Pr 14) [A I R V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.*

[2] 1951 Mad 120 (Pr 28) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.*

[*See also* 1950 S C 27 (38) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Unlike the American Constitution the Indian Constitution is a very detailed one.)

('50) ILR 29 Pat 502 (541) (FB), *L. K. Burman* v. *The State.* (Per *Das J.*—In interpreting the Constitution of India there is, perhaps, a danger of relying too closely on analogies from English or American history, history which was different from that which led to the making of the Indian Constitution.)

1943 All 345 (349) [AIR V 30](DB), *Mohammad Zia* v. *United Provinces.* (The law in America has to be interpreted with reference to the Constitution of the United States, and what may be implicit in the terms of that Constitution is by no means necessarily implicit in the terms of the Government of India Act. Since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases ; for a word or a phrase may take a colour from its context and bear different senses accordingly. Therefore, in interpreting the Government of India Act it is extremely unsafe to rely on commentaries dealing with American Constitution : AIR 1939 F C 1 (FC), Rel. on.)]

[3] 1951 Cal 563 (Pr 37) [A I R V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen.* ("The craze from American precedents can soon become a snare A blind and uncritical adherance to American precedents must be avoided or else there will soon be a perverted American Constitution operating in this land under the delusive garb of the Indian Constitution.")

1951 Mad 120 (Pr 28) [AIR V 38 C 14]:ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.*

[4] 1951 Mad 120 (Pr 13) [AIR V 38 C 14] : ILR (1951) Mad 419 (FB), *Dorairajan* v. *State of Madras.*

In *In re C. P. Motor Spirit Act,*[7] Gwyer, C. J., observed :—

> "Disputes with regard to central and provincial legislative spheres are inevitable under every Federal Constitution, and have been the subject-matter of a long series of cases in Canada, Australia and the United States, as well as of numerous decisions on appeal by the Judicial Committee. Many of these cases were cited in the course of the argument. The decisions of Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly."

9. Retrospective effect. — Every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. This rule also applies to the interpretation of the Indian Constitution.[1] The presumption against retrospective opera-

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[5] 1953 Punj 3 (Pr 47) [AIR V 40] (DB), *East Punjab University* v. *Tarlok Nath.*

[6] 1946 Bom 216 (236) [AIR V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.*

[7] 1939 F C 1 (5) [AIR V 26] (FC).

Preamble — Note 9

[1] 1951 S C 128 (130) (Pr 7) [AIR V 38 C 20] : 1951 S C R 228 : ILR (1951) Hyd 294 : 52 Cri L Jour 860 (SC), *Keshavan* v. *State of Bombay.*

1951 SC 124 (127) (Pr 7) [AIR V 38 C 19] : 1950 S C R 940 : 52 Cri L Jour 391 (SC), *Janardhan Reddy* v. *The State.* (*Prima facie* every legislation is prospective and there is no reason to depart from this rule of interpretation in the case of Art. 136 of the Constitution.)

1953 Assam 35 (36) (Pr 6) [AIR V 40 C 13] : I L R (1953) 5 Assam 24 : 1953 Cri L Jour 395 (FB), *State* v. *Judhabir.* (The Constitution is a repealing enactment within the meaning of S. 6 of the General Clauses Act. Art. 227 has got, therefore, no retrospective effect and cannot apply to a proceeding which was pending immediately before the date on which the Constitution came into force and the

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tion is, however, only a canon of construction and not a constitutional limitation on the power of the Legislature.[2] Therefore, a Legislature can pass an Act with retrospective effect and there will be nothing unconstitutional in its doing so.[3] A taxing statute can also be passed with retrospective effect.[4] A Legislature has power to validate retrospectively orders which, at the time they were made, were invalid.[5] (See also ART. 20 NOTE 3.)

10. Rules as to interpretation of statutes—General.—As seen in NOTE 5, the rules of interpretation of statutes are also applicable to the interpretation of written constitutions. Hence a summary of these rules is given below.

It is a cardinal rule of construction of statutes in general that the intention of an enactment should be gathered from the *language* employed by it,[1] and that where words used are *clear and unambiguous*, it is the duty of the Court to give effect

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rights of the parties in regard to that proceeding shall be regulated by the law which was in force on the date immediately preceding 26th January, 1950: *Case-law discussed* — Where, therefore, a proceeding under S. 16 of the Assam Opium Prohibition Act was at its appellate stage when the Constitution came into force, *held* that the appellate order became final under S. 17 (3) of the Act and it was not open to challenge under Art. 227.)

1953 Him Pra 82 (83) (Pr 5) [AIR V 40 C 39], *Mt. Santokhu* v. *The State.*

1953 Hyd 98 (Pr 3) [AIR V 40 C 38] : ILR (1952) Hyd 976 (DB), *O. H. Pedro* v. *Hyderabad State.* (Hence writ application pleading contravention of Arts. 311 and 14 in respect of order of reversion of civil servant passed prior to the Constitution is untenable.)

[2] 1952 Nag 139 (142) (Pr 18) [AIR V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

[3] 1952 Nag 139 (Prs 18, 19) [AIR V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

[4] 1952 Nag 139 (Pr 31) [AIR V 31] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

[5] ('51) 1951 All L Jour 620 (621) (DB), *Ram Niwas* v. *State of Uttar Pradesh.* (Orders passed under S. 336A of the U. P. Municipalities Act which was declared *ultra vires* by the High Court have been validated by an order passed under the U. P. Act 14 of 1951.)

Preamble — Note 10

[1] 1953 S C 83 (86) (Pr 10) [AIR V 40 C 23] : 1953 S C R 319 : 1953 Cri L Jour 525 (SC). (Language used is true depository of legislative intent.)

1952 S C 369 (Pr 55) [AIR V 39] : 1953 S C R 1 (SC). (*Mukherjea J.*—All constituent parts are to be taken together.)

1949 F C 81 (84) [AIR V 36 C 13] : 1948 F C R 207 (FC).

1943 F C 36 (58, 63) [AIR V 30] : 45 Cri L Jour 1 (FC).

1941 F C 16 (33) [AIR V 28] (FC).

(1847) 9 E R 649 (650) : 1 H L C 1, *Fordyce* v. *Bridges.* (And not from general inferences to be drawn from the nature of the objects dealt with by the statute.)

(1897) 1897 App Cas 22 (38) : 66 L J Ch 35 : 75 L T 426 : 45 W R (Eng) 193, *Salomon* v. *Saloonm & Co.*

(1846) 4 Moo Ind App 179 (187) : 6 Moo P C 1 (PC).

1928 P C 2 (4) : [AIR V 15] (PC).

1920 P C 181 (185) [AIR V 7] (PC).

1920 P C 56 (60) [AIR V 7] (PC).

1918 P C 352 (354) [AIR V 5] (PC). (Court is not concerned with the policy of the Act..)

Preamble Note 10

to them according to their *plain meaning*, neither adding to nor subtracting from them.[2] Due meaning must be given to every part

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[*See* 1944 F C 1 (6) [AIR V 31] : 45 Cri L Jour 413 (FC). (Meaning of words of a section is to be determined by words actually used and not by speculation as to why other words had not been used.)]

[2] 1952 Mad 591 (593) (Pr 5) [AIR V 39) : ILR (1952) Mad 492 (FB).

1951 Pepsu 41 (43) (Pr 6) [AIR V 38 C 14] : 2 Pepsu L R 271 (FB). (It is not open to a Court of law to substitute one word for another used in a particular section of an enactment or to add a word to it on the ground that either the Legislature has made a mistake or its object was different from what is clear from the plain words of the language used.)

1949 F C 81 (84) [AIR V 36 C 13] : 1948 F C R 207 (FC).

1949 Pat 133 (134) [AIR V 36 C 43] : 27 Pat 873 (FB). (Words of limitation are not to be read into a statute if it can be avoided.)

1944 Lah 33 (47) [AIR V 31] : 45 Cri L Jour 580 (FB). (Court has to interpret the law as it has been enacted and not as what it would have been if certain provisions which are complementary to the provision, the constitutionality of which is in question, had not been enacted.)

1943 Bom 169 (174) [AIR V 30] : 44 Cri L Jour 616 (FB).

1942 Mad 690 (691) [AIR V 29] : 44 Cri L Jour 88 (SB).

1941 Mad 449 (460) [AIR V 28] (FB).

1940 Lah 129 (132) [AIR V 27] : 41 Cri L Jour 501 (FB).

1939 P C 47 (51) [AIR V 26] : 40 Cri L Jour 364 (PC).

1938 P C 130 (133) [AIR V 25] : 39 Cri L Jour 452 (PC). (Case under Criminal Procedure Code.)

1938 P C 281 (283) [AIR V 25] (PC). (The Court cannot put into an Act words which are not expressed and which cannot reasonably be implied.)

1936 P C 5 (8) [AIR V 23] (PC).

('83) I L R 5 All 121 (136, 137) (FB). (Popular meaning of words to be taken except when the Legislature uses technical language.)

(1846) 4 Moo Ind App 179 (187) : 6 Moo P C 1 (PC).

1929 All 625 (641) [AIR V 16] (FB).

1935 P C 89 (91) [AIR V 22] : 36 Cri L Jour 838 (PC).

1921 P C 240 (242) [AIR V 8] (PC). (Reasonableness of the provision is only material when the statute is not clear.)

1935 All 723 (725) [AIR V 22] (FB).

1933 All 321 (322) [AIR V 20] (FB).

1930 All 49 (53) [AIR V 17] (FB).

1925 All 610 (612) [A I R V 12] (FB). (Words not found in a section may be supplied by necessary implication if the context so requires it.)

('91) ILR 13 All 432 (457) (FB).

('90) ILR 12 All 129 (141) (FB). (Practice of the Court cannot be used to nullify express enactment.)

1929 Cal 617 (630) [AIR V 16] : 30 Cri L Jour 993 (SB).

1921 Cal 397 (399) [AIR V 8] (FB). (Reference to pre-existing law not permissible unless provisions are doubtful.)

('96) ILR 23 Cal 563 (572) : 23 Ind App 18 (PC).

('81) ILR 7 Cal 127 (132) (SB).

1935 Lah 742 (746) [AIR V 22] (FB).

1918 Mad 1026 (1030) [AIR V 5] (FB). ("And" may be read as "or" to carry out obvious intention of the Legislature.)

1932 Mad 612 (619) [AIR V 19] (FB).

1933 Nag 193 (199) [AIR V 20] (FB).

1936 Oudh 32 (40) [AIR V 23] (FB).

1925 Sind 49 (51) [AIR V 12] (FB). (Rule having the force of law—Courts should abide by it.)

1952 S C 369 (Pr 26) [AIR V 39] : 1953 S C R 1 (SC). (Words cannot be brushed aside as being surplusage, if they can have appropriate application in the circumstances within contemplation of statute.)

of the language employed.[3] The language of the statute must be taken as a whole and detached words should not be given undue importance.[4] The ordinary and grammatical sense of the words is to be adhered to, unless it would lead to repugnance with the rest of the statute.[5] If the

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1952 Mad 771 (779) (Pr 16) [AIR V 39] : ILR (1953) Mad 1 (FB).

[*See* (1951) 1951-2 All E R 839 (841) (H L), *Magor* v. *Newport Corporation.* (Per *Lord Simonds.* — That it is the duty of the Court to find out the intention of the Parliament and not only of the Parliament but also of the Ministers, cannot by any means be supported. The duty of the Court is to interpret the words used. Those words may be ambiguous, but even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited. (1935) App Cas 445, Ref.; (1949) 2 All E R 155, Commented upon.)]

[*See also* ('51) 1951 I D A Y 316 (Cal) (FB). ("And" may legitimately be construed as "or" when the intention of the Legislature is clear and when any other construction would tend to defeat such intention.)]

[See however 1952 Punj 416 (Pr 4) [A I R V 39] (DB). (In absence of clarity, the Court must set to work on constructive task of finding the intention not only from the language of the Statute but also from the social conditions which gave rise to it and of the mischief which it was passed to remedy. It must supplement the written word so as to give force and life to the intention of the Legislature : (1949) 2 All E R 155, Relied on.)]

[3] 1953 S C 274 (276) (Pr. 7) [AIR V 40 C 63] : 1953 Cri L Jour 1105 (SC). (Each word, phrase, or sentence is to be considered in the light of the general purpose and object of the Act itself. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself.)

1952 S C 369 (Pr 55) [A I R V 39] : 1953 S C R 1 (SC). (Per *Mukherjea J.*—All constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself.)

1935 All 723 (725) [AIR V 22] (FB).

[4] 1953 S C 83 (86) (Pr 10) [AIR V 40 C 23] : 1953 S C R 319 : 1953 Cri L Jour 525 (SC). (Words and phrases occurring in a statute are to be taken not in an isolated or detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself.)

1948 Oudh 162 (163) [A I R V 35 C 61] : 23 Luck 40 (FB). (Words may be given a wider or a more restricted meaning than they ordinarily bear, if the context requires it.)

1948 Pat 225 (227) [AIR V 35 C 82] : 49 Cri L Jour 246 : ILR 27 Pat 52 (FB). (Court is entitled, and indeed bound, to consider any other part of the Act which might throw light on the intention of the Legislature.)

[5] 1951 All 119 (120) (Pr 18) [AIR V 38 C 14] : ILR (1952) 1 All 194 (FB). (The word "and" may well be construed in a disjunctive sense and be read as "or".)

1951 Madh B 116 (118) (Pr 13) [AIR V 38 C 55] (SB).

1951 Madh B 1 (11) (Pr 40) [AIR V 38 C 1] : ILR (1952) Madh B 15 (FB).

1946 Cal 348 (353) [A I R V 33 C 83] : I L R (1946) 2 Cal 214 (FB). (The rule of following the plain language must not be carried to the length of producing futility. In such a case, a *casus omissus* can be supplied, or words read in an extended sense; and, for the purpose of ascertaining whether the plain meaning of the words used in one part of a statute will nullify another part, other parts of the statute can properly be referred to.)

1944 Lah 51 (53) [AIR V 31] : 45 Cri L Jour 377 (FB). (Probable intention of the Legislature cannot prevail against the literal grammatical meaning of the words of the section.)

1941 All 243 (249) [AIR V 28] (FB). (Conversion of 'and' into 'or' is permissible to avoid absurdity and anomalies.)

words are plain and can bear only one meaning, the Court should not base its decision on construction solely on results.[6] Even if the result of the construction were absurd[7] or anomalous[8] there would be no reason to depart from clear and unequivocal language capable of only one meaning. At the same time the letter and the statutory provisions should not compel a Court to an unreasonable construction if it is possible to take a reasonable view by taking the letter of the provision along with its substance.[9] In other words, the interpretation should not, where the language is clear, be influenced by extraneous considerations, such as the previous state of the law,[10] or hardship,[11] or expediency,[12] or the policy or the intention of the

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1938 All 456 (460) [AIR V 25] (FB).
1918 Mad 1187 (1192) [AIR V 5] (FB).

[6] ('48) 50 Pun L R 34 (39) (FB).
1945 F C 21 (23) [A I R V 32] : 1944 F C R 355 : I L R (1945) Kar (FC) 3 (FC).

[7] 1945 F C 21 (23) [AIR V 32] : 1944 F C R 355 : I L R (1945) Kar (FC) 3 (FC).
('10) 6 Ind Cas 609 (614) : 32 All 427 (FB).
[See however 1939 Nag 227 (229) [AIR V 26] (DB).
(1913) 1913 App Cas 107 (117) : 82 L J Q B 232 : 107 L T 722, *Vacher & Sons, Ltd.* v. *London Society of Compositors.*]

[8] 1952 Pepsu 131 (133) (Pr 4) [AIR V 39] : 3 Pepsu L R 31 (FB).
1943 F C 13 (17) [AIR V 30] (FC).
1940 All 507 (510) [AIR V 27] (FB).
1940 Mad 127 (129) [AIR V 27] (FB).
1932 Mad 369 (371) [AIR V 19] : 33 Cri L Jour 454 (FB).

[9] 1952 Mad 771 (775) (Pr 16) [AIR V 39] : ILR (1953) Mad 1 (FB).

[10] 1928 Bom 35 (37) [AIR V 15] (FB).
('11) 5 Ind Cas 884 (887) : ILR 34 Mad 505 (FB .
('08) ILR 35 Cal 34 (55) (FB).
1928 P C 16 (18) [AIR V 15] (PC).
1928 P C 2 (4) [AIR V 15] (PC).
1936 All 222 (237) [AIR V 23] (SB).
1921 Cal 397 (399) [AIR V 8] (FB).
1930 Oudh 148 (159) [AIR V 17] (FB).

[11] 1951 SC 124 (126) (Pr 4) [AIR V 38 C 19] : 1950 SCR 940 : 52 Cri L Jour 391 (SC). (Question of hardship should not be allowed to affect true meaning of words used in the Constitution.)
1951 Pepsu 41 (43) (Pr 8) [AIR V 38 C 14] : 2 Pepsu L R 271 (FB). (It is better that hardship should be caused in one or two individual cases than that the certainty of the law, particularly of Statute law, should in any way be disturbed by artificial constructions. When the language of a provision is clear, it cannot be strained or twisted by the Court in order to make it yield what is thought to be beneficial meaning.)
1941 P C 6 (9) [AIR V 28] (PC). (Limitation Act.)
1938 P C 130 (133, 134) [AIR V 25] (PC).
1922 Cal 454 (456) [AIR V 9] (SB).
(1902) 2 Ch D 585 (593), *Jeremiah Ambler & Sons Ltd.* v. *Bradford Corporation*
1929 Lah 593 (594) [AIR V 16] (FB).
1932 All 494 (498) [AIR V 19] (FB).
('02) ILR 24 All 532 (537, 538) (FB).
('90) ILR 12 All 129 (137, 138) (FB).
1919 Mad 972 (979) [AIR V 6] (FB).

[12] 1943 Nag 36 (48) [AIR V 30] : ILR (1943) Nag 73 (DB). (Per *Niyogi J.*)
1930 All 263 (264) [AIR V 17].

law[13] or the reference to or the analogy of other enactments,[14] or the terms of the enactment being against general principles of law or equity,[15] or that giving effect to the words leads to absurdity or

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13. 1952 Trav-Co 482 (483) (Pr 4) [AIR V 39] : I L R (1952) Trav Co. 447 : 1953 Cri L Jour 1 (FB). (Departure from plain language in search of intention not suggested by words of statute is not justified.)

1951 All 167 (174) (Pr 31) [AIR V 38 C 18] : ILR (1952) 2 All 7 (FB). (Language of an enactment clear and explicit. There is neither the necessity of invoking any outside help to interpret the law nor is there any legal justification for introducing public policy, moral justice or supposed intention of Legislature.)

1951 Pat 12 (18) (Pr 10) [A I R V 38 C 4] : 30 Pat 31 : 52 Cri L Jour 309 (SB). (Language clear and explicit — Reference to statement of objects and reasons is unwarranted.)

1949 Orissa 37 (42) [AIR V 36 C 10] : ILR (1949) 1 Cut 83 (FB).

1948 Oudh 162 (163) [AIR V 35 C 61] : 23 Luck 40 (FB).

1944 F C 1 (7) [AIR V 31] (F C). (Questions of fairness or policy are not matters which the Court can take into consideration.)

1943 Bom 169 (174) [AIR V 30] (F B). (Court should not refuse to give effect to the plain and natural meaning of words used on some supposed reluctance of the enacting authority to interfere with individual liberties and vested rights.)

1942 All 394 (396) [AIR V 29] (FB).

1942 Lah 19 (26) [AIR V 29] (FB).

1941 P C 109 (111, 112) [AIR V 28] (PC).

1941 F C 16 (24) [AIR V 28] (FC).

1941 All 110 (112) [AIR V 28] (FB).

1939 P C 47 (51) [AIR V 26] (PC).

1937 Oudh 312 (317) [AIR V 24] (FB).

('82) I L R 5 All 121 (135) (F B).

(1846) 4 Moo Ind App 179 (187) : 6 Moo P C 1 (P C).

('73) 1 Ind App 89 (104) (P C).

1924 Lah 513 (514) [AIR V 11] (FB). (Wisdom or policy.)

1932 Pat 293 (295) [AIR V 19] (SB). (Object of Legislature is immaterial unless it is stated to be guiding principle in interpretation.)

('67) 8 Suth W R 3 (12) : 11 Moo Ind App 75 (PC).

1916 Mad 1 (2) [AIR V 3] (FB). (Policy.)

[*See also* (1882) 22 Ch D 511 (517), *Sutton* v. *Sutton*. (You cannot cut down the words by reference to the general purview of the Act.)]

14. 1943 Pat 289 (296) [AIR V 30] (DB). (Reference to some remotely kindred English statute.)

1938 P C 152 (158) [AIR V 25] (PC).

('99) I L R 22 All 149 (159) : 27 Ind App 58 (PC).

1934 Mad 75 (79) [AIR V 21] (DB). (Corresponding English law cannot be referred to.)

1932 P C 138 (140) [AIR V 19] (PC).

15. 1923 Mad 241 (244) [A I R V 10] (DB). (Equitable construction not allowed.)

('01) 11 Mad L Jour 91 (105) (DB). (International law contravened — Still Act must be given effect to.)

1923 P C 211 (216) [AIR V 10] (PC). (Considerations of facility and practical importance are out of place.)

(1900) I L R 23 All 152 (156, 157) : 27 Ind App 209 (PC).

1932 P C 165 (167) [AIR V 19] (PC).

1931 All 277 (291) [AIR V 18] (FB).

[*See also* 1923 Lah 529 (530) [A I R V 10]. (Avoiding anomaly is no proper ground.)

1919 P C 192 (193) [A I R V 6] (P C). (Public policy, question of, not relevant.)]

Preamble
Note 10

inconvenience or injustice[16] or that the law is different elsewhere.[17] A specific provision in a statute cannot be nullified by a practice of the Court which is not contained in any particular provision of the statute.[18] Nor can the advantages of liberal construction be balanced against the advantages of literal construction.[19]

The Court's function is, to say not what the Legislature meant or ought to have meant but what it has said that it meant.[20] It is

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16. 1946 All 509 (512) [AIR V 33 C 136] : I L R (1946) All 605 (DB). (However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect.)
1946 Cal 348 (353) [AIR V 33 C 83] : I L R (1946) 2 Cal 214 (FB).
1943 P C 76 (83) [AIR V 30] (PC).
1942 All 19 (24) [AIR V 29] (FB). (Per Iqbal Ahmad, C. J.)
1942 All 153 (155) [AIR V 29] (FB).
1942 Lah 19 (23) [AIR V 29] (FB). (Per Din Mohammad J., in Order of Reference to Full Bench.)
1938 P C 130 (133, 134) [AIR V 25] (PC).
1938 Pat 403 (408) [AIR V 25] (FB).
('77-78) I L R 3 Cal 47 (57) : 4 Ind App 127 : 1878 Pun Re No. 7 (PC).
1921 P C 240 (242) [AIR V 8] (PC).
1932 All 494 (498) [AIR V 19] (FB).
1931 All 162 (173) [AIR V 18] (FB).
('10) I L R 32 All 427 (440) (FB).
1934 Bom 74 (78) [AIR V 21] (DB). (Argument *ad inconvenienti* has always to be received with great caution.)
1931 Lah 87 (92) [AIR V 18] (FB).
1928 Sind 1 (11) [AIR V 15] (FB).
[But see 1928 Sind 149 (158) [AIR V 15] (FB). (Ordinary meaning to be modified to avoid absurdity, repugnance or inconsistency.)
1921 Cal 397 (399) [AIR V 8] (FB).]

17. 1941 Pat 70 (83) [AIR V 28] (DB). (Matter expressly governed by Indian statute—Court cannot embark on examination of English law.)
1939 P C 63 (65) [AIR V 26] (PC). (Law of Ceylon not recognising certain doctrine of Roman Law at date of passing of Ordinance. Section of Ordinance should not be interpreted as introducing the Roman Law doctrine.)
1932 Mad 21 (21) [AIR V 19] (DB).
1937 Lah 507 (510) [AIR V 24] (DB).

18. 1947 Cal 190 (192) [AIR V 34 C 56].

19. 1939 P C 47 (51, 52) [AIR V 26] (P C). (Where the words themselves declare the intention of the Legislature, it is inadmissible to consider the advantages or disadvantages of applying the plain meaning.)
1929 Oudh 526 (526) [AIR V 16].
[*See also* 1923 Mad 114 (119) [AIR V 10] (DB). (A liberal construction can be adopted only where two constructions are possible but not otherwise.)]

20. 1952 S C 156 (158) (Prs 8, 11) [AIR V 39] : 1952 S C R 418 : 1952 Cri L Jour 836 (S C). (The Court is not concerned so much with what might possibly have been intended as with what has been actually said in and by the language employed.)
1952 Mad 771 (775) (Pr 16) [AIR V 39] : I L R (1953) Mad 1 (FB). (No speculation as to what Legislature may or may not have intended apart from what it expressed from language.)
1951 Cal 133 (136) (Pr 22) [AIR V 38 C 30 F] : 52 Cri L Jour 1226 (FB). (It is not for a Court to speculate as to what the Legislature should or might have said. Regard can only be had to what the Legislature has said.)
1946 All 508 (509) [AIR V 33 C 135] : I L R (1946) All 588 (DB). (It is not the function of Courts to legislate.)

Preamble
Note 10

not competent to any Court to proceed on the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said.[21] No doubt it is the duty of the Court to try and harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act.[22] Even if there is some defect in the phraseology used by the Legislature the Court cannot aid the Legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is *causus omissus* it is for the Legislature and not the Courts to remedy the defect.[23] It is always dangerous to paraphrase an enactment even if badly worded[24] and no modification of the language to meet the intention can be made[25] unless it is impossible to resist the conviction that the Legislature could not possibly have intended what its words signify and that the modifications thus to be made are mere corrections of careless language and really give the true meaning.[26] Where, however, the language of the enactment is

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1944 Bom 272 (273) [AIR V 31].
1944 Lah 266 (272, 273) [AIR V 31] (FB).
1931 Lah 283 (287) [AIR V 18] (FB). (Court not to scan policy or wisdom of the enactment.)
(1846) 4 Moo Ind App 179 (187) : 6 Moo P C 1 (P C).
1930 P C 120 (126) [AIR V 17] (P C).

[21] 1953 S C 148 (152) (Pr 9) [AIR V 40 C 39] : 1953 S C R 533 (S C).

[22] 1953 S C 394 (397) (Pr 5) [AIR V 40 C 88] : 1953 Cri L Jour 1480 (S C). (While no doubt, it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal, it is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application.)
1952 S C 362 (Pr 14) [AIR V 39] : 1952 S C R 1122 (S C).
1952 Mad 771 (775) (Pr 16) [AIR V 39] : I L R (1953) Mad 1 (F B).
(1951) 1951-2 All E R 839 (841) (HL), *Mogor* v. *Newport Corporation.* (Per *Lord Simonds.* 1949-2 All E R 155, Commented upon.)
[See however 1952 Pun 416 (Pr 4) [A I R V 39] (DB). (In the absence of clarity, when a defect appears a judge must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and he must supplement the written word so as to give force and life to the intention of the Legislatures—(1949) 2 All E R 155, Rel. on.)]

[23] 1953 S C 148 (152) (Pr 9) [AIR V 40 C 39] : 1953 S C R 533 (SC).

[24] ('91) I L R 18 Cal 23 (30) : 17 Ind App 122 (P C).

[25] ('53) 55 Bom L R 246 (265) (D B). (Judgment reversed on another point by 1953 S C 252 [AIR V 40 C 62] (S C)).
('74) 21 Suth W R 318 (320) : 1 Ind App 167 (P C.)

[26] 1949 F C 135 (140) [AIR V 36 C 22] : I L R (1950) 1 Cal 517 : 1949 F C R 292 (F C). (It is more reasonable to hold that the Legislature expressed its intention in a slovenly manner than to give to the words used a meaning which could not have been intended.)
1949 Bom 56 (58) [AIR V 36 C 15] : I L R (1949) Bom 158 (DB). (A Court interpreting a statute would even go to the length of adding words to a section if it be necessary to do so in order to give a construction which is reasonable and which helps the Court in achieving the object for which the section was enacted

Preamble
Note 10

not itself precise or is ambiguous or of doubtful import, or the question arises to what extent changes in the pre-existing law have been effected by any particular amendment, recourse may be had to extraneous considerations.[27] Thus, the provisions of the other statutes which are in *pari materia*,[28] or the previous state of the law,[29] or the scope and intention of the Act,[30] may be considered in such cases. It is not,

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1942 Pat 1 (27, 28) [AIR V 29] (FB).
1940 All 500 (503) [AIR V 27] (DB). (Nothing is to be added to or to be taken away from a statute unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express.)
1933 Mad 207 (211) [AIR V 20] (DB). (Omission of a word in section — Carelessness on the part of Legislature is not to be presupposed.)
[*See* 1937 Sind 129 (143) [AIR V 24] : 32 Sind L R 567 (F B).
('89) I L R 11 All 490 (504) (FB). (Construction which would have led to anomalous results which Legislature could not have intended, avoided.)]

27. 1928 PC 16 (18) [AIR V 15] (PC). (Substantial changes in law pleaded — Pre-existing law should be looked to.)
1920 P C 181 (185) [AIR V 7] (PC).
1924 All 328 (335, 336) [AIR V 11] (FB). (Comparison with old law is permitted in case of doubt.)
('99) ILR 21 All 391 (396, 403) (FB).
1924 Cal 257 (272) [AIR V 11] (FB). (Historical survey is permissible only if there is a reasonable doubt.)
[*See* 1930 P C 120 (121, 122) [AIR V 17] (PC).]

28. 1951 All 155 (167) (Pr 86) [AIR V 38 C 17] (FB). (Statutes in *pari materia*, though made at different times, ought to receive a uniform construction.)
1942 Lah 102 (103) [AIR V 29] (FB).
1941 Bom 85 (89) [AIR V 28] (DB).
1939 All 403 (405, 412) [AIR V 26] (FB).
('80) ILR 4 Bom 515 (526) (FB).
1925 Pat 1 (8) [AIR V 12] (FB). (For example, the Limitation Act and the Civil Procedure Code.)
1952 Mad 186 (190) (Pr 14) [AIR V 39 C 94] : ILR (1952) Mad 421 (FB). (Do.)
('10) 7 Ind Cas 196 (198) : I L R 32 All 351 : 37 Ind App 124 (PC). (Oudh Laws Act and Oudh Land Revenue Act.)
1932 Oudh 210 (216) [AIR V 19] (FB).
1931 Pat 241 (246) [AIR V 18] (FB). (Per *Jwala Prasad J.*)
(1891) 1891 App Cas 325 (349) : 60 L J Q B 683, *Smith* v. *Baker & Sons.*
[*See* (1902) 1902 App Cas 474 (478) : 71 L J Ch 781, *Hilder* v. *Dexter.*]

29. 1944 Lah 169 (170) [AIR V 31] (FB).
1941 Rang 151 (158) [AIR V 28] (DB).
1941 Mad 449 (452) [AIR V 28] (FB). (Per *Venkataramana Rao, J.*, in Order of Reference.)
1940 PC 105 (109) [AIR V 27] (PC).
1927 Bom 273 (300) [AIR V 14] (FB).
1928 P C 16 (18) [AIR V 15] (PC).
1924 Cal 257 (272) [AIR V 11] (FB).
1924 All 328 (335) [AIR V 11] (FB).
1921 Cal 397 (399) [AIR V 8] (FB).

30. 1953 S C 58(60)(Pr 12)[AIR V 40 C 16]:1953 S C R 302 (SC). (Words of statute susceptible of wider meaning—Courts have to pay regard to what the statute or the particular legislation had in view.)
1951 All 167 (174) (Pr 31) [AIR V 38 C 18] : ILR (1952) 2 All 7 (FB).
1943 Bom 209 (213) [AIR V 30]. (In the absence of a statutory definition, a word of doubtful meaning is to be understood in the sense in which it best harmonises with the subject of the rule and the object which it has in view.)
1943 Lah 65 (68) [AIR V 30] (FB).

however, permissible to construe the provisions of one statute in the light of judicial decisions on another statute not in *pari materia* with the statute in question.[31] Expressions in a statute, which are capable of having more than one meaning, should not be given a meaning which has the effect of abrogating a clear provision of another parallel statute. Every endeavour should be made to reconcile the two statutes.[32] In cases of reasonable doubt as to the expression contained in a penal provision, or a fiscal Act, the benefit of doubt must be given to the subject.[33] A construction which facilitates evasion of a statute should be avoided, and Acts like penal Acts are not to be so construed as to furnish a chance of escape and a means of evasion.[34]

Rules of grammar have to yield to commonsense. As there are risks involved in the application of the rules of construction of statutes,

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1943 Lah 148 (154) [AIR V 30] (FB).
1939 Cal 435 (451) [AIR V 26] (FB).
(1891) 1 Ch 423 (430), *Re Dick Lopes* v. *Hume-Dick.*
('81) ILR 3 Mad 271 (280, 287) (FB). (Proceedings of Legislature etc., may be considered.)
1924 All 328 (336) [AIR V 11] (FB). (Where a section of an Act is capable of two interpretations.)
('99) ILR 21 All 391 (396, 397) (FB).
(1877) 5 Ch D 901 (905) : 46 L J Ch 648, *Holme* v. *Guy.*
('84) ILR 10 Cal 166 (184, 192, 193) (FB).
1918 Pat 398 (407) [AIR V 5] (FB).
1951 Cal 48 (Prs 42, 44) [AIR V 38 C 18] (FB). ("And" may legitimately be construed as "or".)
('50) 28 Mys L Jour 221 (224, 225) (FB). (In so doing it is necessary to have an exact conception of the scope and object of the statute.)
[*See also* 1951 Mad 70 (76) (Pr 13) [AIR V 38 C 10] (SB). (Per *Panchapagesa Sastri J.* — Object of an Act is to be gathered from its necessary effect and not from some purpose or motive which the Legislature may be supposed to have had.)]

[31] 1941 Pat 465 (471, 472) [AIR V 28] (DB).
1940 PC 105 (110) [AIR V 27] (PC). (Decisions on other statutory provisions are not of material assistance in construing terms of a particular statute, except in so far as general principles of construction are laid down.)
1935 Lah 570 (586) [AIR V 22] (FB). (Reference to English rulings bearing on English statutes.)
1932 All 293 (307) [AIR V 19] (FB).
[*See* 1935 PC 143 (146) [AIR V 22] (PC). (Income-tax Act of one country not to be construed in the light of decisions on income-tax legislation of another country.)]

[32] 1951 All 643 (Pr 42) [AIR V 38 C 176] (FB).

[33] 1953 S C 278 (282) (Pr 23) [A I R V 40 C 65] : 1953 Cri L Jour 1116 (S C). (In a penal statute it is the duty of the Courts to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for honest, unlearned (in the law) and unwary men.)
1953 Bom 347 (353) (Pr 21) [AIR V 40 C 110] : 1953 Cri L Jour 1445 (FB).
1950 Bom 6 (9) [AIR V 37 C 3] (DB).
1926 Sind 273 (275) [AIR V 3] (FB).
1930 All 265 (267) [AIR V 17] (FB).
1939 Lah 81 (85) [AIR V 26] (FB).
('30) 1930 Mad W N 249 (280) (SB).

[34] 1952 Cal 789 (Pr 42) [AIR V 39] : 1952 Cri L Jour 1651.

Courts of law should not be too prone to resort to them unless the exigencies of the case pre-eminently call for their application. It must never be forgotten that they are rules of construction only and are not meant to cure inherent defects in a legislation.[35]

Subject to the broad principles mentioned above, the following general rules of interpretation of statutes should also be borne in mind in construing the provisions of an Act:

(1) Where an Act, such as the Civil Procedure Code, is divided into sections and rules, the sections must be taken to lay down *general principles* and the rules as providing the machinery or the means of *applying* them.[36]

(2) Where the language of an enactment is difficult and ambiguous, the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are, by the statute authorising them, directed to be read as part of the Act.[37] But where rules are framed under a power given by the enactment such rules cannot govern or control the words of the enactment,[38] though in case of a conflict between such rules and a bye-law, the rule prevails over the bye-law.[39]

(3) Where two constructions are possible, a section should be construed so as to avoid *inconsistency* of meaning,[40] or the making of

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35. 1952 Pat 359 (365) (Pr 14) [AIR V 39] : ILR 31 Pat 493 (SB).

36. 1917 Cal 657 (658) [AIR V 4] (DB). (Sections create jurisdiction, while rules indicate the mode in which they are to be exercised.)

1914 Cal 163 (164) [AIR V 1] (DB). (Rules restrict sections.)

1917 Cal 44 (46) [AIR V 4] (FB). (View that rules restrict sections is dissented from at page 47 by *Mookerjee J.*)

37. 1952 Pat 359 (365) (Pr 15) [AIR V 39] : 31 Pat 493 (SB).

1937 Mad 481 (483) [AIR V 24].

[*See also* 1931 Lah 320 (323, 331) [AIR V 18] (FB). (Per *Addison J.* — Departmental instructions issued on the working of Act may be referred to — Per *Tek Chand, J. contra.*)]

[But see 1926 Cal 856 (858) [AIR V 13] (DB). (Bengal Cess Manual cannot be looked at for construing Bengal Cess Act.)]

38. 1953 S C 252 (268) (Pr 65) [AIR V 40 C 62] (SC). (Per *Bose J.*—Rules framed under an Act cannot save the Act. Rules are made by a subordinate authority which is not the Legislature.)

1942 Sind 65 (71) [AIR V 29] (SB).

1936 Pesh 57 (59) [AIR V 23] (DB).

39. 1938 Lah 8 (10) [AIR V 25] (DB).

40. 1948 Pat 225 (228, 229) [A I R V 35 C 82] : 49 Cri L Jour 246 : 27 Pat 52 (FB).

1942 Lah 114 (117) [AIR V 29] (FB). (That alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate.)

1940 Nag 39 (42) [AIR V 27] (FB).

1917 Mad 958 (960) [AIR V 4] (SB).

1928 Lah 609 (613) [AIR V 15] (FB).

1924 Bom 219 (225, 226) [AIR V 11] (FB).

1933 Nag 193 (197) [AIR V 20] (FB).

[*See* 1918 Pat 103 (105) [AIR V 5] (FB).]

Preamble
Note 10

a word, clause or sentence either superfluous or insignificant.[41] It may be noted that a section which is clear in itself will be affected by previous or succeeding sections, only when those sections are capable of an interpretation which is repugnant to or startling in juxtaposition with the section in question.[42] In other words, the statute should be examined as a self-contained unit, the different sections being considered simultaneously in view of each other.[43] It follows from this

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41. 1953 Nag 89 (113, 114) (Pr 139) [AIR V 40 C 32] : ILR (1953) Nag 839 (FB). (It is not permissible to omit the words unless reading them in the statute would lead to absurdity.)

1952 Mad 591 (593) (Pr 5) [AIR V 39] : ILR (1952) Mad 492 (FB). (A provision can be rejected as unnecessary only if a Court is driven to such a situation and not otherwise.)

1951 Nag 58 (78) (Pr 140) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB). (Effect has to be given to every provision of a statute and that construction must lean against rendering any provision a surplusage.)

1942 Bom 191 (193) [AIR V 29].

('05) ILR 28 Mad 466 (471) (FB).

1930 Sind 265 (279) [AIR V 17] (FB).

1925 Cal 1 (3) [AIR V 12] (FB).

42. 1932 Mad 391 (395) [AIR V 19] (FB).

[*See* 1935 Oudh 427 (428, 429) [AIR V 22] (DB). (Certain words not found in the statute held as "understood" in order to avoid inconsistency between two provisions of the section.)]

43. 1953 Trav.Co 479 (481) (Pr 5) [AIR V 40 C 191] : ILR (1952) T C 953 (FB). (All the provisions in the section are to be taken together and interpreted in such a way as to give each provision a legitimate and reasonable interpretation so as to fit in with all the provisions within the scheme envisaged in the Act.)

1950 Bom 6 (9) [AIR V 37 C 3] (DB). (Court as far as possible must reconcile different sections of an Act)

1949 Bom 109 (112) [AIR V 36 C 35] (DB). (Power conferred by Act — Whether coupled with duty or purely discretionary—Determination of question — Principles to be considered—Court must look at whole scheme of the Act — Question has to be decided *aliunde* by construing the object, scope and scheme of the whole Act, when the language of the particular section does not, on the face of it, furnish much help in deciding the question.)

1949 Pat 400 (Pr 5) [AIR V 36 C 115]: 27 Pat 77 (80) (DB). (Every attempt should be made to harmonise the different parts of a statute and that each part should be construed so as to expound every other part of the statute.)

1948 Oudh 162 (163) [AIR V 35 C 61] : 23 Luck 40 (FB).

1948 Pat 225 (227) [AIR V 35 C 82] : 49 Cri L Jour 246 : 27 Pat 52 (FB). (A well-known rule of interpretation applicable to all statutes is the rule of construction *ex visceribus actus*, that is, within the four corners of the Act.)

1942 Pat 1 (27) [AIR V 29] (FB).

1923 Mad 609 (614) [AIR V 10] (FB). (Per *Devadoss, J.*)

1922 Bom 247 (252) [AIR V 9] (FB).

(1886) 11 App Cas 286 (291) : 55 L J Q B 417, *Turquand* v. *Board of Trade*.

1932 P C 168 (171) [AIR V 19] (PC). (Terms of a composite enactment not to be considered separately.

1920 P C 181 (184, 185) [AIR V 7] (PC).

('97) ILR 19 All 390 (407) (FB).

1936 Cal 505 (512) [AIR V 23] (FB). (Construction though not strictly grammatical must be consistent with the Act in all its parts.)

('96) ILR 23 Cal 738 (751, 752) (FB). (*Bank of England* v. *Vagliano*, L R (1891) App Cas 107, Relied on.)

1933 Nag 193 (197, 199, 200) [AIR V 20] (FB).

that where two remedies or two procedures are provided for, one must not be taken as operating in derogation of the other.[44] A procedural provision in a statute should be construed liberally, that is in such a way as will lead to the smooth working of the scheme of the statute.[45]

(4) Everything is to be taken as permissible unless there is some prohibition against it.[46] In the case of consolidating statutes, like the Civil Procedure Code, the *statute itself* must be consulted in order to find the authority or the prohibition.[47]

(5) Where the statute is not clear, reasonable construction should be adopted.[48] In the case of ambiguity that meaning should be preferred which is more in accord with justice and convenience[49] or which would make the provisions of the Act *intra vires* the Legis-

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1935 Pat 342 (345) [AIR V 22] (SB). (Other parts of Act throwing light on intention of Legislature can be considered when interpreting any provision.)

1938 Sind 1 (5) [AIR V 25] (FB). (The more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent from the statute and if the words are sufficiently flexible to admit of some other construction by which the intention will be better appreciated.)

[*See* 1944 Pat 41 (52) [AIR V 31] (FB). (It is wrong to construe a particular provision after taking it out of the context.)

1935 All 946 (952) [AIR V 22] (FB). (Per *Thom, J.*)

1935 Bom 402 (403) [AIR V 22] (FB). (It may sometimes be necessary to do violence to the language used in a particular part of the statute in order to give effect to the enactment as a whole.)]

44. 1940 Nag 104 (106) [AIR V 27]. (Section 105, Civil P. C., which is an enabling section cannot be read as taking away rights already conferred by S. 104.)

('86) ILR 8 All 354 (361) (FB).

1922 P C 17 (19) [AIR V 9] (PC).

1933 All 230 (230) [AIR V 20] (DB).

45. 1953 All 467 (Pr 16) [AIR V 40 C 220] (FB).

46. ('89) ILR 11 All 267 (287) (FB). (Per *Mahmood, J.*)

('82) ILR 5 All 163 (172) (FB). (Per *Mahmood, J.*; Followed in ILR 37 Cal 399.)

1936 Nag 55 (61) [AIR V 23] (DB). (Law is always subject to evasion in the sense that there is no obligation not to do what the Legislature has not really prohibited and it is not evading an Act to keep outside it.)

47. ('89) ILR 11 All 267 (288) (FB).

48. 1949 Bom 210 (212) [AIR V 36 C 59] : ILR (1949) Bom 265 (FB). (Court would lean in favour of that construction which gives effect to the Legislature's intention rather than that which leads to difficulties and anomalies.)

1948 Bom 239 (243) [AIR V 35 C 66] : 49 Cri L Jour 341 (DB). (Words flexible —Interpretation should be to better effectuate intention of Legislature.)

1942 Oudh 39 (44, 45) [AIR V 29] (DB). (Law not clear— Court can rely on maxim "*argumentum ab inconvenienti plurium valet in lege.*")

1941 F C 16 (31) [AIR V 28] (F C).

1921 P C 240 (242) [AIR V 8] (PC).

1931 P C 24 (26) [AIR V 18] (PC).

1936 All 576 (578) [AIR V 23] (FB).

1928 All 207 (210) [AIR V 15] (FB).

('38) ILR 10 All 223 (234) (FB).

1919 Cal 551 (569) [AIR V 6] (FB).

1939 Lah 81 (85) [AIR V 26] (FB).

49. 1938 P C 130 (133) [AIR V 25] (PC).

[*See* (1886) 31 Ch D 402 (407) : 55 L J Ch 294 : 54 L T 100 : 34 W R (Eng) 332, *Reid* v. *Reid.*]

Preamble
Note 10

lature.[50] A construction which leads to an absurd result,[51] or unjust consequences entailing hardship,[52] or produces injustice,[53] or defeats the object of the Act itself,[54] or facilitates evasion of the

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50. 1952 Pat 359 (363) (Pr 10) [AIR V 39] : 31 Pat 493 (SB). (Two constructions possible—One which leans towards the constitutionality of legislation should be preferred to that which has the effect of destroying it.)
1948 Cal 322 (324) [AIR V 35 C 133] : ILR (1948) 2 Cal 455 (DB).
1944 F C 1 (5) [AIR V 31] (FC). (Two constructions possible — One giving some effect should be preferred to one making enactment void.)

51. 1950 Bom 1 (2) [AIR V 37 C 1] (DB).
1949 Bom 109 (112) [AIR V 36 C 35] (DB). (Courts must not read and construe statutes in a manner which leave anomalous and illogical lacuna to be filled up.)
1943 Lah 148 (154) [AIR V 30] (FB).
1942 Lah 114 (117) [AIR V 29] (FB). (That alternative is to be rejected which will introduce absurdity, uncertainty, friction or confusion in the working of the system.)
1942 Lah 257 (259) [AIR V 29] (SB).
1921 Cal 397 (399) [AIR V 8] (FB).
1933 Sind 151 (154) [AIR V 20] (FB).
1928 Sind 149 (158) [AIR V 15] (FB).

52. 1942 Lah 257 (259) [AIR V 29] (SB).
1942 Pat 1 (14) [AIR V 29] (FB).
1922 Nag 89 (93, 94) [AIR V 9] (FB).
('76) ILR 1 All 311 (315) (FB).
(1862) 142 E R 1026 (1028) : 11 C B (NS) 842 (848), *Smurthwaite* v. *Wilkins.*
1934 All 626 (639) [AIR V 21] (FB).

53. 1948 Bom 112 (113) [AIR V 35 C 26] (DB).
1943 Lah 148 (154) [AIR V 30] (FB).
1942 Lah 257 (259) [AIR V 29] (SB).
1926 All 617 (622) [AIR V 13] (FB).
1938 Bom 484 (488) [AIR V 25] (FB).

54. 1952 S C 324 (327) (Pr 12) [AIR V 39]: 1952 S C R 683 : 1952 Cri L Jour 1503 (S C).
1951 Orissa 378 (381) (Pr 4) [AIR V 38 C 88] : ILR (1951) Cut 177 (SB). (*Narasimham, J.*—The words of a statute, when there is doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular sense, as in the subject or in the occasion on which they are used, and the object to be attained.)
1949 Bom 131 (Pr 5) [AIR V 36 C 40] (DB). (If the Legislature fails to carry out its object by giving proper expression to it by using adequate language for the purpose, the Court cannot violate the canons of construction merely for the purpose of assisting the Legislature for a supposed object which it might have.)
1948 Bom 370 (371, 372) [AIR V 35 C 95] : 49 Cri L Jour 677 : ILR (1948) Bom 891 (FB). (Unless the language of statute is so intractable or so incapable of that particular interpretation.)
1946 Cal 348 (353) [AIR V 33 C 83] : ILR (1946) 2 Cal 214 (FB).
1943 Lah 65 (68, 78) [AIR V 30] (FB). (A beneficial construction should be placed when this appears to be consonant with its object.)
1942 Lah 257 (259) [AIR V 29] (SB).
1941 All 110 (112) [AIR V 28] (FB).
1941 All 243 (249, 275) [AIR V 28] (FB). (Conversion of 'and' into 'or' is permissible.)
1939 Cal 435 (451) [AIR V 26] (FB). (Conflict between two parts of statute—Part agreeing with governing intention of Legislature should be given effect to— Governing intention should be taken from sections and not rules made thereunder.)

statute[55] should, if possible, be avoided.

(5a) The principle of necessary intendment should not be ordinarily extended to taxing statutes and where the question only is whether a particular item of property has or has not been taxed, the Act must expressly and unequivocally supply the answer. Where, however, the vires of the statute itself is being assailed and it is said that the statute is beyond the legislative competence of the State, the rules can be certainly called in aid in order to understand the scheme and purpose of the legislation.[56]

(6) Words operating in derogation of the rights of the subject,[57] like penal statutes or words imposing pecuniary burden,[58] should be strictly construed.

1937 Bom 275 (278) [AIR V 24] (FB).
1918 Pat 103 (105) [AIR V 5] (FB). (Defence of India Act.)
('97) ILR 19 All 390 (407) (FB)
(1860) 2 L T (NS) 748 (753, 755) : 8 H L C 594 : 31 L J Ch 9 : 125 R R 286, *Jeffries* v. *Alexander*. (An Act must be so construed that an attempt to evade it would be defeated.)
1931 All 727 (732) [AIR V 18] (FB).
1926 All 617 (622) [AIR V 13] (FB).
1932 Oudh 210 (211) [AIR V 19] (FB).
1933 Sind 151 (154) [AIR V 20] (FB). (Words nullifying a statute can be ignored.)
(1881) 6 App Cas 114 (122), *Caledonian Railway Co.* v. *N. B. Railway Co.*

[55] 1952 Cal 789 (Pr 42) [AIR V 39] : 1952 Cri L Jour 1651. (Penal Statute.)

[56] 1952 Pat 359 (365) (Pr 15) [AIR V 39] : 31 Pat 493 (SB).

[57] 1952 S C 156 (158) (Prs 8, 11) [AIR V 39] : 1952 S C R 418: 1952 Cri L Jour 836 (S C). (Bombay Rents, Hotels and Lodging House Rates Control Act, 57 of 1947 —Since it creates an offence and imposes penalty it should be strictly construed in favour of the subject.)
1948 Pat 8 (10) [AIR V 35 C 3] : 48 Cri L Jour 558. (Penal clause.)
('49) 54 Mys H C R 52 (57) (DB). (Enactments like the Mysore Public Security Act which give wide powers to the Executive, and are a serious encroachment upon the liberty of the subject.)
1944 Lah 422 (424) [AIR V 31] (DB).
1944 Lah 302 (307) [AIR V 31] (DB). (Local enactments (e. g., U. P. Encumbered Estates Act, 1934), conferring exceptional exemptions from common burden and powers interfering with rights of others.)
1944 Nag 337 (342) [AIR V 31] (DB). (A provision which limits rights of suit.)
1939 Bom 305 (307) [AIR V 26] (FB).
(1917) 1917 App Cas 260 (274) : 86 L J K B 1119 : 116 L T 417, *Rex* v. *Halliday*.
(1882) 7 App Cas 178 (188) : 51 L J P C 43: 46 L T 321, *Western Countries Rly. Co.* v. *Windsor & Annapolis Rly. Co.*
('86) ILR 8 All 354 (361) (FB).
1934 P C 36 (40) [AIR V 21] (PC).
1928 P C 287 (290) [AIR V 15] (PC). (Person aggrieved is entitled to compensation unless expressly deprived.)
1921 P C 224 (227) [AIR V 8] (PC). (Intention to alienate private rights without compensation should not be imputed to the Legislature, unless expressed in clear terms.)
[*See also* 1943 Cal 285 (318) [AIR V 30] (SB). (Ordinance taking rights from subject. (Per *Sen, J.*).)]

[58] 1953 Trav.Co 104 (109) (Pr 11) [AIR V 40 C 35] : ILR (1952) Trav.Co 991 (FB). (Taxing statutes — Interpretation most beneficial to subject should be adopted.)

(6a) In construing a statute specially enacted for the benefit of a particular class of society, with the object of giving relief to ignorant, illiterate and poor agriculturist, unless there is a clear contravention of the law, the Court ought not to indulge in technicalities as far as possible, but every technicality must be brushed aside in order to give relief to persons for whose benefit the Act is enacted.[59] Where a section enacted for the benefit of a class of persons, encroaches upon the vested right of another class of persons, the section has to be strictly construed so as to interfere as little as possible, consistently, of course, with its language and not making it nugatory with that right.[60]

(7) A restricted construction ought not to be placed upon the language of a remedial Act.[61]

1950 Bom 45 (46) [AIR V 37 C 13] (DB). (Assessee getting advantage not intended by Legislature—Court should not deprive him of same.)
1948 Bom 425 (428) [AIR V 35 C 118] : ILR (1949) Bom 56 (DB). (Taxing statute —Construction doubtful—Doubt to be resolved in favour of subject.)
1941 Rang 212 (219) [AIR V 28] (SB).
1938 Mad 498 (499) [AIR V 25] (DB). (Fiscal statutes — Two constructions — Construction more favourable to subject must be enforced.)
1937 Cal 551 (552) [AIR V 24] (DB). (Taxing statute must be construed strictly.)
1935 Bom 256 (257) [AIR V 22] (SB).
1935 Bom 423 (425) [AIR V 22] (DB). (The Court ought not to strain the language of the Act against the tax payer.)
1935 Lah 570 (576, 578) [AIR V 22] (FB) (Per *Jai Lal* and *Skemp, JJ.*, in judgment of Division Bench.)
('71) 16 Suth W R 208 (209) (SB).

[59] ('52) 1952 I D A 7675 (Bom). (Bombay Agricultural Debtor's Relief Act (1947).)

[60] 1952 Cal 846 (Pr 8) [AIR V 39] (DB). (Section 168A, Bengal Tenancy Act.)

[61] 1951 Orissa 378 (381, 392) (Prs 4, 43) [AIR V 38 C 88] : ILR (1951) Cut 177 (SB). (Per *Narasimham J.*—Even where the usual meaning of the language falls short of the whole object of the Legislature a more extended meaning may be attributed to the words of a remedial Act, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words.)
1952 Trav-Co 333 (347) (Pr 44) [AIR V 39] (FB). (The words of a remedial statute must be construed, so far as they reasonably admit, so as to secure that the relief contemplated by the statute shall not be denied to the persons intended to be relieved—1944 P C 35 [AIR V 31] (PC) and 1949 F C 135 [AIR V 36 C 22] : 1949 F C R 292 (F C), Referred.)
1949 F C 135 (139) [AIR V 36 C 22] : ILR (1950) 1 Cal 517 : 1949 F C R 292 (FC). (The words of a remedial statute, such as one framed to relieve debtors from excessive interest, must be construed, so far as they reasonably admit, so as to secure that the relief contemplated by it shall not be denied to persons intended to be relieved.)
1945 Pat 35 (37) [AIR V 32] : 24 Pat 66 (FB). (It is the duty of the Court to give such a construction to the provisions of a remedial enactment as may be in consonance with its object.)
1944 P C 35 (38) [AIR V 31] (PC). (Construction of U. P. Agriculturists' Relief Act, 27 of 1934 — It cannot in ordinary circumstances be an objection to relief that applicant is seeking to resile from the very agreement against which the law has expressly said he may be relieved.)
1941 F C 72 (77) [AIR V 28] (FC). (Even if an Act intended to be remedial is found in a small minority of cases to prejudice rather than to benefit those whom it is intended to help; the Court should adopt the construction which is

(8) General words must be given the broadest possible effect unless there is some specific reason to the contrary.[62] But general words and phrases, however comprehensive and wide they may be in their literal sense, must be usually construed as limited to the actual objects of the Act and not as altering the law beyond.[63] Specific words of importance like "mortgage" should be given their appropriate meaning.[64]

(8a) Dictionaries cannot be taken as authoritative exponents of the meanings of the words used in Acts of the Legislature, for the plainest words may be controlled by a reference to the context.[65] Similarly, lexicons only define an expression in terms of a decision

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on the whole best calculated to give effect to the manifest intention of the Legislature.)

1928 Oudh 396 (400) [AIR V 15] (FB). (Per *Srivastava J.*, on the construction of the Usurious Loans Act.)

(1906) 1906 App Cas 461 (467) : 75 L J Ch 705 : 95 L T 202, *Samuel* v. *Newbold*. (*Lord Loreburn, L. C.*, on the construction of Money-lenders Act 1900 (63 & 64 Vict., Ch. 51).)

1951 Cal 48(Pr 37) [AIR V 38 C 18] (FB). (Should be construed so as to grant the relief intended rather than to deny such relief.)

[See however 1946 Cal 348 (353, 354) [A I R V 33 C 83] : ILR (1946) 2 Cal 214 (FB). (There is no special rule of beneficial construction for statutes of remedial character.)]

62. 1951 All 641 (641) (Pr 8) [AIR V 38 C 175] (FB). (General words used in an enactment may be given a restricted meaning if the context in which they occur justifies this being done, or if it is necessary to do so in order to avoid absurdities or anomalies or to give some meaning to provisions which would otherwise be devoid of meaning.)

1941 F C 72 (75) [A I R V 28] (FC). (Where a Legislature with limited powers uses a term of general import such as "property" the term must be construed as referring only to that property with respect to which the Legislature was competent to legislate. Such term must be construed in the light of its powers at the time of enactment.)

('86) ILR 8 All 354 (360, 361) (FB).

1916 Pat 133 (134) [AIR V 3] (FB).

63. 1953 Trav-Co 332 (334) (Pr 3) [AIR V 40 C 148] (FB). (All words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular, that is, they must be understood as used with reference to the subject-matter in the mind of the legislature and limited to it.)

1951 All 845 (848) (Pr 12) [A I R V 38 C 211] : I L R (1952) 1 All 742 (FB). (A comprehensive view of an enactment or the overriding principles on which it is based may necessitate putting restrictions upon the generality of the words used in the provisions which constitute exceptions thereto. In such cases the provision must be read as subordinated to the overriding principles and in the light of the scheme of the enactment.)

1941 Pat 465 (470) [AIR V 28] (DB). (Restricted meaning must be given where it is clearly intended.)

1939 Lah 388 (392) [AIR V 26] (FB). (Word capable of various shades of meaning —Particular meaning must be arrived at by reference to scheme of Act or of section as a whole.)

1922 Bom 416 (419, 420) [AIR V 9].

1929 Nag 246 (249) [AIR V 16].

64. 1929 All 174 (176) [AIR V 16].

65. 1945 Lah 158 (162) [AIR V 32] (DB).

given by a Court of law and unless that decision was one given under the Act in which that expression is used, reliance upon the definition in the lexicons involves a dangerous method of interpretation.[66]

(9) A *general* provision must yield to a *special* provision providing for particular cases.[67] If the Legislature makes a special Act dealing with a particular case and later makes general Act which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless, unless it is clear that in making the general Act the Legislature intended to abrogate the special Act, the provisions of the general Act do not override the special.[68] As a matter of fact a repeal of the special Act by the general Act by implication will not be admitted if the two can be read together.[69] The same rule applies to general and special expressions used in different clauses of a section[70] or to two sections in a statute, one dealing

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[66] 1946 Lah 116 (128) [AIR V 33 C 29] : I L R (1946) Lah 692 (FB). (Per *Ram Lall J.*)

[67] 1953 S C 252 (273) (Pr 82) [AIR V 40 C 62] (SC). (A particular enactment is not repealed by a general enactment in the same statute.)
1952 Mys 21 (23) (Pr 6) [A I R V 39 C 11] : I L R (1952) Mys 83 (FB). (General provisions do not derogate from special provisions.)
1950 Pat 392 (418) (Pr 39) [AIR V 37 C 108] : 29 Pat 790 (SB).
1949 Bom 402 (403) [AIR V 36 C 105] : I L R (1949) Bom 465 (DB). (Document falling under special class also capable of being classed under general provision—Duty of Court—Registration Act, S. 17 (2) (b) and (d).)
1949 Pat 78 (79) [AIR V 36 C 19] (DB). (Section 224, Orissa Tenancy Act, prevails over O. 21, R. 55, Civil P. C.)
('89) ILR 12 Mad 94 (95) (FB). (Section 396, Criminal P. C. (1882) must yield to provisions of Reformatory Schools Act (1876) being a special Act.)
1930 Bom 490 (492) [AIR V 17] (FB).
1922 Bom 247 (251) [AIR V 9] (FB).
1932 Oudh 193 (195) [AIR V 19] (FB).

[68] 1941 Lah 364 (367) [AIR V 28] (DB).
1926 Cal 819 (821) [AIR V 13] (DB .
('02) ILR 25 Mad 457 (484) (DB).
(1898) 1898 App Cas 748 (754) : 67 L J P C 115, *Barker* v. *Edger.*
(1878) 3 App Cas 944 (950) : 48 L J Ex 186, *Garnet* v. *Bradley.*
1932 P C 252 (254) [AIR V 19] (PC).
1929 Nag 17 (21) [AIR V 16] (FB).
[See however 1937 Pat 1 (2) [A I R V 24] (DB). (Earlier treaty exempting a Raja from taxation — Later general provisions of Income-tax without any specified exemption of any person—Two provisions inconsistent—*Held* general provisions of Income-tax will prevail.)]

[69] 1951 Orissa 1(4) (Pr 11) [A I R V 38 C 1] : 52 Cri L Jour 43 (SB). (One of the tests to be applied in deciding whether an earlier statute is repealed by a later statute is whether both of them can stand together and their provisions obeyed to the full extent. There is no inconsistency when it is possible to obey each without disobeying the other.)
1942 Cal 607 (609) [AIR V 29].
1940 Lah 129 (134) [A I R V 27] (FB). (But if the general statute is so worded that the repeal flows from it as a necessary consequence, Court should give effect to it.)
1937 Pat 1 (2) [AIR V 24] (DB).
(1917) 1917 App Cas 260 (305) : 86 L J K B 1119, *Rex* v. *Halliday.*
(1862) 1 Mad H C R 115 (120) (DB).

[70] 1942 Bom 191 (193) [AIR V 29].

Preamble Note 10

specially with any particular subject which is also included in some of the provisions of another section, which is couched in general terms,[71] as also to two special Acts.[72] But such special provision must be applied only to those cases to which it is confined by the Legislature.[73] Thus, a special Act of the Legislature as the Sale of Goods Act cannot possibly, except in the branch of the law to which it relates, overrule a statute of the nature of the General Clauses Act.[74] Again, when on the same subject two incompatible provisions are in force, one general and the other particular, the particular provision must be taken to be an exception to the general one.[75]

(10) Where there are general words following particular and specific words in a section, the general words must be confined to things of the same kind *(ejusdem generis)* as those specified.[76] The applicability of this rule, however, will not arise if the class of cases intended to be provided for by the section is clear from the language

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71. 1951 Madh B 149 (Pr 27) [AIR V 38 C 59] : 52 Cri L Jour 1467 (FB). (Rule applies to interpretation of the Articles of the Constitution.)

72. 1942 Rang 30 (36) [AIR V 29]. (If it is possible to read the later Act in such a way as to make it consistent with the law as it was before the later Act came into operation, then that is the way in which the Court ought to read it.)
1928 All 186 (189, 190) [AIR V 15] (DB). (The former enactment must be specifically repealed or its continuance must be inconsistent with a provision of a later Act, in which case, repeal will be deemed by necessary implication.)
1930 Mad 963 (968) [AIR V 17].
1930 Bom 554 (563) [AIR V 17) (DB).

73. 1915 Mad 781 (784) [AIR V 2].
1917 Mad 951 (954) [AIR V 4] (DB).
1929 Oudh 389 (392) [AIR V 16] (FB).

74. *See* 1929 Nag 246 (249) [A I R V 16]. (General statute cannot be impliedly repealed by local or special statute.)

75. 1940 Pat 577 (578) [AIR V 27].
1933 All 241 (244, 245) [AIR V 20] (FB).
[*See* 1942 Cal 587 (592) [AIR V 29] (DB). (The one test of repugnancy between two provisions of law is to see if the two can co-exist.)]

76. 1951 All 845 (848) (Pr 12) [A I R V 38 C 211] : I L R (1952) 1 All 742 (FB).
1948 Bom 306 (311) [AIR V 35 C 77] : ILR (1948) Bom 822 (DB). (Unless there is anything in the context to suggest that they were intended to be used in their unrestricted meaning.)
1943 Lah 140 (143) [A I R V 30] (FB). (The rule of *ejusdem generis* applies as much to associated words in one sentence as to terms or phrases appearing in parts of the same section or in different sections in the same chapter.)
1941 All 345 (346) [AIR V 28] (FB).
1938 Bom 41(42) [AIR V 25](DB). (But that rule being one of construction should never be invoked where its application appears to defeat the general intent of the instrument to be construed.)
('13) 19 Ind Cas 765 (768) (PC).
('88) ILR 12 Bom 507 (520). (Interpretation should not be inconsistent with the established rules of international law.)
1928 P C 16 (18) [AIR V 15] (PC).
1939 Nag 186 (189) [AIR V 26] (FB).
[But see 1925 Cal 116 (135) [A I R V 12] (DB). (*Prima facie* to be taken in general sense.)]

of the section[77] or by the general object of the Act,[78] or where the specific words are of different genera.[79]

(11) Where an Act has adopted part of the language of the old Act, the interpretation put upon such language by the Courts must be taken to have been accepted by the Legislature.[80] When legislation follows a continuous practice and repeals the very words on which that practice was founded, it may be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning.[81]

(12) Provisions ousting the jurisdiction of the Courts,[82] and those

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[77] 1942 Mad 462 (463) [A I R V 29]. (When context makes clear that it was the intention of the Legislature that words should be construed generally.)
('02) ILR 29 Cal 890 (907, 909) (FB). (If the particular words exhaust a whole genus, the general words must refer to some larger genus.)
1920 Mad 413 (413) [AIR V 7] (DB).
1932 Lah 239 (241) [AIR V 19] (DB).

[78] 1941 All 345 (347) [AIR V 28] (FB).

[79] 1939 Bom 421 (422) [AIR V 26].

[80] 1947 Oudh 133 (Para 9) [AIR V 34 C 45] : ILR 22 Luck 71 (FB).
1944 Nag 350 (352) [AIR V 31] : ILR (1945) Nag 363 (DB).
1927 All 369 (371) [AIR V 14] (FB).
1930 All 69 (71) [AIR V 17] (FB).
1931 All 489 (490) [AIR V 18] (FB).
1931 All 294 (299) [AIR V 18] (FB).
1929 All 625 (630) [AIR V 16] (FB).
1938 Bom 484 (488) [AIR V 25] (FB).
1930 Lah 764 (767) [AIR V 17] (FB).
(1870) 5 Ch App 703 (706) : 23 L T 289, *Ex parte Campbell.*
(1857) 120 E R 20 (28) : 8 El & Bl 54, *Mansell* v. *The Queen.*

[81] 1942 Cal 442 (443) [AIR V 29] (DB). (Later legislation attaching meaning to words in previous Act—Interpretation applies to old Act.)
1939 Mad 421 (427) [AIR V 26] (FB).
1938 Bom 231 (232) [AIR V 25] (FB).
('07) ILR 30 Mad 426 (433) : 34 Ind App 186 (PC).
('02) ILR 29 Cal 890 (905, 906) (FB).
1933 Mad 489 (490) [AIR V 20] (SB).
1934 Rang 27 (29) [AIR V 21] (SB).

[82] 1949 Bom 337 (339) [AIR V 36 C 85] (DB).
1949 Bom 277 (302) [A I R V 36 C 77] : ILR (1950) Bom 1 (DB).
1942 Lah 217 (227) [AIR V 29] (FB).
1939 Cal 435 (446) [AIR V 26] (FB).
1928 Lah 121 (122) [AIR V 15] (FB). (When the language is doubtful, the Courts should lean against an ouster of the jurisdiction of the ordinary tribunals.)
1930 All 225 (230) [AIR V 17] (FB).
('67) 8 Suth W R 428 (436) (FB).
1938 Lah 14 (15) [AIR V 25] (DB).
1938 Nag 80 (82) [AIR V 25] (DB).
1935 Oudh 96 (100) [A I R V 22] (DB). (Statutes affecting jurisdiction of Civil Courts are to be construed as far as possible so as not to transfer suits from the ordinary Civil Courts to executive officers.)
1919 Pat 71 (73) [AIR V 6] (DB).
[*See also* 1943 Cal 285(318)[AIR V 30](SB). (Where an Ordinance or Act curtails the jurisdiction and powers of the Court, the duty of the Court is to be vigilant and to satisfy that all the conditions necessary for the validity of such an Ordinance or Act have been complied with. (Per *Sen J.*).)]

conferring jurisdiction on special bodies or persons or Courts,[83] should be strictly construed. If there is any doubt in the matter, the Court should lean to such an interpretation as would maintain the existing jurisdiction.[84] The grant of a special jurisdiction does not carry with it the power to act outside such jurisdiction.[85]

(13) In the absence of any context indicating a contrary intention, the Legislature must be taken to attach the same meaning to the same words used in different parts of the statute[86] or in subsequent statutes in a similar connexion.[87] But, if sufficient reasons exist, a word can be construed in one part of an Act in a sense different from that it bears in another part.[88] Where an expression is *defined* in an Act, it

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[83] 1949 Pat 335 (337) [AIR V 36 C 97] : ILR 27 Pat 925 (DB).
1948 Pat 225 (227) [AIR V 35 C 82] : 49 Cri L Jour 246 : ILR 27 Pat 52 (FB).
1931 Nag 48 (50) [AIR V 18].
('12) 17 Ind Cas 342 (343) (Mad).
1923 Oudh 100 (102) [AIR V 20]. (When jurisdiction has been conferred upon a special Court for investigation of particular matter such jurisdiction is exclusive.)
1932 Rang 123 (127) [A I R V 19] (FB). (Conditions precedent for vesting jurisdiction not fulfilled — Proceedings before the special tribunal are null and void.)

[84] ('51) 55 Cal W N 566 (569).

[85] 1930 Nag 205 (205) [AIR V 17].
1933 Nag 193 (196) [AIR V 20] (FB).

[86] 1949 Pat 31(34) [A I R V 36 C 4] : I L R 27 Pat 273 (DB): (Unless expressly enacted to the contrary.)
1942 Lah 102 (103) [AIR V 29] (FB).
1939 Cal 435 (446) [AIR V 26] (FB).
1935 Lah 570 (575)[AIR V 22](FB). (Per *Jai Lal J.* in judgment of Division Bench.)
1929 All 977 (980) [AIR V 16] (FB).
1918 Mad 998 (1002) [AIR V 5] (FB).
('02) ILR 24 All 319 (326) (FB).
1936 All 495 (503) [AIR V 23] (FB).
1932 Bom 71 (77) [AIR V 19] (FB).
1926 Bom 497 (500) [AIR V 13] (FB).
1937 Mad 385 (390) [AIR V 24] (FB).
1937 Nag 17 (22) [AIR V 24] (FB).

[87] 1942 Lah 102 (103) [A I R V 29] (FB). (Word "sale" as used in Art. 166, Limitation Act, has the same meaning as in the Civil Procedure Code.)
1942 Sind 45 (46) [A I R V 29] (DB). (Where the same or exactly similar words are used in statutory provisions which have a similar object, they are to be interpreted in the same way.)
1928 Bom 69 (71) [AIR V 15].
1919 P C 142 (142, 143) [AIR V 6] (PC).
1920 Pat 349 (350) [AIR V 7].

[88] 1942 Mad 495 (500) [AIR V 29].
1937 Sind 129 (144) [AIR V 24] (FB).
1935 Lah 570 (575) [AIR V 22] (FB). (Per *Jai Lal J.*, in judgment of Division Bench.)
('93) ILR 13 All 224 (245, 246) (DB). (Per *Mahmood J.* — The rule that a word used in a statute is to be understood in the same sense throughout, is only rule of presumption, by no means inflexible.)
1937 Mad 385 (390) [AIR V 24] (FB).
1952 S C 369 (Pr 82) [AIR V 39] : 1953 S C R 1 (SC). (Per *Das J.*: Context may exclude application of the rule that the same word should be given the same meaning wherever it occurs in the Act.)

must be given the same meaning throughout the Act,[89] unless there is some provision which makes it clear that, for certain purposes, the expression must be given a different meaning.[90] But definitions are of limited scope being framed only for the purpose of the Act in which they occur, unless specially extended.[91] Though a definition may be more or less the same in two different statutes, still the objects to be achieved may be widely different. Hence, the decisions on the meaning of particular words found in other statutes are scarcely of much value when the Courts have to deal with a specific statute of their own. They may be helpful, but cannot be taken as guides or precedents.[92] Where, however, the Legislature has not defined a legal expression it would be wrong for a Court to lay down a rigid definition of it.[93] When a word is not expressly defined in an Act it must be read in its popular, natural and ordinary sense unless there is reason upon the face of it to believe that it was not intended to bear that construction.[94] Similarly, where the Legislature uses a term which has a well settled meaning, that meaning must, in the absence of any indication to the contrary, be given to it.[95]

(14) *Prima facie* when two different expressions are used in a statute the Court ought to assume that they are intended to bear

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89. 1952 Hyd 80 (91) (Pr 35) [A I R V 39 C 43] : I L R (1952) Hyd 196 (FB). (Legitimate function of an interpretation clause explained.)
1940 Mad 385 (390) [A I R V 27] (FB). (Per *Krishnaswami Ayyangar J.*, in Order of Reference.)
1939 P C 63 (65) [AIR V 26] (PC). (Interpretation of definition must be appropriate to the purpose of the Act.)
1939 All 1 (3) [AIR V 26].
('13) 19 Ind Cas 40 (41) : 1913 Pun Re No. 2 (FB). (Order of Reference.)
1938 All 613 (615) [AIR V 25].
[See however (1880) 5 Q B D 386 (389), *R.* v. *Pearce.* (Interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain.)]

90. 1943 Cal 345 (354, 356) [AIR V 30] (FB). (The qualifying words "unless there is anything repugnant in the subject or context" are always understood in a definition. *Knights Bridge Estates Trust Ltd.* v. *Byrne*, (1940) 1940 App Cas 613 : (1940) 2 All E R 401, Rel. on.)
1942 All 50 (65) [AIR V 29] (FB). (Per *Das J.*)
1951 Mad 917 (Pr 6) [AIR V 38 C 327] (DB), *Shambhatta* v. *Narayana Bhatta.* (The function of an interpretation clause is not to apply the meaning of the term under all circumstances but merely to declare what may be included in the term when the circumstances require that it should be so interpreted.)

91. 1949 Lah 34 (35) [AIR V 36 C 7] : ILR (1947) Lah 867 (FB).
('93) ILR 15 All 141 (143).
1925 Lah 415 (416) [AIR V 12] (DB).
('78) ILR 4 Cal 665 (666, 667).
[*See* 1929 P C 181 (183) [AIR V 16] (PC). (Seeking meaning of words in one Act from definition even in another cognate Act is unsatisfactory.)]

92. 1953 SC 58 (60, 61) (Pr 12) [AIR V 40 C 16] : 1953 S C R 302 (SC).

93. 1917 Cal 502 (507) [AIR V 4] (DB).

94. ('04) 7 Oudh Cas 74 (76).

95. 1951 All 674 (685) (Pr 51) [A I R V 38 C 182] : I L R (1952) 2 All 46 (FB). (Similarly where the Legislature uses a term which has a well settled meaning, that meaning must, in the absence of any indication to the contrary, be given to it.)

Preamble
Note 10

distinct meanings,[96] but, on the other hand, it may appear from the context that the two expressions are used interchangeably and are not intended to have different meanings.[97]

(15) Where a power is conferred by a statute that power may be exercised from time to time when occasion arises unless a contrary intention appears.[98] All rules of law are founded on the assumption that the constituted tribunals are fairly competent and have power to carry out the provisions of the Acts.[99] They should, therefore, be construed so as to further and not so as to restrict the purposes of the Act.[100] Where jurisdiction is given to a Court to make a particular order, the Legislature must be deemed to have granted also the power to enforce such order.[101] Where the intention of an Act in conferring an express power is frustrated by not construing it as necessarily implying another incidental power, of however substantial in nature, the same must be implied in order not to bring about frustration of the express intention.[102]

(16) A Court which acquires a new jurisdiction acquires with it all the necessary consequences that flow therefrom, and when a question is referred to an established Court without any more qualification, the ordinary incidents and procedure of that Court, including a right of appeal, attach to the same.[103]

(17) Where an order is made in the exercise of power given by an Act, the notification containing that order has the force of law.[104]

(18) Where a statute creates a right and provides a remedy, that remedy and *no other* is available.[105] This rule, however, does not apply

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96. 1948 East Punj 47 (48). [AIR V 35 C 20]. (The Legislature is not supposed to use words without a meaning.)
1939 Bom 478 (479) [AIR V 26].
1942 Bom 191 (192, 193) [AIR V 29]. (Two analogous expressions, such as 'wages' and 'salary'.)
1929 All 33 (37) [AIR V 16] (FB).

97. 1939 Bom 478 (479) [AIR V 26].

98. 1953 S C 357 (Pr 8) [AIR V 40 C 80) (SC). (Section 108 of the Government of India Act, 1915, conferred power on the High Court which that Court could exercise from time to time with reference to its jurisdiction whether existing at the coming into force of the Government of India Act, 1915, or whether conferred on it by any subsequent legislation.)

99. 1922 Cal 118 (120) [AIR V 9] (DB).

100. 1921 Cal 85 (86) [AIR V 8] (DB).

101. 1933 Mad 689 (689) [AIR V 20] (DB).
1933 Mad 748 (750) [AIR V 20] (DB).

102. 1952 Orissa 11 (Pr 11) [A I R V 39 C 2] (DB). (Power to hold the elections expressly given under sub-s. (5) of S. 1, Orissa Municipal Act, 1950, must necessarily be held to imply the power to apply various relevant provisions of the Act and the rules notwithstanding that the Act itself, in its general application, has not been brought into force.)

103. 1951 Raj 1 (6) (Pr 13) [AIR V 38 C 1] (FB). ((1913) 1913 App Cas 546 : 82 L J K B 1197, Rel. on.)

104. 1951 S C 318 (329) (Pr 25) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC).

105. 1939 Mad 967 (968) [AIR V 26].

where the right exists *independently* of the statute.[106] Where, again, a statute gives power to any person for a public purpose from which an individual may receive an injury, and where the mode of redress for such injury is also specified in the statute, the jurisdiction of the ordinary Courts will be ousted.[107] Where a statute prescribes a particular mode of enforcing a new obligation created by it such obligation can, as a general rule, be enforced in no other manner than that provided by it.[108]

(19) Where a statute confers rights on a party in general terms, the cutting down of those rights by a rule would make the rule repugnant to the Act.[109] But such rules must be supported unless they are manifestly unreasonable or unfair.[110] If a new rule is in conflict with the previous existing rule, the new rule must by implication be deemed to have annulled or altered that rule.[111]

(20) When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.[112]

(21) A change in the language of the present Act from that of the old Act may be presumed to indicate a change of intention on the part of the Legislature.[113] In regard to the matters dealt with by

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1935 Lah 406 (408) [AIR V 22] (DB). (When a new cause of action is created by statute and a special jurisdiction outside the course of the general law is prescribed, there is no ouster of the jurisdiction of the ordinary Courts for they never had any.)
1927 Cal 149 (150) [AIR V 14] (DB).
1924 Mad 521 (522) [AIR V 11] (DB).
1933 All 358 (363) [AIR V 20] (DB).
1918 Cal 850 (856) [AIR V 5] (DB). (Case law discussed.)
1933 Nag 193 (195) [AIR V 20] (FB).

[106] 1917 Lah 75 (78) [AIR V 4] (DB).
[*See also* 1933 Nag 193 (196) [AIR V 20] (FB).
1931 Mad 83 (87) [AIR V 18] (DB).]

[107] 1939 Mad 967 (968) [AIR V 26].
1938 Mad 972 (974) [AIR V 25].
1936 Lah 901 (903) [AIR V 23] (DB). (The principle will not apply where there is no matter in existence with which the person empowered is authorised to deal.)
1928 Lah 562 (564) [AIR V 15] (DB).
1931 Mad 574 (575) [AIR V 18] (DB).

[108] ('46) 50 Cal W N 310 (334).
1944 Bom 247 (248) [AIR V 31] (DB).

[109] 1928 Mad 1182 (1186) [AIR V 15] (FB).

[110] 1933 Cal 243 (245) [AIR V 20].

[111] 1931 All 567 (567) [AIR V 18] (FB).

[112] 1953 S C 244 (246) (Pr 5) [A I R V 40 C 58] : 1953 Cri L Jour 1094 (SC). ((1881) 17 Ch D 746 and (1952) 1952 App Cas 109, Rel. on.)

[113] 1948 Bom 370 (371) [AIR V 35 C 95] : 49 Cri L Jour 677 : ILR (1948) Bom 391 (FB). (But if the language used in two statutes is different and the language used in the earlier statute was unnecessary and superfluous and the Legislature

the change, only the new provisions should be looked to[114] and the Court in construing the later statute is not bound by the decisions under the earlier one.[115] But it is also a recognised presumption that the Legislature does not intend to make any alteration beyond what it expressly declares,[116] and where the language used is doubtful no change will be deemed to have been made.[117] Any change in the language of the statute would be presumed to have been made by the Legislature with the knowledge of the course of decisions previous to the change.[118] Where the Legislature does not alter the language of a section whose meaning is obscure, the legitimate inference is that the interpretation put upon it in a particular way is in accord with the intention of the Legislature.[119] However, a change in the wording of a section of an enactment does not necessarily involve a change in the law as amendments are often made to clear up ambiguities.[120]

(22) Where a question arises as to whether any particular provision is mandatory or directory, the general test is the relation which the provision has to the general object intended to be secured by the Act.[121] Another test has also been applied and that is to see whether a

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deletes the superfluous part from the statute, no inference or presumption can be drawn from a change in the language.)
1914 Sind 11 (12) [AIR V 1] (DB).
('08) ILR 35 Cal 34 (44) (FB).
[*See* 1928 Bom 69 (71) [AIR V 15]. (Presumption is that any change of language in a statute is some indication of a change of intention of the Legislature.)
1938 Rang 317 (317) [AIR V 25] (DB). [Do.)]
[*See also* 1940 Mad 385 (392) [AIR V 27] (FB). (If the words of a later statute differ materially from those of an earlier one effect should be given to the change especially where to do so would be to advance the policy underlying it.)]

[114] 1948 All 36 (37) [AIR V 35 C 16] : ILR (1947) All 157 (DB).
1932 All 188 (190) [AIR V 19].

[115] 1940 Mad 385 (392) [AIR V 27] (FB).

[116] 1951 Orissa 378 (394) (Pr 47) [AIR V 38 C 88] : I L R (1951) Cut 177 (SB).
1940 Oudh 138 (142) [AIR V 27] (FB).
1938 P C 191 (194) [AIR V 25] (PC).
1919 Mad 7 (9) [AIR V 6] (FB). (Interpretation of section repealed and re-enacted with slight difference.)
('13) 20 Ind Cas 572 (574) : 7 Sind L R 31.
1930 Sind 265 (279) [AIR V 17] (FB).
1918 Sind 22 (23) [AIR V 5] (DB).

[117] 1918 Mad 1100 (1102) [AIR V 5] (DB).
1930 All 193 (197) [AIR V17] (FB).
1931 Pat 1 (3) [AIR V 18].

[118] 1930 All 225 (240) [AIR V 17] (FB).

[119] 1951 S C 155 (Pr 10) [AIR V 38 C 23] : ILR 30 Pat 310 : 1951 SCR 138 (SC).

[120] 1950 Bom 6 (9) [AIR V 37 C 3] (DB).
('13) 18 Ind Cas 939 (943) : ILR 40 Cal 123 (DB).

[121] 1945 Nag 97 (99) [AIR V 32] : ILR (1945) Nag 121 (DB).
1940 Lah 266 (267) [AIR V 27] (DB).
1938 Pat 539 (541) [A I R V 25] (DB). (The scope and object of a statute are the only guides in determining whether its provisions are directory or imperative and in the absence of express provision, the intention of the Legislature is to be ascertained by weighing the consequences of holding a staute to be directory or imperative.)

Preamble
Note 10

party may waive the benefit of the particular provision.[122] To determine this question the ultimate test is whether the particular provision is based on grounds of public policy or whether it was intended only for the benefit of a particular person or class of persons.[123] In deciding the question, the Court should take into account the possibility of justice suffering from a too rigid application of the rule.[124] In case of affirmative words, even the word "shall" might be taken to be only directory as distinguished from imperative, while in cases of negative words, the proper construction is to take the words as prohibitive. In other words, a provision that a certain thing shall be done may be held to be only directory. But a provision that a certain thing shall not be done should be treated as prohibitive.[125]

(23) Words in singular should be read as including the plural unless there is anything in the context to the contrary.[126]

(24) In following decided cases in regard to the interpretation placed by them upon words in a statute, the danger of diverting attention from what has been enacted to what has been judicially said about the enactment must be avoided.[127]

(25) Forms given in the Schedule do not control the clear words of the Act itself.[128]

(26) Where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act

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1943 Cal 266 (277, 278) [AIR V 30] (DB). (Do.)
1937 Mad 51 (57, 58, 77) [AIR V 24] (DB).
('77) ILR 3 Cal 47 (57) : 4 Ind App 127 (PC). ('Must' or 'shall' may be substituted for 'may' for giving effect to intention of Legislature.)
[*See also* (1841-46) 3 Moo Ind App 488 (492, 493) (PC). (Where it is intended not to *compel* but to leave it optional with the parties the words "think fit" are the very ordinary technical and appointed words to show that the power is not compulsory. The word 'may' is held to confer a power, but the word 'shall' is held to make that power or the exercise thereof *compulsory*.)]

122. 1945 Cal 6 (16) [AIR V 32] : ILR (1943) 2 Cal 485.
('01) 5 Ind Cas 390 (395) (DB) (Cal).
1929 Cal 433 (435) [AIR V 16].

123. 1945 Cal 6 (16) [AIR V 32] : ILR (1943) 2 Cal 485. (A statutory provision based on public policy is mandatory. But it does not follow that because the statute is generally based on public policy every provision contained in it must be mandatory.)

124. 1915 Mad 920 (921) [AIR V 2] (DB).
1931 Lah 15 (16) [AIR V 18].
[*See* 1943 Cal 266 (278) [AIR V 30] (DB). (Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it is neither unjust nor inconvenient to exact rigorous observance of them as essential to the acquisition of the right or authority conferred.)]

125. ('90) ILR 12 All 510 (517, 521) (FB).
[*See also* ('87) ILR 11 Bom (375, 376) (DB). (When a statute directs anything to be done in a particular way that includes that it shall not be done otherwise.)]

126. 1925 Rang 94 (95) [AIR V 12] (DB).

127. 1932 P C 36 (40) [AIR V 19] (PC).

128. 1941 Rang 135 (140) [AIR V 28] (DB).
918 Cal 631 (632) [AIR V 5].

which is not expressly made applicable to the subsequent Act can be deemed to be incorporated in it, at all events, if it is possible for the subsequent Act to function effectively without the addition, nor can the repeal of the first statute affect the second.[129]

(27) Provisions of Acts passed by the same Legislature, when apparently inconsistent, should so far as possible be reconciled with each other[130] by reading one as a qualification to the other. If that is not possible the later Act should prevail.[131] The same rule applies to two apparently inconsistent sections in the same Act.[132]

(28) The enacting part of a statute must, where it is clear, be taken to control the *non obstante* clause where both cannot be read harmoniously ; for, even apart from such clause, a later law abrogates earlier laws clearly inconsistent with it.[133]

(29) Although a relative or a qualifying phrase is normally taken with the immediately preceding term or expression, yet this rule has

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1932 Mad 523 (524) [AIR V 19].

129. 1931 P C 149 (152) [AIR V 18] (PC).

130. 1941 Bom 158 (159) [AIR V 28]. (Adjective law cannot control substantive law in absence of express provision.)
1927 Cal 432 (443) [AIR V 14] (FB).
('13) 19 Ind Cas 387 (390) : ILR 37 Bom 231 (DB).
('83) ILR 6 Mad 32 (36) (DB). (Statutes are not to be held to be repealed by implication unless the repugnancy between the new provisions and former statute be plain and unavoidable.)
('76) ILR 1 Mad 89 (110, 114, 116) (FB).
('75) ILR 1 Bom 67 (69) (DB).
1929 Bom 274 (275) [AIR V 16] (DB).
1928 Lah 609 (614) [AIR V 15] (FB).

131. 1941 F C 16 (31) [AIR V 28] (FC).
1930 Pat 442 (445) [AIR V 17] (DB).
1924 Cal 980 (980) (AIR V 11] (DB). (If there is an earlier Act with certain penalties and a subsequent Act with other penalties as general proposition the earlier statute is repealed by later statute even if there are no express words to that effect in the later statute.)
(1934) 1934 L J K B 364 (367) : (1934) 1 K B 590, *Ellen Street Estates Ltd.* v. *Minister of Health.*
1931 Sind 124 (126) [AIR V 18].
1952 Punj 158 (Pr 5) [A I R V 39 C 60]. (Repeal of the earlier enactment will be implied.)
[See however 1926 Sind 115 (116) [AIR V 13]. (Where there are two conflicting provisions of the Legislature, that provision, the terms of which are more appropriate to the circumstances of the case, governs it.)]

132. 1950 Pat 392 (418) (Pr 39) [AIR V 37 C 108] : ILR 29 Pat 790 (SB).
1949 Bom 131 (133) [AIR V 36 C 40] (DB).
1949 Bom 56 (58) [AIR V 36 C 15] : ILR (1949) Bom 158 (DB).
1939 Mad 361 (365) [AIR V 26) (FB).
1921 Cal 603 (604) [AIR V 8] (DB). (Particular enactment, whenever found, must be construed strictly as against the general provision.)

133. 1952 S C 369 (Pr 27) [AIR V 39] : 1953 S C R 1 (SC). (Per *Patanjali Sastri C. J., Vivian Bose and Ghulam Hasan JJ.;* Per *Das J.*—While it may be true that the *non obstante* clause need not necessarily be co-extensive with the operative part, ordinarily there should be a close approximation between the two.)

got to be discarded if it is against common sense and natural meaning of the words and the expressions used.[134]

(30) The canon of construction of statutes enunciated in S. 38 of the English Interpretation Act, and reiterated with some modification in S. 8, General Clauses Act, or at least the principles of construction enunciated in those provisions apply in construing Charters (Letters Patent) of the High Court.[135]

(31) A repealing section should not be interpreted with reference to the reading of the repealed section.[136] The effect of repeal of a statute, in the absence of saving clauses, is that it has to be considered as if the statute so repealed has never existed.[137] Unless so repealed or altered the prior existing law will continue in force.[138] When any Act passed repeals another in whole or in part and substitutes some provision or provisions in lieu of the provision or provisions repealed, the repealed enactment remains in force until the substituted provision or provisions come into operation.[139] The repeal of a repealing statute does not revive the repealed statute.[140] Where the Act repealed is a parent Act, all the laws passed under that Act also stand repealed unless there is a saving provision in the repealing Act.[141]

(32) A repealed earlier enactment must be construed by reference to its provisions in order to ascertain its meaning and effect and not by reference to a later enactment dealing with the same subject-matter.[142]

(33) Where an Act or any provision in an Act is incorporated in another Act, and is subsequently repealed or amended, the repeal or amendment will not affect the incorporating Act.[143]

(34) A repealing Act does not affect any legal proceedings in

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[134] 1952 S C 369 (Pr 58) [AIR V 39] : 1953 S C R 1 (SC). (Per *Mukherjea J.*)

[135] 1953 SC 357 (360) (Pr 9) [AIR V 40 C 80] (SC).

[136] 1932 P C 92 (94) [AIR V 19] (PC).
1928 Nag 136 (142) [AIR V 15] (DB).

[137] 1934 Cal 80 (82) [AIR V 21] (DB).

[138] 1941 F C 16 (31) [AIR V 28] (FC).

[139] 1951 Hyd 140 (Pr 61) [AIR V 38 C 57] : I L R (1951) Hyd 689 (FB). (Per *Manohar Prasad J.*)

[140] ('98) ILR 25 Cal 333 (336).

[141] 1940 All 272 (280) [AIR V 27] (FB).

[142] 1946 Cal 539 (543) [AIR V 33 C 124] : ILR (1946) 2 Cal 259. (Rule applied in construing R. 25 framed under S. 59, Income-tax Act, 1922, before its amendment in 1939.)

[143] 1951 Bom 369 (Pr 20) [AIR V 38 C 79]: ILR (1951) Bom 626: 52 Cri L J 954 (DB). (The principle that an amendment to an incorporated statute is not to be taken as affecting an incorporating statute in the absence of an express provision to that effect, cannot be applied to an adaptation—But even if this is not for any reason correct the adaptation made to the India (Central Government and Legislature) Act, 1946, would affect the Essential Supplies (Temporary Powers) Act, 1946 : 1931 P C 149 [AIR V 18] (PC), Rel. on.)

Preamble
Note 10

respect of rights acquired before the repeal.[144] When an Act is in force on the date of a transaction, a subsequent repealment of the Act does not affect the merits, rights or liabilities of the parties on the date of the transaction.[145]

(35) Amending statutes should be read as part of the original statutes.[146] When a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier then the earlier Act must thereafter be read and construed in such a way that there is no need to refer to the amending Act at all.[147]

(36) When an amending Act changes the old law it is not necessary that the amending Act itself should expressly say what is the residue of the old law that still continues to exist. The Court should doubtless give full effect to the amendment; but after giving such effect and excising from the old law all the elements which were expressly dispensed by the amendment the residue must continue to remain in force.[148]

(37) It is not proper to use one Act for the purpose of interpreting another Act.[149]

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[144] 1951 Mys 72 (86) (Pr 43) [AIR V 38 C 33]: ILR (1951) Mys 284: 52 Cri L Jour 992 (FB). (The policy of Legislature is that a subsequent repeal or rescission of an Act should not have retrospective effect so as to completely undo the consequences already ensued or continue to be ensuing.)
1933 Mad 57 (58) [AIR V 20].
1927 Pat 203 (205) (AIR V 14] (DB).
[*See* 1951 Orissa 105 (118) (Pr 27) [AIR V 38 C 32] (FB). (Per *Panigrahi J.*—A proviso in a repealing statute "except as to acts done under it" will operate to preserve to parties all rights if the action is brought before the repealing statute passes.)]

[145] 1948 Pat 229 (Pr 4) [A I R V 35 C 83] : 49 Cri L Jour 251 : 26 Pat 169 (176) (DB). (The repeal or expiry of a temporary statute (such as the Defence of India Act) does not invalidate proceedings already terminated and completed before expiry of the repealed or temporary statute.)
(1926) 1 K B 393 (409) : 95 L J K B 148, *Falcon* v. *Famous Players Film Co.*
1925 Pat 346 (349) [A I R V 12] (DB).
('76) I L R 1 Bom 286 (291) (DB).

[146] 1951 Mad 191 (Prs 13, 14) [AIR V 38 C 19]: 52 Cri L Jour 744 (DB). ((1918) App Cas 591, *Union of South Africa* v. *Simmer & Jack Proprietary Mines Ltd.* and 1950 Mad 243 [AIR V 37 C 110] : 51 Cri L Jour 615, Rel. on.)

[147] 1952 S C 324 (326)(Pr 7) [AIR V 38]: 1952 S C R 683 : 1952 Cri L Jour 1503 (S C).

[148] 1951 Orissa 186 (197) (Pr 27) [A I R V 38 C 50] : I L R (1951) Cut 1 (SB).

[149] 1942 All 440 (441) [A I R V 29]. (Every word in particular statute must be construed in its technical sense—It is not satisfactory to refer to other statutes for that purpose.)
1942 Cal 47 (48) [AIR V 29] (DB). (Especially when it is not in *pari materia.*)
1940 All 291 (300) [AIR V 27] (DB).
1939 Cal 435 (444, 447) [A I R V 26] (FB). (Unless the scope and object of the two statutes be similar.)
1939 Pat 55 (57) [A I R V 26] (FB). (In interpreting Government of India Act, 1935, decisions of Privy Council regarding British North America Act are of little assistance and would be dangerous.)
1935 Cal 732 (733) [AIR V 22] (DB).
1932 Mad 343 (345) [AIR V 19] (DB).

(38) In interpreting foreign statutes, Courts should not be guided by outside opinion, however eminent such opinion may be.[150]

(39) Proceedings taken against a person under a temporary statute will, in the absence of a special provision to the contrary, *ipso facto* terminate as soon as the statute expires.[151]

(40) Technical language must have technical meaning attached to it, unless the contrary manifestly appears.[152]

(41) In the construction of a clause in statute promulgated by an executive authority it is permissible and perhaps even necessary to take into account what may be described as the departmental construction.[153]

(42) Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Such orders must be construed objectively with reference to the language used in the order itself.[154]

(43) Special Acts must be strictly construed.[155]

(44) Where the terms of a statute are not imperative, the use of general powers conferred by that statute should be in strict conformity with private rights.[156]

(45) In enactments which confer powers upon public authorities, the language of permission may not preclude the existence of a duty.[157]

(46) The words in an Act are used correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been

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1934 All 681 (683) [AIR V 21] (DB).
1935 Mad 600 (601) [AIR V 22] (DB).

[150] 1930 Mad 146 (146) [AIR V 17] (DB).

[151] 1951 S C 301 (304) (Pr 10) [A I R V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC).

[152] 1933 Cal 467 (468) [AIR V 20] (DB)..
1937 Lah 178 (179) [AIR V 24] (DB). (The word 'pensions' has been employed in the C. P. Code in its etymological sense.)
('12) 15 Ind Cas 122 (123) (DB) (Lah).
('85) ILR 5 All 121 (137) (FB).
('54) 5 Moo Ind App 234 (250) : 8 Moo P C 4 (PC). (Words long used in a technical sense and judicially also construed as such — Same words used in a statute must be taken to have been used in the technical sense.)

[153] 1947 Lah 296 (297) [AIR V 34 C 71].

[154] 1952 S C 16 (18) (Pr 9) [A I R V 39 C 5] : 1952 S C R 135 (SC).

[155] 1941 Nag 249 (251) [A I R V 28]. (It must be construed strictly in favour of subject relying on ordinary law.)
1930 Lah 333 (334) [AIR V 17].
('46) 1946 A M L J 1 (3). (A law to benefit an istimrardar must be carefully scrutinized.)

[156] 1937 Mad 51 (78) [AIR V 24] (DB).
1931 Rang 95 (96) [AIR V 18].

[157] 1937 Mad 51 (78) [AIR V 24]. (Word 'may' construed as obligatory.)
1934 Pat 670 (672) [AIR V 21] (FB).
1930 Rang 297 (300) [AIR V 17] (FB).
1950 S C 218 (Pr 8) [AIR V 37 C 17] : 1950 S C R 536 (SC). (Per *Kania C. J.*)

broken the burden of establishing their proposition lies heavily and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.[158]

(47) While it is possible that there might be an overlapping of powers conferred on different persons, by a statute, yet, at least where the matter admits of doubt, the construction against overlapping of powers should be adopted ordinarily.[159]

(48) In construing a statute one should endeavour to give it a meaning, in all cases of ambiguity, which will make it consonant to, rather than in disagreement with, other Acts.[160] Similarly, where two constructions are possible, the interpretation that will promote the object of the statute and not defeat it, should be preferred.[161] Where an Act is impeached as being *ultra vires*, the pith and substance of the impugned legislation and not merely its form must be looked to.[162] In the case of emergency legislation it is the nature of legislation and not the existence of emergency that must determine whether it is valid or not.[163] War-time measures, which often have to be enacted hastily to meet a grave pressing national emergency in which the very existence of the State is at stake, should be construed more liberally in favour of the Crown or the State than peace time legislation.[164] There is a presumption that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the statute.[165]

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[158] **158.** 1933 P C 216 (217) [AIR V 20] (PC).
1934 Pat 304 (305) [AIR V 21] (DB).

[159] **159.** 1935 Lah 742 (753) [A I R V 22] (FB).

[160] **160.** 1946 F C 27 (30) [A I R V 33 C 6] : 1946 F C R 94 :I L R (1947) Lah 387 : I L R (1947) Kar F C 1 (F C). (As not to be inconsistent with the comity of nations or with the established rules of international law.)
1939 Nag 50 (52) [AIR V 26] (FB).
1939 Pat 49 (54) [AIR V 26] (DB).
1935 Pat 508 (513) [AIR V 22] (DB). (If there are two inconsistent enactments it must be seen if one cannot be read as a qualification of the other.)
1914 Oudh 199 (200) (AIR V 1] (DB).

[161] **161.** 1949 Bom 210 (212) : [A I R V 36 C 59] : I L R (1949) Bom 265 (FB).
1949 Orissa 37 (40) [AIR V 36 C 10] : I L R (1949) 1 Cut 83 (FB).
1946 Bom 65 (77) [A I R V 33 C 16] : 47 Cri L Jour 1048 : ILR (1946) Bom 309. (The Courts should while construing emergency legislation even adopt a construction which might appear strained or unnatural in times of peace.)
1944 Nag 337 (345) [AIR V 31] (DB). (Per Niyogi J.)
('52) 1952 I DA 7675 (Bom). (Bombay Agricultural Debtors Relief Act, 1947.)

[162] **162.** 1944 Nag 201 (211) [AIR V 31].
1951 Mad 979 (Pr 7) [AIR V 38 C 339] (DB).

[163] **163.** 1946 P C 88 (90) [AIR V 33 C 31] (PC).

[164] **164.** 1952 S C 335 (337. 338) (Pr 18) [A I R V 39] : 1952 S C R 877 : 1952 Cri L Jour 1406 (SC).

[165] **165.** 1943 Bom 213 (215) [AIR V 30] (DB), (Special Act dealing with succession among Hindus.)
1940 Oudh 138 (142, 143) [AIR V 27] (FB).

(49) In interpreting an Act the principle has to be borne in mind that the Legislature is not capricious, but that when it confers a right, it should be presumed that it is conferred not only in favour of a few persons entitled to that right, but that the right is conferred on all persons entitled to it.[166]

(50) In the case of statutes the maxim *expressio unius est exclusio alterius* (mention of one thing is the exclusion of others) is to be applied with great caution.[167]

(51) When a statute is partly valid and partly invalid, then provided the invalid portion can be severed from the rest, it must be upheld to the extent that it is good.[168]

(52) When a liability is imposed by a statute, that liability cannot be defeated by the exercise of any discretion by Government or by making rules which may negative that liability.[169]

See also the undermentioned cases[170] and the General Clauses Act (1897), S. 6A.

1931 Cal 580 (581) [AIR V 18]. (Presumption that the Legislature did not intend to alter the law by an Act described as a consolidatory Act cannot override the plain meaning of the words used.)

166. 1951 Hyd 124 (Pr 8) [AIR V 38 C 52] : I L R (1951) Hyd 575 (DB). (Right to sue in *forma pauperis.*)

167. 1926 Sind 133 (134) [AIR V 13].

1923 Cal 66 (69) [AIR V 10] (DB).

168. 1951 Nag 58 (84, 85, 88) (Prs 178, 203) [A I R V 38 C 20]: I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB). (Though R. 7 of the C. P. and Berar Foreign Liquor Rules, 1938, is invalid being discriminatory it is no part of the C. P. and Berar Prohibition Act, 1938, and hence the Act remains unaffected.)

1949 All 513 (520) [AIR V 36 C 189] : I L R (1950) All 615 (FB).

1944 Nag 201 (219) [AIR V 31].

169. 1951 S C 180 (Pr 16) [AIR V 38 C 27] : 1951 S C R 266 (SC).

170. 1949 F C 135 (141) [AIR V 36 C 22) : I L R (1950) 1 Cal 517 : 1949 F C R 292. (When a negative condition in the shape of non-existence of a certain fact is prescribed as an essential pre-requisite to a particular legal result the condition is deemed to be satisfied if the existence of the fact has been rendered impossible by circumstances : 1945 P C 108 [AIR V 32] : 72 Ind App 156 : ILR (1945) Kar (PC) 250 : I L R (1945) 2 Cal 449 (P C), Appl.)

1943 All 19 (191) [AIR V 30] (FB). (Where a definition is expressed in the present tense and without any qualification, the Court has to look at the Act as a whole and more particularly at the context in which the word occurs in order to ascertain the point of time to which the definition is referable.)

1943 Cal 108 (110) [AIR V 30] (DB). ("Include" is very generally used in interpretation cluase in order to enlarge meaning of words and phrases occurring in body of statute and in such cases, the word or phrase must be construed as comprehending not only such things as it signifies according to its natural import but also things which the interpretation clause declares that it shall include. *Dilworth* v. *Commr. of Stamps*, 1899 A C 99 at 105, Cited.)

1943 Cal 447 (449) [AIR V 30] (DB). (Word "may" when may have compulsive for e.)

1943 Cal 285 (301) [AIR V 30) (SB). (Validity of statute—Court can take judicial notice of historical facts. (Per *Derbyshire, C. J. and Khundkar J.; Sen, J. contra.*).)

1940 Oudh 138 (142, 143) [AIR V 27] (FB). (There is no presumption that when one view as to the meaning of an Act would apply the Act to a larger number

Reference to pre-existing state of the law

Where the language of a statute is *plain and clear* it cannot be qualified or neutralised by indications of intention gathered from the previous state of law.[171] In the leading case of *Bank of England* v. *Vagliano Bros.*,[172] Lord Herschell observed as follows :

> "I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

But where the language is not clear or the statute has made no provision for any particular case, the previous legislation may be

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and another view to a smaller number, the Legislature meant it to affect the larger number.)

1937 Pat 185 (187) [A I R V 24] (FB). (When in an interpretation clause, it is stated that a certain term includes so and so, it is implied that the term retains its ordinary meaning whatever else it may mean.)

1935 Pat 243 (247) [A I R V 22] (DB). (The current meaning of any particular word may differ widely from that of the word from which it was derived and no useful purpose is served by the method of considering etymological derivations of a word.)

1933 Bom 234 (237) [A I R V 20] (DB). (Government resolution cannot override the law.)

('76-78) I L R 1 Mad 158 (163) (DB). (A statute not only enacts its substantive provisions but as a necessary result of legal logic, it also enacts as a legal proposition everything essential to the existence of the specific enactments.)

1943 Mad 202 (205) [A I R V 30] (DB). (The Courts are not entitled to travel beyond the express terms of the statute in search of some general principle outside the enactment and inconsistent with its language.)

171. ('40) 44 Cal W N 511 (512). (Reference to reported cases on which the statutory provisions are thought to be based is not desirable.)
('07) I L R 35 Cal 34 (55) (FB).
('97) I L R 22 Cal 788 (797) : 22 Ind App 107 (PC). (Reversing ILR 21 Cal 732.)
1920 P C 140 (142) [AIR V 7] (PC). (Mere omission in later statute of negative provision in earlier one cannot by itself effect substantive affirmation.)
1928 P C 2 (4) [A I R V 15] (PC).
(1891) 1891 App Cas 107 (120), *Bank of England* v. *Vagliano*.
1921 Cal 397 (399, 402) [A I R V 8] (FB).
('96) I L R 23 Cal 563 (572) : 23 Ind App 18 (PC).
[*See* 1930 Oudh 148 (159, 164) [AIR V 17] (FB).
1939 Oudh 131 (137) [A I R V 26] (FB). (It is not to be doubted that both the heading and the preamble are to be taken into consideration in interpreting the clauses of the Contempt of Courts Act, 1926, but they are not the operative portions of the Act.)]

172. (1891) 1891 App Cas 107 (144, 145).
See also the following cases where the principle of the above observation is accepted :
1928 P C 16 (18) [AIR V 15] (PC).
1925 Cal 34 (41) [AIR V 12] (SB).
1924 Cal 257 (272, 273) [AIR V 11] (FB). (Case-law referred to.)
1921 Cal 1 (6) [AIR V 8] (SB). (Do.)
1928 Lah 361 (368) [AIR V 15] (FB).

referred to for the purpose of ascertaining the object and intention of the Legislature.[173]

Reference to proceedings of the Legislature

In the case of *The Administrator-General* v. *Prem Lal Mullick*,[174] their Lordships of the Privy Council have laid down definitely that it is not competent to refer to the proceedings of the Legislature as legitimate *aids* to the construction of the *statute*.[175] This is in consonance with

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173. 1953 Mad 458 (459) (Pr 4) [AIR V 40 C 174]: ILR (1953) Mad 295 (FB). (In order properly to interpret any statute it is necessary to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide and the remedy provided by the statute to cure that mischief.)
1943 F C 36 (70) [A I R V 30] (FC). (History of legislation and facts giving rise to enactment can be referred to.)
1941 Mad 449 (452, 468) [AIR V 28] (FB).
1940 P C 105 (109) [AIR V 27] (P C).
1940 Oudh 138 (143) [A I R V 27] (FB). (So as to find the mischief sought to be cured by the Legislature.)
('08) ILR 35 Cal 34 (55) (FB).
('82) ILR 5 All 121 (135) (FB).
('84) I L R 8 Bom 313 (321) (FB). (Case not provided for in the consolidating statute.)
('90) I L R 17 Cal 590 (599, 602) : 17 Ind App 40 (PC).
1933 Pat 435 (437, 438) [AIR V 20] (SB).
1924 All 328 (335) [AIR V 11] (FB).
('84) ILR 6 All 509 (530, 531, 540) (FB).
1930 Sind 265 (279) [AIR V 17] (FB).
[*See also* 1953 S C 252 (264) (Pr 40) [A I R V 40 C 62] (S C). (Per *Bose J.*— In construing a statute it is legitimate to take into account existing laws and the manner in which they were acted upon and enforced.)
1951 Mys 72 (93) (Pr 58) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 932 (FB). (In interpreting an Act of Parliament, the Courts are entitled and in many cases bound to look to the state of the law at the date of the passing of the Act in order properly to interpret the statute.)]

174. ('95) I L R 22 Cal 788 (798, 799) : 22 Ind App 107 (PC). (I L R 21 Cal 732 (FB) not approved.)

175. *See also the undermentioned cases* :
1952 S C 366 (368) (Pr 16) [A I R V 39] : 1952 S C R 112 : I L R (1953) T C 337 (SC). (Speeches by members of the Constituent Assembly in course of debate on draft constitution cannot be made use of in interpreting an article of the Constitution —22 Cal 788 : 22 Ind App 107 (PC), Foll.)
1951 Pat 12 (18) (Pr 10) [A I R V 38 C 4] : 30 Pat 31 : 52 Cri L Jour 309 (S B). (Where the language of a statute is perfectly clear and unambiguous, reference to the statement of objects and reasons is irrelevant and unwarranted.)
1944 Lah 266 (272) [AIR V 31] (FB). (Statement of Objects and Reasons.)
1942 Nag 5 (7) [AIR V 29] (FB).
1942 Sind 65 (69) [AIR V 29] (SB).
1940 Oudh 138 (143, 145) [A I R V 27] (FB). (The Statement of Objects and Reasons.)
1952 S C 369 (Pr 31) [AIR V 39]: 1953 S C R 1 (S C). (No reference to the debate on the Bill is to be made.)
('87) I L R 11 Bom 1 (4).
('82) I L R 5 All 121 (185) (FB).
1920 P C 56 (59) [AIR V 7] (PC).
('95) I L R 22 Cal 1017 (1022) (FB). (Following I L R 22 Cal 788 : 22 Ind App 107 (PC).)

the principle that where the language is *plain* no *extraneous* matter should be taken into account in the interpretation of the Act.

The cases in India,[176] before the date of the above Privy Council decision, which had taken the view that such proceedings could be always referred to in aid of the construction of statutes, cannot be considered to be good law after the date of the said decision.

The legislative proceedings can be referred for the proper understanding of the circumstances under which the Act in question was passed and the reasons which necessited it.[177]

Where the language is doubtful or ambiguous, such proceedings may of course be looked into.[178]

('94) I L R 21 Cal 732 (753) (FB).
1937 Lah 497 (499) [AIR V 24] (SB). (Statement of Objects and Reasons.)
1920 Mad 1019 (1024) [AIR V 7] (FB).
1935 Pat 346 (348) [AIR V 22] (SB). (Speeches in Assembly.)
1936 Sind 209 (210) [AIR V 23] (DB). (Statement of Objects and Reasons.)
1952 S C 369 (378) (Pr 32) [AIR V 39] : 1953 S C R 1 (SC). (Do.)
1919 Sind 80 (80) [A I R V 6] (FB). (But they have been referred to, to ascertain the object of the statute where there is ambiguity.)
[*See* ('13) 19 Ind Cas 765 (766, 767) (P C). (In the course of argument Lord Loreburn remarked : "The decision of the Select Committee, eminent though the members were, did not possess the same authority on the interpretation of a statute as that of a Court of Law.")]
[But see 1924 Nag 249 (250) [A I R V 11] : 20 Nag L R 103. (The case holds contrary to what the Privy Council has held but does not refer to that decision or to any principle—This cannot be considered to lay down correct law.)
('99) I L R 22 Mad 494 (504). (Do).]

176. ('83) I L R 7 Bom 310 (315).
('94) I L R 18 Bom 616 (625) (DB).
('91) ILR 15 Bom 583 (585) (DB).
('90) I L R 17 Cal 852 (860) (DB).
('84) ILR 10 Cal 167 (192, 193) (FB).
('93) I L R 16 Mad 207 (210) (DB).

177. 1951 S C 41 (45) (Pr 12) [A I R V 39 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (S C). (Per Fazal Ali J.)
1951 Mad 979 (984) (Pr 11) [AIR V 38 C 339] (DB). (They are, however, certainly not excluded from consideration when one has to determine the object and purpose of an Act—1951 S C 41 [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), Foll.)

178. 1952 All 716 (720) (Pr 14) [A I R V 39] : I L R (1952) 2 All 200 (F B). (Language of proviso to S. 58 (c), T. P. Act, ambiguous — Report of the Select Committee can be looked into for ascertaining the true intention of the Legislature.)
1952 All 6 (22) (Pr 61) [A I R V 39 C 2] (FB). (It is permissible to take the proceedings of the Legislature (reports and speeches) into consideration in ascertaining the object and the purpose of the Legislature in passing a particular Act.)
('84) I L R 8 Bom 241 (246, 247) (DB).
('92) I L R 19 Cal 544 (567, 569) (FB).
1928 Lah 337 (340) [AIR V 15] (DB).
1918 Mad 381 (382) [AIR V 5] (DB).
1919 Sind 80 (80) [AIR V 6] (FB).
('87) I L R 14 Cal 721 (728, 729) (FB).

The proceedings of the Legislature will include—

(1) The Statement of Objects and Reasons;
(2) The Report of the Select Committee;
(3) The draft stages of the Bill; and
(4) The Debates of the Legislature.

But the acceptance or rejection of amendments to a Bill in the course of Parliamentary proceedings does not form part of the pre-enactment history of a statute.[179]

Reference to Preamble and headings prefixed to the sections

Where the language of the enactment itself is clear, then under the general principles, its construction cannot be affected in any way by a consideration of the title of an Act,[180] the preamble or the headings prefixed to the sections.[181] In cases of ambiguity of the language of the enactment, however, they may be usefully referred to for the purpose of finding out the object and intention of

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[*See also* 1930 All 225 (238) [AIR V 17] (FB).]
[But see 1923 Cal 74 (77) [A I R V 10] (DB). (Even in cases of ambiguity reference is not permissible.)]

179. 1952 S C 369 (378) (Pr 33) [A I R V 39] : 1953 S C R 1 (S C). (As such it does not throw valuable light on the intention of Legislature, when the language used admits of more than one construction.)

180. (1903) 1903 App Cas 443 (447): 72 L J K B 787, *Fenton* v. *Thorly & Co. Ltd.*
(1870) L R 3 C P 511 (522) : 37 L J C P 226, *Clydon* v. *Green.*
[*See* 1952 S C 369 (388) (Pr 75) [A I R V 39] : 1953 S C R 1 (SC). (*Das J.*—Title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of the enactment.)]

181. 1952 Cal 150 (160) (Pr 68) [A I R V 39 C 63] : 1952 Cri L Jour 450 (F B). (Preamble of an Act cannot be used to cut down the scope and plain meaning of a provision in an Act.)
1949 All 660 (661) [AIR V 36 C 248] : I L R (1949) All 508 (DB). (General heading under which section comes.)
1949 All 612 [AIR V 36 C 224] : I L R (1950) All 247 (DB).
1949 All 513 (516, 522) [A I R V 36 C 189] : I L R (1950) All 615 : 50 Cri L Jour 798 (FB).
1949 All 403 (405) [AIR V 36 C 151] : I L R (1949) All 681 : 50 Cri L Jour 657. (Head-notes of sections and chapters.)
1949 Orissa 37 (43, 44) [AIR V 36 C 10] : I L R (1949) 1 Cut 83 (FB).
1944 Lah 266 (273) [AIR V 31] (FB).
1943 F C 36 (71) [AIR V 30] (FC). (Rule that preamble cannot be made use of to control the enactment — Scope and meaning of rule, explained.)
1943 Cal 285 (312) [AIR V 30] (SB).
1940 P C 105 (109) [AIR V 27] (PC). (The heading of chapter.)
1942 Sind 65 (69) [AIR V 29] (SB). (Preamble.)
1940 Oudh 138 (147) [AIR V 27] (FB).
1938 Nag 134 (141) [AIR V 25] (FB).
1931 All 597 (599) [AIR V 18] (FB).
1936 All 507 (511) [AIR V 23] (FB). (Preamble.)
1919 P C 52 (53) [AIR V 6] (PC). (Section beyond Preamble governs Preamble.)
1919 Cal 551 (560) [AIR V 6] (FB).
1938 Mad 441 (445) [AIR V 25] (FB).
[See however 1932 Oudh 152 (153) [AIR V 19] (FB).]
[But see 1918 Pat 398 (408, 409) [AIR V 5] (FB).]

Preamble
Note 10

the enactment.[182] In the undermentioned case[183] the High Court of Madras cited with approval the view expressed in *Eastern Counties etc., Railway Companies* v. *Francis Marriage*[184] that headings are not to be treated as if they were marginal notes or were introduced merely for the purpose of classifying the enactments, that they constitute an important part of the Act itself and that they may be read, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, but as affording a better key to the construction of the sections which follow than might be afforded by a mere preamble. The same view was taken by the High Court of Nagpur.[185]

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182. 1953 S C 274 (276) (Pr 7) [A I R V 40 C 63] : 1953 Cri L Jour 1105 (S C). (Title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the Legislation itself.)
1952 All 703 (705) (Pr 6) [A I R V 39] (FB). (The preamble to a statute can be taken into consideration in deciding the question whether the Act is or is not for a public purpose.)
1952 Cal 150 (160) (Pr 68) [AIR V 39 C 63] : 1952 Cri L Jour 450 (FB).
1952 Hyd 58 (60) (Pr 6) [AIR V 39 C 35] : I L R (1952) Hyd 95 (FB).
1952 Pepsu 131 (133) (Pr 7) [AIR V 39] : 3 Pepsu L R 31 (FB).
1951 Madh B 1 (11) (Pr 39) [A I R V 38 C 1] : I L R (1952) Madh B 15 (FB).
1949 All 513 (522) [A I R V 36 C 189] : I L R (1950) All 615 : 50 Cri L Jour 798 (FB).
1949 East Punj 94 (Prs 14, 16) [A I R V 36 C 23] : I L R (1949) East Punj 143 (FB).
1949 Orissa 37 (43, 44) [AIR V 36 C 10] : I L R (1949) 1 Cut 83 (FB). (But the Court must not create or imagine an ambiguity. If very general language is used, which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply.)
1943 Lah 260 (264) [AIR V 30] (SB).
1942 F C 17 (21) [A I R V 29] (FC). (But it is very doubtful whether a preamble retrospectively inserted in 1940 in an Act passed 25 years before can be looked at by the Court for purpose of discovering what the true intention of the Legislature was at the earlier date.)
1940 Oudh 138 (140, 141) [AIR V 27] (FB).
1931 All 597 (599) [AIR V 18] (FB). (Headings.)
1917 Pat 305 (315) [AIR V 4] (FB). (Per *Jwala Prasad, J.*)
('07) I L R 29 All 385 (414) (FB).
(1886) 11 App Cas 286 (288) : 55 L J Q B 417, *Tarquand* v. *Board of Trade.*
(1857) 7 Moo Ind App 72 (99) (P C).
1936 All 507 (511) [AIR V 23] (FB). (Preamble.)
1919 Cal 551 (560) [AIR V 6] (FB). (Preamble.)
1951 Bom 137 (139) (Pr 3) [AIR V 38 C 30]:ILR (1952) Bom 54 (FB). (Preamble.)

183. 1938 Mad 449 (454) [AIR V 25] (DB).

184. (1862) 9 H L C 32 (41) : 8 W R (Eng) 748.
[*See also* (1882) 10 Q B D 309 (321) : 52 L J M C 4, *R.* v. *Local Government Board.* (Heading of a series of sections must be considered as a part of the sections and used for construing any doubtful matter in the sections under that very heading.)]

185. 1951 Nag 121 (122) (Pr 12) [AIR V 38 C 23] : I L R (1951) Nag 638 (DB). ((1860) 9 H L C 32 : 8 W R 748, Followed; 1938 Mad 449 [A I R V 25], Referred.)

Preamble
Note 10

Marginal notes to sections

It is now settled that marginal notes to sections *do not form part of the statute* itself and cannot be referred to for explaining or construing the section.[186]

In *Balraj Kunwar* v. *Jagatpal Singh*,[187] their Lordships of the Privy Council observed as follows:

> "It is well settled that the marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament."

Where, however, there is *ambiguity* in the section the marginal note can be referred to for solving the ambiguity.[188]

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[186] 1953 S C 148 (150) (Pr 5) [AIR V 40 C 39] : 1953 S C R 533 (SC). (The marginal note cannot control the meaning of the body of the section if the language employed therein is clear and unambiguous. If the language of the section is clear then it may be that there is an accidental slip in the marginal note rather than that the marginal note is correct and the accidental slip is in the section itself.)

1947 P C 82 (84) (Pr 8) [AIR V 34 C 20] : I L R (1947) Bom 110 : I L R (1947) Kar (P C) 113 : 1947 F C R 59 : 74 Ind App 89 : 48 Cri L Jour 791 (P C). (There can be no justification for restricting the contents of the section by the marginal note.)

1951 Madh B 116 (116) (Pr 3) [AIR V 38 C 55] (S B).

1946 Bom 510 (512) [AIR V 33 C 104] : I L R (1947) Bom 315 (DB).

1942 All 19 (34) [AIR V 29] (FB).

1941 Bom 397 (402) [AIR V 28] (SB).

(1923) 1 Ch 143 (147) : 92 L J Ch 145, *Settlement Trusts, Penrhyn* v. *Roberts*.

(1916) 1 App Cas 242 (247) : 85 L J K B 146, *Bradford Corporation* v. *Meyers*.

('04) I L R 26 All 393 (406) : 31 Ind App 132 (PC).

1917 Nag 215 (224) [AIR V 4] (FB).

[*See* 1943 Cal 377 (412) [AIR V 30] (SB). (A marginal note cannot control a section but it certainly elucidates and illumines the meaning of a section.)

(1868) L R 3 C P 511 (519, 522) : 37 L J C P 226, *Claydon* v. *Green*. (Marginal note cannot be used in construction of Acts of Parliament as they are not put there by the Legislature or assented to by them.)]

[But see 1941 Nag 292 (293) [AIR V 28]. (Marginal note can be taken into consideration as showing the intention of the section.)

1939 Cal 313 (314) [AIR V 26] (DB). (The side note, although it forms no part of the section, is of some assistance in interpreting the section inasmuch as it shows the drift of the section.)

1935 Bom 347 (349) [AIR V 22] (DB). (Marginal notes can be looked at in order to see general trend of section.)

1929 Nag 17 (20) [AIR V 16] (FB). (Although a marginal note does not form part of the section, it is of some assistance in properly consturing a section.)]

[187] ('04) I L R 26 All 393 (406) : 31 Ind App 132 (P C).

[*See also* 1938 Bom 284 (285) [AIR V 25] (DB). (Marginal notes may be referred to as aids in construing section, but if the language is plain and unambiguous, they cannot curtail plain meaning of section.)]

[188] 1940 Bom 363 (364) [AIR V 27] (DB).

1939 Nag 230 (231) [AIR V 26] (DB).

1925 All 503 (515) [AIR V 12] (FB). (The view was expressed obiter—There was no ambiguity in the case.)

1925 Cal 329 (330) [AIR V 12] (DB).

1926 Mad 749 (751) [AIR V 13] (DB).

Preamble
Note 10

There can be no objection to the reference to marginal notes for the purposes of construing or interpreting the sections of an Act, *if they are inserted by or under the authority of or assented to by the Legislature.*[189] See also Note 5.

Illustrations

Illustrations, unlike marginal notes, are to be considered as part of the statute itself.[190] They are to be accepted, if that can be done, as being both of relevance and of value, in the construction of the section.[191] The rule, however, is subject to two limitations —

(1) An illustration only exemplifies the section and cannot be taken to *restrict* or modify the sense of the section.[192]

1932 Nag 174 (176) [AIR V 19].
[But see 1915 Lah 271 (272) [AIR V 2] (DB). (Marginal note cannot be relied upon in clearing up the ambiguity but it may be referred to when it confirms the conclusion warranted by the language of the section.)]

[189] 1952 All 788 (791) (Pr 9) [AIR V 39] : 1952 Cri Jour 1282. (*Held* that marginal notes were inserted under the authority of and with the knowledge of Constituent Assembly in the Constitution.)
1929 All 53 (58) [AIR V 16] (FB).
1933 Bom 417 (421) [AIR V 20] (FB).
1935 Cal 287 (289) [AIR V 22] (DB).
1935 Oudh 337 (342) [AIR V 22] (FB).
[*See also* 1952 Cal 273 (280) (Pr 45) [AIR V 39 C 75 (29)] (FB). ((1942) 2 All E R 39, Rel. on—Court will pay due regard to marginal note of a section, in a proper case.)]

[190] 1918 P C 249 (250) [AIR V 5] (PC).
1928 Oudh 15 (17) [AIR V 15] (DB).
1937 Oudh 57 (60) [AIR V 24] (DB).
[But see 1935 Sind 145 (157) [AIR V 22].
('77) I L R 1 All 487 (495) (DB.)]

[191] 1953 Mad 637 (644) (Prs 9, 24) [AIR V 40 C 250] : I L R (1953) Mad 427 (FB).
1947 Bom 122 (130) [AIR V 34 C 38] : I L R (1947) Bom 1. (It is dangerous to pick out illustrations wrenched from their context and apply them literally—Illustrations merely illustrate a principle and what the Court should try and do is to deduce the principle which underlies the illustrations.)
1944 P C 67 (69) [AIR V 31] : I L R (1945) 1 Cal 1 (PC).
1943 P C 34 (38) AIR V 30] (PC). (An illustration cannot be ignored or brushed aside because it is not part of the body of the section—1916 P C 242 [AIR V 3] (PC), Followed.)
1927 Mad 99 (108) [AIR V 14] (FB).
('74) 22 Suth W R 367 (368) (DB). (But the practice of looking more at the illustrations than at the words of the sections is a mistake.)
1916 P C 242 (244) [AIR V 3] (PC).
1921 Cal 1 (4) [AIR V 8] (SB). (Illustration does not bind the Courts to place a meaning on the section quite inconsistent with its language.)
1916 Low Bur 114 (116) [AIR V 3] (FB). (Illustrations cannot be taken as laying down substantive law and they merely go to show the intention of the framers of the Act.)

[192] 1952 All 122 (125) (Pr 17) [AIR V 39 C 45] : 1952 Cri L Jour 292. (The only object of an illustration is to make the rule more easily intelligible.)
1938 PC 67 (70) [AIR V 25].
1921 Cal 1 (4) [AIR V 8] (SB).

(2) Where the illustration is in *conflict* with the main section, the illustration must give way to the section.[193] But it would require a very special case to warrant its rejection on the ground of its assumed repugnance to the section itself.[194]

Punctuation marks

Before the year 1849, the English Acts of Parliament were not punctuated by any stops and the then accepted rule of interpretation was that such marks could not be relied upon in construing Acts of Parliament.[195] In *Maharani of Burdwan* v. *Krishna Kamini Dasi*,[196] which was a case under the Bengal Regulation of 1819, their Lordships of the Privy Council held that "it is an error to rely on punctuation in construing Acts of the Legislature."

Since the constitution of the regular Legislatures in India, however, the practice has been to insert stops in Bills before the Legislatures and to retain them in the authentic copies of the Acts signed by the Governor-General and published in the Gazette of India.[197] In these circumstances, it was held by the High Court of Bombay,[198] that punctuation marks may be considered as aids to the interpretation of the statute *where the language thereof might otherwise be doubtful.* The High Court of Madras took the view that the marks were part of the statute and should be considered as such.[199] On the other hand, it was held by the High Courts of Allahabad[200] and Calcutta[201] following the case of the *Maharani of Burdwan* that punctuation marks could not be taken into consideration in construing the statute.

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[193] 1924 All 748 (749) [AIR V 11].
1930 Rang 173 (174) [AIR V 17] (DB).
1933 Bom 313 (314) [AIR V 20].
1915 Lah 16 (50) [AIR V 2] (DB).
('30) 1930 Mad W N 638 (643).

[194] ('40) 44 Cal W N 11 (31).
1927 Mad 99 (108, 109) [AIR V 14] (FB).
1916 PC 242 (244) [AIR V 3] (PC).

[195] *See* 1915 Bom 50 (52, 53) [AIR V 2] (DB).
[*See also* (1890) 24 Q B D 468 (478) : 59 L J Q B 206, *Devonshire (Duke)* v. *O'Connor*. ("To my mind, it is perfectly clear that in an Act of Parliament there are not such things as brackets any more than there are such things as stops" — Per *Lord Esher, M. R.*)
(1868) L R 3 C P 511 (522) : 37 L J C P 226, *Claydon* v. *Green*.]

[196] ('87) ILR 14 Cal 365 (372) (PC). ✓
[*See also* 1931 All 154 (156) [AIR V 18] (DB). (Following I L R 14 Cal 365 and 1929 P C 69 [AIR V 16]—Practice of Indian Legislature ignored.)
1929 P C 69 (71) [AIR V 16] (PC).
1923 Rang 185 (186) [AIR V 10] (DB).]

[197] 1915 Bom 50 (53) [AIR V 2] (DB).

[198] 1915 Bom 50 (53) [AIR V 2] (DB).

[199] 1924 Mad 455 (456) [AIR V 11] (DB).

[200] (1900) ILR 22 All 270 (277) (FB).

[201] 1919 Cal 551 (563) [AIR V 6] (FB).
[See however ('98) ILR 25 Cal 239 (242). (Punctuation looked into in construing S. 424 of the Civil P. C. of 1882.)]

Preamble
Note 10

The question came again before the Privy Council in *Lewis Pugh* v. *Ashutosh Sen*,[202] a case under ARTS. 48 and 49 of the Indian Limitation Act, and it was held that a Court was *bound to read those articles without the commas inserted in the print.* This view as to the use of punctuation marks has now been followed by the High Courts of Allahabad,[203] Bombay,[204] Lahore,[205] and Calcutta in the undermentioned case.[206] In the undermentioned case,[207] however, the High Court of Calcutta has held that where it is not contended tha the punctuation is wrongly placed, there is no reason why the punctuation should not be taken as a good guide for the purpose for which it is there, namely, to understand the sense of the passage. In the undermentioned case of the Supreme Court[208] it was held that when a statute is carefully punctuated and there is doubt about its meaning, weight should undoubtedly be given to the punctuation. Punctuation may have its uses in some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text.

Proviso

A proviso is subordinate to the main enactment[209] to which it is appended either to allay unfounded fears[210] or as a condition precedent to the enforcement of the operative clause,[211] or for explaining what particular matters are not within the meaning of the enactment or for providing exceptions and qualifications for the enactment.[212]

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202. 1929 PC 69 (71) [AIR V 16] (PC).

203. 1931 All 154 (156, 157) [AIR V 18].
1933 All 521 (522) [AIR V 20].

204. 1937 Bom 39 (41) [AIR V 24].

205. 1944 Lah 353 (367) [AIR V 31] : ILR (1945) Lah 173 (FB).
1941 Lah 28 (30) [AIR V 28] (DB).

206. 1952 Cal 178 (180) (Pr 9) [AIR V 39 C 66] (SB). (Punctuation and brackets form no parts of statute even when found in the text as printed by official printer.)

207. ('36) 163 Ind Cas 573 (575) (Cal).

208. 1952 S C 369 (Pr 57) [AIR V 39] : 1953 S C R 1 (SC). (Per *Mukherjee and Das JJ.*)

209. 1918 Mad 1210 (1230) [AIR V 5] (SB).

210. ('10) 6 Ind Cas 410 (412) : ILR 37 Cal 697 (DB). (Following *West Darby Union* v. *Metropolitan Life Assurance Society*, (1897) 1897 App Cas 647.)

211. 1918 Mad 1266 (1278) [AIR V 5] (SB).
[*See* ('82) ILR 8 Cal 637 (641, 642) (DB).]

212. 1951 All 69 (72) (Pr 6) [AIR V 38 C 9] : ILR (1951) 1 All 247 (FB).
1950 Bom 45 (46) [AIR V 37 C 13] (DB). (The function of a proviso to a section is to take out of that section a part of the category to which section applies.)
1944 P C 71 (73) [AIR V 31] : ILR (1945) Mad 1 (PC).
1927 Bom 149 (150) [AIR V 14] (DB).
(1880) 5 Q B D 170 (173), *Mullins* v. *The Treasurer of the County of Surrey.*
1918 Mad 1210 (1230) [AIR V 5] (SB).
1933 Oudh 491 (500) [AIR V 20] (DB).
[But see 1915 Mad 750 (755) [AIR V 2] (DB). (A proviso is in the nature of a substantive rule and should not be treated as an exception to the proposition stated in the section.)]

A proviso merely carves out something from the section itself; it never destroys the section as a whole.[213]

A proviso should be taken together with the language of the previous portion of the enactment[214] and construed in the ordinary manner.[215] As a general rule, it must be taken to govern the main proposition of law which *immediately precedes* such proviso, unless the language of the statute shows a different intention.[216]

But in no case can a proviso *extend* or *enlarge* the operative effect of the substantive portion, unless there is an ambiguity therein.[217] Likewise, exceptions should not be enlarged in their scope more than what their words properly justify.[218]

Where there are two provisos to a section and the second is repugnant to the first, the second must prevail for it stands last in the enactment and so speaks the last intention of the makers.[219]

Explanation

An explanation added to the section does not enlarge the scope of the section.[220] Nor does it restrict its operation.[221] An explanation

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213. 1953 Bom 26 (Pr 3) [AIR V 40 C 6] : ILR (1953) Bom 406.

214. 1950 Bom 45 (46) [AIR V 37 C 13] (DB). (The proper canon of construing a section of an Act which has several provisos is to read the section and the provisos as a whole, try to reconcile them and give a meaning to the whole section along with the provisos which is comprehensive and logical.)
1914 P C 140 (144) [AIR V 1] (PC).

215. 1919 P C 31 (33) [AIR V 6] (PC).
1932 Mad 46 (52) [AIR V 19] (DB). (It is not open to Court to add words to a proviso with a view to enlarge the scope of the proviso.)
[See however ('82) ILR 8 Cal 637 (641, 642) (DB).]

216. ('84) ILR 6 All 509 (531, 540) (FB).
('10) 6 Ind Cas 410 (412) : I L R 37 Cal 697 (DB). (Two constructions possible — Proviso may be taken as a guide to choose one of the two.)

217. 1939 Cal 669 (670) [AIR V 26] (DB).
1926 Cal 927 (932) [AIR V 13] (DB).
1932 Mad 46 (52) [AIR V 19] (DB).
1930 Cal 38 (40) [AIR V 17] (DB).
('87) I L R 11 Bom 657 (658) (DB). (A saving clause cannot be looked at for the purpose of extending an enactment nor can it give a new or different effect to the previous sections of the enactment.)

218. 1944 P C 71 (73) [AIR V 31] : ILR (1945) Mad 1 (PC).
1942 Lah 243 (248) [AIR V 29] (DB).
1928 Lah 162 (163) [AIR V 15]. (Exceptions are to be taken most strongly against the party for whose benefit they are introduced.)
1932 Mad 120 (123) [AIR V 19] (DB).
1930 Mad 124 (125) [AIR V 17] (SB). (Proviso should not by implication withdraw what the main provisions have given.)

219. 1947 P C 94 (Pr 7) [AIR V 34 C 25] (PC).

220. ('53) 55 Bom L R 246 (259) (DB). (Reversed on another point in 1953 S C 252 [AIR V 40 C 62] (SC).)
1951 All 155 (167) (Pr 85) [AIR V 38 C 17] (FB).
('40) 1940 Nag L Jour 638 (645) (DB).

221. ('53) 55 Bom L R 246 (259) (DB). (An explanation is not a proviso. It does not carve out of the section something which the section has provided and deal with that part which is carved out. Reversed in 1953 S C 252 [A I RV 40 C 62] (SC) on another point.)

is ordinarily intended to apply to the whole ambit of the section and to throw light on the construction of the words used by the Legislature.[222] An explanation very often introduces a legal fiction and treats the legal fiction as a reality contained in the section itself.[223]

When any word, phrase or expression in an enactment is explained by the Legislature, the section has to be understood in the light of the explanation.[224]

The description of a provision as an explanation may not be decisive of its true meaning or interpretation which must depend upon the words used in it, but when two interpretations are put upon the provision that which fits the description as an explanation is to be adopted.[225]

Exceptions

Where, in the same section, express exceptions from the operative part of the section are found, it may be assumed, unless it otherwise appears from the language employed, that those exceptions were necessary as otherwise the subject-matter of the exceptions would have come within the operative provisions of the section.[226]

Saving clause

A saving clause is used to exempt something from immediate interference or destruction, but where the main enactment is clear, a saving clause can have no repercussion on the interpretation of the main enactment so as to exclude from its scope what clearly falls within its terms. The rule is that if the saving clause is in irreconcilable conflict with the body of the statute of which it is a part, it is ineffective or void.[227] The saving clause cannot be used to determine the construction of the Act or to give it a wider scope.[228]

Judicial precedents

Judicial precedents constitute an important guide to the proper interpretation of statutes. It is a general principle of construction of statutes that the Court should follow existing rulings so as not to upset or disturb existing and *settled* practice,[229] unless such practice is *clearly contrary* to an express enactment

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222. ('53) 55 Bom L R 246 (259) (DB). (Reversed on another point in 1953 S C 252 [AIR V 40 C 62] (SC).)

223. ('53) 55 Bom L R 246 (259) (DB). (Reversed on another point in 1953 S C 252 [AIR V 40 C 62] (SC).)

224. 1927 Mad 85 (88) [AIR V 14].

225. 1953 S C 252 (258) (Pr 14) [AIR V 40 C 62] (SC). (Provided it is consistent with the language employed.)

226. 1947 P C 200 (205, 206) [AIR V 34 C 58] : 74 Ind App 103 : I L R (1947) Bom 495 : ILR (1947) Kar (PC) 337 (PC).

227. 1951 Punj 52 (Pr 39) [AIR V 38 C 14] (FB).

228. 1951 Madh B 1 (7, 28) (Prs 21, 142) [AIR V 38 C 1] : ILR (1952) Madh B 15 (FB). (A saving clause does not give to a party any further right than he already had. Nor does it give retrospective effect to an enactment.)

229. 1952 Hyd 99 (107) (Pr 24) [AIR V 39] : I L R (1952) Hyd 245 (FB). (Decisions unchallenged for many years.)

1951 Bom 10 (13) (Pr 10) [AIR V 38 C 5] : I L R (1951) Bom 217 (FB). (The doctrine is always more important and more to be respected than any logical doctrine resulting from any particular view as to the strict law.)

1941 Mad 161 (171) [AIR V 28] (FB). (Per *Patanjali Sastri, J.*)

1940 Pat 633 (640) [AIR V 27] (SB).

or is inconsistent with it.[230] This rule is based, in the case of statutes enacting substantive law, on the ground that otherwise it would embarrass trade and commerce, affect the status of persons and unsettle many titles.[231] Though that particular ground does not apply in the case of statutes of procedure which cannot be considered to affect any rights in or titles to property,[232] it is nevertheless of great practical importance that on questions of procedure the law should be certain rather than that it should be logical[233] and that there should be uniformity of decisions.[234] The principle of *stare decisis* has been

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1939 Mad 614 (635) [AIR V 26] (DB). (Its want of logic, if any, if it has the support of the Judicial Committee, has to be mended only by resort to legislation.)
1918 All 412 (413) [AIR V 5] (DB). (Decision before an amendment of an Act — Amendment not altering the law—The decision is binding and should be followed.)
(1917) 1 K B 98 (138, 139) : 86 L J K B 467, *R.* v. *Casement*. (Long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice may perhaps be regarded as some sanction and approval of it.)
('82) I L R 8 Cal 593 (597) (FB). (Especially where the subject of interpretation is a matter of every day occurrence like the provisions of Court-fees Act.)
1924 P C 50 (55) [AIR V 11] (PC). (Particular plea not being raised in a series of cases—Irresistible conclusion is that the plea was felt to be bad.)
1952 Bom 16 (Pr 3) [AIR V 39 C 2] (DB). (Decision based on point conceded by counsel is binding — When counsel make a concession at the bar it means that the point is so clear and unarguable, that it must be taken as well settled.)
1916 P C 182 (184) [AIR V 3] (PC).
1932 All 617 (620) [AIR V 19] (FB).
('96) I L R 18 All 403 (409).
1931 Pat 241 (251) [AIR V 18] (FB).
[*See also* 1938 All 91 (94) [AIR V 25]. (When there is authority for the interpretation of some part of a statute which is susceptible of more than one interpretation authority must be followed.)]

230. 1916 P C 182 (184) [AIR V 3] (PC).
1929 Mad 53 (57) [AIR V 16] (FB).
1915 P C 127 (130) [AIR V 2] (PC).
1932 All 617 (620) [AIR V 19] (FB).
1922 All 467 (469) [AIR V 9] (FB).
1917 Bom 254 (257, 258) [AIR V 4] (FB).
1927 Mad 1043 (1051) [AIR V 14] (FB).
1925 Rang 340 (344) [AIR V 12] (FB).
1930 Sind 287 (293) [AIR V 17] (DB).
[*See* 1935 Pat 291 (301) [AIR V 22] (FB). (Principle of *cursus curiæ* or the rule of practice can only be applied when (1) the statute is ambiguous; (2) when decisions are consistent throughout and (3) when titles are dependent on those decisions.)]

231. 1941 Bom 1 (3) [AIR V 28] (DB).
1921 Cal 15 (29) [AIR V 8] (SB).
1925 Bom 12 (18) [AIR V 12] (DB).
1922 Cal 331 (333, 334) [AIR V 9] (DB).
1927 Mad 636 (639) [AIR V 14] (FB).

232. 1928 All 629 (630) [AIR V 15] (FB).
1929 Rang 41 (43) [AIR V 16] (FB). (Principle of *stare decisis* has far less applicability to law of procedure than substantive law.)

233. 1917 P C 156 (159) [AIR V 4] (PC).
('03) ILR 31 Cal 511 (513) (DB).

234. 1925 Cal 966 (969) [AIR V 12] (DB). (1915 Cal 126 [AIR V 2], Ref.)

Preamble
Note 10

accepted not only in regard to the decisions of the Courts of co-ordinate jurisdiction but also in regard to the decisions of Courts which have only a conditional authority as precedents. Even in a case where the appellate Court would be normally entitled to overrule a decision reached by a subordinate Court, it would apply the principle of *stare decisis* and not overrule the same after lapse of time, subjects acting upon that decision and the like considerations making it more expedient for the appellate Court not to unsettle the law which had been pronounced at one time and acted upon by the subjects.[235] It has been held that the principle of *stare decisis* will not apply with its usual force where the question involves no possibility of disturbance of titles but is a fiscal matter between the Government and the litigant,[236] or where there is a conflict between two Full Bench decisions of equal strength,[237] or where the result of departing from an incorrect view of law is merely this, that in dispute on subject to which the law applies, a new set of defence would be put forward in the Courts.[238]

But it is necessary that the Courts should ascertain the facts with accuracy before turning their attention to the authorities.[239] They should also bear in mind the rules that no decision can cut down the express and clear words used by the section,[240] that a decision is applicable only to the facts of that particular case[241] and that a decision

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1914 P C 87 (89) [AIR V 1] (PC).
1917 P C 156 (159) [AIR V 4] (PC).
('75) 24 Suth W R 193 (195) : 2 Ind App 219 (PC).
(1876) 3 Ch D 512 (515), *Dymond* v. *Croft*.

235. 1951 Bom 57 (67) (Pr 23) [AIR V 38 C 10] : ILR (1951) Bom 576 (DB).
[See however 1952 Nag 51 (54) (Pr 25) [AIR V 39 C 24] : ILR (1951) Nag 830 (FB). (Where Judges following the decision of a single Judge think fit to grant leave for appeal under the Letters Patent, the appellate Court cannot on the principle of *stare decisis* refuse to examine the foundation on which the Court below rested its decision. The very object of granting leave to appeal is to bring the decision under the review of an appellate Court.)]

236. 1947 Bom 259 (260) [AIR V 34 C 73] (FB).

237. 1952 Mad 419 (454) (Pr 80) [AIR V 39] : ILR (1952) Mad 835 (FB).

238. 1952 Hyd 99 (111) (Pr 40) [AIR V 39] : ILR (1952) Hyd 245 (FB). (Per *Manohar Pershad J.*)
[*See also* ('50) 28 Mys L Jour 271 (302) (FB). (Full Bench has power to overrule decisions to the contrary of Division Benches of the High Court even though they are of long standing.)]

239. (1900) 24 Bom 407 (410) (DB).
1924 P C 126 (132) [AIR V 11] (PC).
1925 Cal 845 (848) [AIR V 12] (FB).

240. 1943 Bom 141 (142) [AIR V 30].
1938 All 91 (94) [AIR V 25]. (When there is no ambiguity, dicta which might suggest that a meaning is imputed to a statute which it cannot bear must be read in connection with the facts of the case in which they are expressed.)
1917 Cal 9 (10) [AIR V 4] (DB).

241. 1952 All 942 (949) (Pr 35) [AIR V 39]: ILR (1952) 2 All 605 (FB). (Observations of Judges are not to be construed as the words of a statute — They are always to be construed with reference to the facts of the particular case in which they were made.)
1917 Cal 2 (4) [AIR V 4] (DB).

is only an authority for what it actually decides and not for every proposition that may seem to follow logically from it.[242] To use the words of Lord Halsbury in *Quinn* v. *Leathem*:[243]

> "Every judgment must be read as applicable to the particular facts proved . . . . since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

It is essential that a Court should confine its opinion to the question arising on the facts of the case and should not express hypothetical opinion which may embarrass other Judges.[244] The following circumstances tend to lessen the authority of a precedent: (a) where the question passes *sub silentio* without argument at the bar; (b) where the reasoning is defective; and (c) where its result is embarrassing or unjust.[245]

The only use of the authorities or decided cases is the establishment of some principle of law which the Judge can follow in deciding the case before him.[246] There can be no precedent on questions of fact

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1921 P C 59 (61) [AIR V 8] (PC).
1931 All 490 (493) [AIR V 18] (FB).
1929 All 593 (596) [AIR V 16] (DB). (Change of law—*Stare decisis* does not apply.)
('87) ILR 9 All 528 (555) (FB).
1924 Cal 257 (275) [AIR V 11] (FB).
1929 Lah 609 (611) [AIR V 16] (FB).
1926 Mad 1038 (1039) [AIR V 13] (FB). (Decisions under Acts not now in force serve rather as guides for interpretation than as authorities.)
('10) 5 Ind Cas 4 (8) : ILR 33 Mad 265 (FB).
1916 Low Bur 114 (123) [AIR V 3] (FB).
1940 P C 230 (234) [AIR V 27] (PC).

[242] 1952 Nag 145 (153) (Pr 43) [AIR V 39] : ILR (1952) Nag 243 (FB).
1949 Bom 17 (19) [AIR V 36 C 3] (DB).
1946 Pat 419 (423) [AIR V 33 C 142] (DB).
1943 Nag 340 (342) [AIR V 30] (FB). (Obiter has no binding force.)
1942 P C 13 (17) [AIR V 29] (PC). (An abstract proposition of law which will govern every case should not be attempted to be laid down.)
1931 All 277 (280) [AIR V 18] (FB).
1929 All 625 (630) [AIR V 16] (FB).
1932 Bom 654 (671) [AIR V 19] (DB).
1932 Mad 482 (483) [AIR V 19] (DB).
1927 Cal 657 (658) [AIR V 14] (DB).
1916 Oudh 30 (48) [AIR V 3] (DB). (Case law discussed.)
1950 Pat 309 (Pr 6) [AIR V 37 C 81] : 29 Pat 381 (DB).
[*See also* 1943 Pat 194 (205) [AIR V 30] (FB). (Principles laid down in case which make an inroad into the general principles of law and rights of ownership should not be further extended.)]

[243] (1901) 1901 App Cas 495 (506).
[*See also* discussion in (1914) 1914 App Cas 25 (40), *G. and C. Kreglinger* v. *New Patagonia Meat aud Cold Storage Co., Ltd.*]

[244] 1951 Bom 121 (Pr 1) [AIR V 38 C 23] : ILR (1951) Bom 656 (DB).

[245] 1952 Madh B 171 (173) (Pr 10) [AIR V 39] : ILR (1952) Madh B 1 (FB).

[246] 1915 All 360 (362) [AIR V 2].

and matters of discretion.[247] Nor can the *dicta* of Judges, however eminent, be cited as establishing authoritatively propositions of law unless such *dicta* form the integral part of the train of reasoning directed to the real question decided.[248] It should also be noted that in relying on decided cases in regard to the interpretation of the words of any statute, the danger of the terms of the statute being unduly extended by such reliance, the diversion of attention from what has been enacted to what has been judicially said about the enactment, is to be avoided.[249]

The rules of interpretation which apply to statutes cannot be brought into service for considering the applicability or scope of judgments of courts of law.[250]

Subject to the principles mentioned above, the following rules may be remembered:

(1879) 13 Ch D 696 (712), *In re Hallett's Estate ; Knatchbull* v. *Hallett.*
1919 Bom 40 (41) [AIR V 6] (DB). (Decision arising from the application of a rule to a set of facts is no authority for its application to another set of facts.)
1924 Cal 508 (509) [AIR V 11] (DB).
1928 Pat 304 (310) [AIR V 15] (DB).
1953 Nag 126 (127) (Pr 4) [AIR V 40 C 37] : ILR (1952) Nag 931 (DB). (Function of precedent is to supplement, to interpret, to reconcile and to develop the principles of law.)
[*See also* 1915 P C 139 (142) [AIR V 2] (PC). (The plainer a proposition, the more difficult it is to find a decision actually in point.)]

247. 1926 Rang 109 (110) [AIR V 13].
1928 Pat 316 (317) [AIR V 15] (DB).
1928 Oudh 430 (435) [AIR V 15] (DB).
1927 Bom 660 (661) [AIR V 14] (DB).
[*See also* 1941 Rang 66 (66) [AIR V 28]. (Decisions as to existence of personal law or custom not *res judicata*.)]

248. 1919 Mad 75 (86) [AIR V 6] (FB).
1941 Nag 3 (4) [AIR V 28] (DB).
1928 Cal 148 (150) [AIR V 15] (DB).
1922 Nag 1 (7) [AIR V 9] (FB).
1932 Bom 122 (124) [AIR V 19] (FB).
1929 Pat 392 (395) [AIR V 16] (DB). (It will be an abuse of precedents to apply isolated dicta to cases entirely different on facts.)
[*See* 1935 All 247 (250) [AIR V 22] (DB). (Though entitled to great weight obiter dicta of Full Bench are not binding.)]
[*See also* 1951 Pepsu 33 (38) (Pr 11) [AIR V 38 C 11] : 2 Pepsu L R 245 (FB). (Though the observations of the superior Court of the nature of an obiter dictum are entitled to great respect, strictly speaking, they do not amount to the "law laid down.")
[But see 1933 Lah 159 (160) [AIR V 20] (DB). (Obiter dicta containing reasoning.)]

249. 1938 All 91 (94) [AIR V 25].
1935 Mad 70 (71) [AIR V 22].
1921 Cal 40 (43) [AIR V 8] (SB).
1932 P C 36 (40) [AIR V 19] (PC).
[*See also* 1933 Mad 782 (784) [AIR V 20]. (Unintentional wrong interpretation which is against authorities not binding.)]

250. 1949 All 685 (690) [AIR V 36 C 257] : ILR (1951) 1 All 62 (FB).

(1) All Courts in India are bound by the decisions of the Supreme Court (See the Constitution of India, ART. 141). Before the coming into force of the Constitution of India, all Courts in India were bound by the decisions of the Federal Court[251] and the Privy Council.[252] A considered decision of the Privy Council could not be ignored as being *obiter*.[253] In the case of different views among the High Courts on any point of law, the view of the Privy Council, even if *obiter*, was to be accepted.[254]

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[251] 1951 Nag 94 (109) (Pr 121) [AIR V 38 C 22] : ILR (1951) Nag 563 (FB). (But it is open to it 'to examine the facts on which that decision rested and to discover how far the principle on which stress is laid applies to the facts' of the case it is dealing with.)

1944 Lah 33 (45) [AIR V 31] (FB). (A declaration by the Federal Court that a particular provision of law is *intra vires* the Indian Legislature is binding on the High Court although the precise point urged before it was not taken before the Federal Court and consequently there was no adjudication by the Federal Court on it : *Vide* S. 212, Government of India Act, 1935.)

[252] 1946 Lah 116 (123) [AIR V 33 C 29] : ILR (1946) Lah 692 (FB). (Although it is in conflict with a decision of the House of Lords.)

1943 Lah 295 (297) [AIR V 30]. (The decision of their Lordships of the Privy Council and of the Division Bench of the High Court are binding on a Single Bench and have to be followed in spite of the decision of the House of Lords to the contrary.)

1940 Cal 97 (101) [AIR V 27] (DB). (*Obiter dicta* binding if principle of law is laid down.)

1939 Mad 614 (635) [AIR V 26] (DB).

1925 P C 272 (279) [AIR V 12] (PC).

1931 Rang 113 (116) [AIR V 18] (FB).

1936 Lah 163 (186) [AIR V 23] (DB). (Even if there is contrary decision of its own High Court given subsequently to Privy Council decision.)

1915 Mad 833 (835) [AIR V 2] (DB). (Even if the decision is not given in an appeal from an Indian Tribunal.)

1929 Nag 98 (105) [AIR V 16] (FB).

[*See also* 1947 Lah 1 (12) [AIR V 34 C 1] : I L R (1947) Lah 449 (FB). (Even obiter remarks of their Lordships are binding.)

1940 Pat 707 (712) [AIR V 27] (DB). (It is not open to the Indian Courts to attempt to draw fine distinctions in the pronouncements of their Lordships of the Judicial Committee.)]

[See however 1947 Sind 154 (159) [AIR V 34 C 57] : I L R (1946) Kar 416. (A decision of the House of Lords is the highest authority binding on the Courts and Dominions and may therefore be preferred on a question of common law to an earlier decision of the Privy Council.)]

[253] 1940 All 544 (550) [AIR V 27] (FB).

1935 Cal 419 (442) [AIR V 22] (FB).

1915 Mad 208 (209) [AIR V 2] (DB). (Decision on mixed question of law and fact carries great weight.)

1929 Nag 211 (212) [AIR V 16] (DB).

[*See* 1931 All 162 (172) [AIR V 18] (FB). (Long course of decisions should not be departed from simply on the basis of an obiter dictum of the Privy Council.)]

[254] 1940 Lah 129 (130) [AIR V 27] (FB). (Per *Abdul Rashid, J.*, in Order of Reference.)

1926 Nag 154 (155) [AIR V 13].

[*See* 1951 Bom 57 (Pr 15) [AIR V 38 C 16] : I L R (1951) Bom 576 (DB). (A statement made by their Lordships merely on a concession made by the counsel

Where a decision of a superior Court is based upon more than one ground or supported by more than one reason, it is not open to an inferior Court which is bound to follow its decision, to treat either of the reasons given as an *obiter.*[255]

The Judicial Committee was not absolutely bound by previous decisions of the Board.[256-257]

As to the present authority of decisions of Privy Council and Federal Court, see ART. 141 NOTE 8.

(2) A Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone;[258] but a Single Judge of the High Court is bound by the decision of a Bench of two or more Judges[259] and a Bench of two or more Judges is itself

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at their Lordships' bar was not even an obiter and would not have the sanctity of an endorsement of a particular legal position by their Lordships of the Privy Council.)]

255. 1951 Nag 94 (117) (Pr 167) [AIR V 38 C 22] : I L R (1951) Nag 563 (FB). (Per *Mudholkar, J.*)

256-257. 1947 Lah 1 (12) [AIR V 34 C 1] : I L R (1947) Lah 449 (FB).
1940 Mad 356 (362) [AIR V 27] (FB).
1921 Cal 169 (171) [AIR V 8] (DB).
1946 P C 88 (90, 91) [AIR V 33 C 31] (PC). (But Board would seldom depart from decision of old standing on constitutional questions.)

258. 1945 Bom 173 (176) [AIR V 32] : I L R (1945) Bom 702. (A Court of law should usually follow a prior decision of a Court of co-ordinate jurisdiction, and a Judge of the High Court as a matter of practice follows the decision of another Judge of the same Court. But the only thing in a Judge's decision binding as an authority on a subsequent Judge is the principle upon which the case was decided. Therefore it is open to a subsequent Judge to dissent from the prior decision and in effect reverse the same, though it is the decision of a Court of co-ordinate jurisdiction, if he considers that the principle on which the prior decision was based was not the right principle, and that the true principle was quite the contrary.)
[*See also* 1951 Raj 61 (Pr 2) [AIR V 38 C 24] (DB). (Single Judge in revision taking view favourable to accused and acquitting them—Another Single Judge dealing with different accused in another set of facts should normally take same view unless he finds it is not possible to do so.)
('52) 1952 Lab A C 198 (202) (Cal). (A Judge can hold an opinion different from that held by him in a previous decision, if he gives sufficient reasons for holding the contrary view.)]
[But see 1945 Bom 110 (113) [AIR V 32].]

259. 1952 Madh B 171 (172, 173) (Prs 7, 8) [AIR V 39] : I L R (1952) Madh B 1 (FB).
1940 Cal 584 (584) [AIR V 27]. (Single Judge disagreeing with Division Bench decision must refer case to Division Bench.)
1943 Lah 295 (297) [AIR V 30]. (Division Bench decision binding on Single Judge of High Court in spite of decision of House of Lords to contrary.)
('40) 42 Pun L R 101 (102). (A Taxing Judge is bound to follow the law as laid down by a Division Bench of the High Court.)
1925 Mad 441 (442) [AIR V 12].
1933 Pat 38 (39) [AIR V 20] (DB). (Even if contrary to his view.)
1936 All 555 (556) [AIR V 23] (DB). (Single Judge can entertain doubt but must follow Full Bench ruling.)
1932 All 188 (189) [AIR V 19].

bound by the decisions of the Full Bench of the same High Court until they are overruled by the Privy Council (now, the Supreme Court) or by another Full Bench.[260] So far as Full Bench decisions are concerned in India, the practice is that till a superior Court sanctions one as a good law and overrules the other, the High Court concerned and the inferior Courts under the High Court are bound by the later ruling of a Full Bench consisting of more Judges.[261] A decision of a Division Bench is also binding on other Division Benches of the same High Court.[262] When a Division Bench disagrees with the decision of another Division Bench it is its duty to refer the matter to a Full Bench and it cannot

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1929 Cal 572 (574) [A I R V 16] (D B). (Single Judge if he cannot follow the decision of a Bench should send the case before a Bench and not decide it himself.)
1932 Mad 693 (694) [AIR V 19].
('91) I L R 14 Mad 186 (191).
1934 Sind 95 (95) [AIR V 21].
[*See* 1933 Pat 81 (83) [AIR V 20]. (Obiter dictum of Division Bench must be treated with respect.)]
[See however ('83) I L R 9 Cal 604 (607). (Decision of Appellate Bench though not binding should receive respectful consideration by a single Judge on original side.)
1929 All 896 (896) [AIR V 16]. (Obvious error in a Bench decision.)]
[But see 1924 Cal 733 (738) [AIR V 11]. (Judge on original side not bound by Division Bench on appellate side.)]

260. 1952 Madh B 171 (172. 173) (Prs 7, 8) [AIR V 39] : I L R (1952) Madh B 1 (FB).
('07) I L R 34 Cal 735 (741) (DB).
1932 All 293 (303) [AIR V 19] (FB).
1927 All 244 (244) [AIR V 14] (DB).
1921 Oudh 217 (219) [AIR V 8]. (Considered dictum of Full Bench should not be ignored as being obiter.)
[*See* 1918 Cal 952 (957) [AIR V 5] (DB).
1941 Bom 408 (409) [AIR V 28] (DB). (*Quære* : Whether a later Full Bench of a High Court can overrule an earlier Full Bench merely because the later Bench consists of more Judges than the earlier.)]
[See however 1953 Hyd 105 (110) (Pr 9) [AIR V 40 C 40] : I L R (1953) Hyd 1 (FB). (*Obiter dicta* of previous Full Bench is not binding in subsequent Full Bench though the latter be a smaller Bench.)
1932 All 149 (150) [AIR V 19]. (Decisions of Board of Revenue not binding on High Court.)]

261. 1952 Madh B 171 (172, 173) (Prs 7, 8) [AIR V 39) : I L R (1952) Madh B 1 (FB).

262. 1947 Lah 13 (15) [AIR V 34 C 2] : I L R (1947) Lah 417 (FB).
1943 Nag 340 (342, 343) [A I R V 30) (FB). (1940 Mad 356 [A I R V 27] (FB), Foll.)
1938 Pat 613 (616) [AIR V 25] (DB). (If a Division Bench does not agree with another Division Bench it should refer the matter to a larger Bench.)
1940 Mad 356 (362) [A I R V 29] (F B). (If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench.)
1935 Rang 370 (375) [AIR V 22] (FB).
[See however 1928 Bom 130 (133) [AIR V 15] (DB). (Practice of Bombay High Court is that no Bench has power to bind all other Benches as to the practice to be adopted in cases coming before them.)]

simply ignore the earlier decision.[263] But when there is a decision of the Judicial Committee or the Supreme Court on the point the previous Division Bench ruling need not be acted upon and the point need not be referred to a Full Bench.[264] As to whether, when a Bench differs from the decision of a Full Bench, it has got the power to refer the Full Bench decision to a fuller Bench itself or to refer the matter to the Chief Justice who is to consider if a fuller Bench should consider the question, see the undermentioned case.[265]

The fact that a Full Bench decision of four Judges has not been accepted by another Full Bench of four Judges does not certainly show that the former has ceased to be and that the latter has, in its place, become binding authority on the point. If there are two conflicting Full Bench decisions of equal strength on any point, it is necessary that the conflict should be submitted to fuller Bench for determination in any case in which the question on which the conflict exists does arise for decision. If this course is not adopted, Courts subordinate to the High Court are left without guidance as to which Full Bench ruling to follow and which to reject.[266]

When specific questions of law are referred to a Full Bench for decision, the Full Bench is bound to give its verdict on those questions, irrespective of any consideration as to whether the questions are separately and independently referred or whether the questions are referred along with the case which gave rise to the order of reference. Where the case is also referred, the Full Bench will have to decide the case in the light of the answers to the questions referred and on a consideration of the evidence on record. Even if the question of law referred to the Full Bench for decision does not strictly arise from the facts of the case, the decision of the Full Bench on those questions can never be relegated to the position of *obiter dicta*. On the other hand, the decision will have to be accepted as the authoritative ruling of the Full Bench on the questions which it was expressly called upon to decide.[267]

Even though five Judges constitute a Special Bench, the case only has the authority of a Division Bench decision. It cannot be regarded as a decision of a Full Bench.[268]

(2a) However interesting and even important certain questions may be, the time of the Judges should not be occupied in debating them if in the end the matter might prove academic. Before, therefore, any reference can be made to a Full Bench, the referring Judges must make certain that the reference will not in the result prove to have been unnecessary.[269]

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[263] See cases under foot-note 262.

[264] 1943 Cal 114 (118) [AIR V 30].

[265] 1932 Mad 612 (614 & 647) [AIR V 19] (FB).

[266] 1952 Mad 419 (453) (Pr 80) [AIR V 39] : I L R (1952) Mad 835 (FB). (Per *Raghava Rao J.*: Rule of *stare decisis* does not bear application in such situation.)

[267] 1953 Trav-Co 77 (81, 85, 87) (Prs 19, 33, 39) [AIR V 40 C 27] : ILR (1952) Trav-Co 784 (FB). (Per Majority, *Subramania Iyer, J.* contra.)

[268] 1951 Cal 133 (135) (Pr 18) [AIR V 38 C 30F] : 52 Cri L Jour 1226 (FB).

(3) Subordinate Courts[270] are bound to follow the rulings of the High Court to which they are subordinate,[271] and in the absence of such rulings, they should follow the rulings, if any, of the other High Courts.[272] If there are two decisions of a High Court, one of a single Judge and another of a Bench of two Judges, then, unless the subordinate Court finds some grounds for distinguishing one from the other, it is bound to follow the decision of the Bench.[273] A precedent overruled is definitely and formally deprived of all authority. It becomes null and void.[274]

(3a) A decision of the late Judicial Commissioner's Court of Oudh was not binding on the Chief Court of Oudh.[275] A decision of the late Chief Court of Lower Burma was not binding on the High Court of Rangoon.[276] A decision of the late Court of Jodhpur is not binding on

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269. 1944 Nag 105 (105) [AIR V 31] (FB).

270. For definition of subordinate Courts, see Civil P. C., 1908, S. 3.

271. 1946 All 509 (511) [AIR V 33 C 136] : I L R (1946) All 605 (DB). (Even if all the relevant reasons in support of or against the view taken by the higher Court are not discussed or mentioned in the judgment or the actual decision is based upon a reason which does not appeal to the subordinate Courts.)
1945 Pat 132 (133) [AIR V 32] (DB).
1944 Lah 54 (55) [AIR V 31]. (But the Judge of a Subordinate Court is free to submit his point of view.)
1943 Mad 471 (473) [AIR V 30] (DB). (A Judge may express his contrary opinion —Fact that some argument was overlooked in the judgment binding on him is immaterial.)

272. 1915 P C 15 (17) [AIR V 2] (PC).
1930 All 573 (575) [AIR V 17] (DB).
1923 All 392 (393) [AIR V 10] (FB).
1936 Bom 59 (59) [AIR V 23] (FB).
('92) I L R 17 Bom 555 (558) (DB).
('98) I L R 25 Cal 488 (491) (SB).
('84) I L R 10 Cal 82 (84) (DB).
1936 Lah 612 (615) [AIR V 23].
1931 Mad 71 (72) [AIR V 18] (DB).
1925 Mad 261 (262) [AIR V 12] (DB).
1929 Nag 156 (158) [AIR V 16].
1919 Pat 293 (296) [AIR V 6] (DB).
1932 Pat 346 (347) [AIR V 19] (DB). (Subordinate Courts should follow a single Judge's decision of their own High Court in preference to Bench decision of another High Court.)

273. 1931 Mad 71 (72) [AIR V 18] (DB).

274. 1953 Nag 126 (127) (Pr 5) [A I R V 40 C 37] : I L R (1952) Nag 931 (DB). (Where the trial Court came to a particular decision relying on a case which, before the matter was finally decided in second appeal, was overruled by a Full Bench decision: *Held* that the second appellate Court was bound to follow the overruling decision.)

275. 1927 Oudh 1 (2) [AIR V 14] (DB). (NOTE : The Oudh Court has now been amalgamated with the Allahabad High Court.)
[*See also* 1927 Sind 225 (226) [AIR V 14] (DB). (Single Judge judgments of Sind Sadar Court though entitled to every respect were in no way binding on the Sind Judicial Commissioner's Court.)]

276. 1927 Rang 4 (5) [AIR V 14] (FB). (The Chief Court cannot be held to be a Court of co-ordinate jurisdiction with the High Court—The decisions however, the High Court of Rajasthan.[277] So also, a decision of the former Travancore High Court has no force as a binding precedent so far as the present Travancore-Cochin High Court is concerned.[278] Similarly, the Madhya Bharat High Court cannot be looked upon as successor to Indore High Court or any High Court of any of the Covenanting States and their decisions are not binding on the Madhya Bharat High Court or the Courts subordinate to it.[279] The reason is that the former is not a Court of co-ordinate jurisdiction with the latter.

(4) Where there are conflicting rulings both binding on the Court and they cannot be reconciled, the authority which is at once the more recent and more consistent with general principles and equity should prevail.[280]

(5) In a matter in which there is a conflict of decisions among various High Courts, the High Court should follow its own *cursus curiae* unless it is of opinion that the previous decisions of the Court are clearly wrong.[281]

(6) Section 3, Law Reports Act, enacts that no Court is bound to treat as authority any unauthorised report quoted before it.[282] But the

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of the Chief Court are to be given highest value (Per F. B., *Cunliffe J.*, dissenting).)

277. 1952 Raj 7 (Pr 5) [AIR V 39 C 5] : ILR (1951) 1 Raj 297 (FB). (Late Chief Court of Jodhpur was not a Court of record while the present Rajasthan High Court is one.)

278. 1953 Trav Co 1 (Pr 24) [AIR V 40 C 1] : ILR (1952) Trav-Co 558 (FB).

279. 1952 Madh B 171 (173, 174) (Prs 12, 13, 14) [A I R V 39] : I L R (1952) Madh B 1 (FB). (*Held* that 1950 Madh B 31 [AIR V 37 C 17] : 1 Madh B L R 81 (FB), should be disregarded.)

280. (1880) 5 App Cas 787 (798), *Campbell* v. *Campbell*. (Referred to in 9 Ind Cas 173 (Mad) (FB).)

('11) 9 Ind Cas 173 (176) (FB) (Mad). (But as far as possible the authority of all former decisions ought to be supported and later decisions must, whenever possible, be treated as interpreting and limiting the application of the earlier cases.)

281. 1941 Mad 161 (171) [AIR V 28] (FB). (Question merely one of procedure, *cursus curiæ* for over 50 years will not be upset (Per *Patanjali Sastri J.*).)

1939 Mad 369 (370) [AIR V 26] (SB).

('83) ILR 9 Cal 82 (87) (FB). (Especially where the measure relates to some technical or fiscal rule such as the registration of documents.)

1933 All 634 (638) [AIR V 20] : ILR 55 All 743 (DB).

1928 Pat 641 (649) [AIR V 15] (DB). (Patna High Court will follow the *cursus curiæ* established by the Calcutta High Court.)

1927 Rang 4 (14) [AIR V 14] (FB). (Rangoon High Court not bound to follow the decisions of the Lower Burma Chief Court — But Subordinate Courts are bound by authorized reports of Chief Court.)

1928 Sind 166 (167) [AIR V 15] (DB). (Bombay decisions are considered by the Sind Courts as of more authority than those of other High Courts.)

1924 Sind 75 (83) [AIR V 11] (FB). (Do.)

[*See* 1945 Pat 153 (154) [AIR V 32] : ILR 23 Pat 862 (DB). (Patna High Court will ordinarily follow *cursus curiæ* of Calcutta High Court.)]

282. 1934 Rang 39 (40) [AIR V 21].

1932 Nag 137 (138) [AIR V 19].

1931 Rang 279 (280) [AIR V 18]. (Two decisions of the High Court — One in official report, the other in unauthorized report — Subordinate Court can follow officially reported cases.)

Judges, in exercising their discretion under this section, would generally have regard to the practice prevailing in their Courts with regard to the particular report quoted before them.[283] The Law Reports Act has no application to a decision of the Privy Council and therefore the Courts are at liberty to refer to an unauthorized report of the decision of the Privy Council.[284] It must be noted, however, that it is the decision which establishes the precedent and the report but serves as evidence of it. Hence, an unreported case may be cited as an authority if the actual decision can be shown from the original sources.[285]

(7) Where the authorities have laid down a rule, it is not always necessary to discover the original basis of it.[286]

(8) In the interpretation of the All-India statute, the considered opinion of another High Court should, as far as possible, be followed unless the Court cannot conscientiously accept that view.[287]

English and American decisions

English and American decisions are not precedents and are not binding as authority upon Courts in India not administering English law,[288] and where the law in India has been codified it is not open to

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283. ('48) I L R (1948) Nag 565 (567). (Per *Mangalmurti J.*, in Order of Reference : According to R. 9 (2) (b) of the Rules of the High Court of Judicature at Nagpur, there is no difference in the decisions reported in C. P. L. Reports, N. L. Reports, and I. L. Reports (Nagpur Series) so far as their authority is concerned. The reporting of a ruling in an official report does not give it greater authority than it had before.)

1931 Mad 71 (72) [AIR V 18] (DB).

1930 Bom 320 (326) [AIR V 17] (DB).

See also the following cases :

1932 Cal 550 (551) [AIR V 19] (DB). (Bench decision in unauthorized report preferred to single Judge's decision in authorized report.)

1930 Oudh 57 (58) [AIR V 17] (DB).

1933 Rang 75 (76) [AIR V 20]. (Courts should fall back on unofficially reported cases only when they can find no officially reported case on the point.)

284. 1926 Mad 20 (23) [AIR V 13] (DB). (Per *Devadoss J.*)

285. 1944 Nag 44 (46) [AIR V 31] (FB). (A single Judge of the High Court is bound by the decision of the Division Bench, even though the decision is not reported—Per *Bose J.* : All that the Law Reports Act does is to ensure that Judges who have no access to the decisions themselves shall be provided with accurate copies of them.)

286. 1928 All 596 (598) [AIR V 15] (FB).

287. 1945 Bom 258 (263) [AIR V 32] : ILR (1945) Bom 528 (DB).

288. 1952 Hyd 58 (61)(Pr 8)[AIRV 39 C 35]: ILR (1952) Hyd 95 (FB). (It would be dangerous to apply the decision of an English Court construing an English Act of Parliament not in *pari materia* with the Indian statute and not even forming the foundation of those statutes and allow it to prevail over Indian decisions interpreting very similar enactments.)

1945 All 318 (319) [AIR V 32]. (Although they are entitled to great weight.)

1945 Nag 8 (19) [AIR V 32] : ILR (1945) Nag 6 (DB).

1942 All 302 (307) [AIR V 29] (DB).

1941 Mad 713 (718) [AIR V 28] (DB).

1941 Nag 282 (284) [AIR V 28].

1939 Pat 323 (329) [AIR V 26] (SB). (Per *Manohar Lal, J.*)

1918 P C 11 (20) [AIR V 5] (PC).

the Courts in India to ignore the enacted law and follow the English law, simply because in certain cases the enforcement of such statute law might create hardship.[289] But, if an Indian Act is silent on any question or there is ambiguity, it may be necessary to apply English principles.[290]

('83) ILR 7 Bom 341 (359) (FB). (English decisions only afford useful analogies.)
1932 P C 207 (211) [AIR V 19] (PC).
1924 P C 40 (41) [AIR V 11] (PC).
1933 All 366 (368) [AIR V 20] (DB). (Companies Act, 1913.)
1923 Bom 321 (350) [AIR V 10] (FB). (English judgments are in no better position than the opinion of eminent jurists.)
1924 Cal 864 (867) [AIR V 11] (DB).
(1900) ILR 28 Cal 171 (175) (DB).
1924 Lah 513 (522, 524) [AIR V 11] (FB).
1927 Mad 988 (290) [AIR V 14] (DB). (American decisions.)
1920 Mad 427 (432) [AIR V 7] (FB). (Following American decisions deprecated.)
('13) 19 Ind Cas 12 (16) : ILR 36 Mad 544 (FB). (English cases are no precedents but may be referred to as explanatory of Indian statutes which are usually based on those decisions.)
1927 Rang 183 (186) [AIR V 14] (DB). (1918 P C 11 [AIR V 5] (PC) referred to.)
1927 Sind 130 (131) [AIR V 14] (FB).
[*See* ('95) ILR 18 Mad 88 (91). (English law referred to.)
1937 Sind 129 (144) [AIR V 24] (FB). (Decisions on expressions used in an English Act are hardly a guide in the interpretation of similar words used in an Indian Act.)]

[289] 1947 P C 82 (84) (Pr 8) [AIR V 34 C 20] : I L R (1947) Bom 110 : 74 Ind App 89 : ILR (1947) Kar (PC) 113 : 48 Cri L Jour 791 (PC).
1947 Bom 38 (40) [AIR V 34 C 10] : 48 Cri L Jour 168 (SB). (Unless there is a corresponding statute in England.)
1941 Bom 339 (344) [AIR V 28].
1941 Pat 70 (83) [AIR V 28] (DB).
1940 Cal 429 (431, 432) [AIR V 27].
1936 Cal 356 (367) [AIR V 23] (FB).
1930 Cal 731 (734) [AIR V 17] (DB). (When the case is not one of legislative omission, the Court cannot take recourse to English authorities for determining the intention of the Legislature.)
1930 Mad 441 (442) [AIR V 17] (DB). (When words clearly express intention of Legislature.)
('99) ILR 22 All 149 (159) : 27 Ind App 58 (PC).
1931 All 183 (185) [AIR V 18] (FB).
1932 P C 207 (211) [AIR V 19] (PC).
1931 P C 79 (82) [AIR V 18] (PC).
1932 Bom 291 (294) [AIR V 19] (DB). (At the most English case may assist by way of analogy.)
1929 Lah 344 (354) [AIR V 16] (FB).
1935 Mad 528 (532) [AIR V 22] (FB). (When terms of section are clear.)
1938 Nag 540 (543) [AIR V 25].
1932 Oudh 1 (4) [AIR V 19] (DB). (Questions regarding acknowledgment in Limitation Act.)
1931 Rang 235 (243) [AIR V 18] (SB).
[*See* 1933 P C 145 (147) [AIR V 20] (PC). (Application of decisions on Imperial Income-tax Code is misleading.)]
[*See also* 1931 P C 165 (170) [AIR V 18] (PC).
('08) ILR 35 Cal 34 (48, 58, 59) (FB). (Per *Mookerjee, J.*—Such rules cannot be disregarded especially where the plain construction of the statute leads to manifest injustice.)]

[290] 1937 Rang 302 (307) [AIR V 24] (DB).

They may, however, be referred to with advantage as affording analogies in the following cases:

(1) Where an Indian statute has been passed in the *same terms* and on the *same lines* as those of an English statute and the latter has been authoritatively construed by English decisions.[291] But where the terms of a section in an Indian Act are taken from the English law, such section should be construed strictly in relation to the immediate context of the Indian Act, and the Court should decline to be guided by evidence as to their meaning or judicial interpretations of them when they occur in another context or other statutes.[292]

(2) Where an English or American decision is based upon *general legal principles* recognised by the laws of civilised countries.[293] But it must be applied with reference to Indian conditions,[294] and where the

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[291] 1947 Bom 38 (40) [AIR V 34 C 10] : 48 Cri L Jour 168 (SB).
1941 Mad 535 (537) [A I R V 28] (SB). (Income-tax Act — English decisions applicable.)
1941 Pat 151 (152) [AIR V 28] (DB).
1935 Lah 570 (572)[AIR V 22](FB). (Same expressions as used in the Indian Acts.)
1931 Lah 578 (581) [AIR V 18] (FB).
('03) ILR 30 Cal 36 (76) (DB).
('01) 11 Mad L Jour 91 (108) (DB).
('75) 2 Ind App 169 (181) : 23 Suth W R 314 (PC).
1933 All 789 (793) [AIR V 20] (FB).
1930 Mad 609 (615) [AIR V 17] (DB).
1933 Pat 461 (463) [AIR V 20] (DB).

[292] 1922 Mad 263 (265) [AIR V 9] (DB). (Per *Coutts-Trotter, J.*)
1951 S C 454 (Pr 9) [AIR V 38 C 59] : 1952 S C R 1 (SC). (English decisions under the Finance Act are not always helpful in dealing with matters arising under Indian Income-tax Statutes — Analogies and inferences drawn from them are at times misleading.)

[293] ('87) ILR 11 Bom 551 (561) : 14 Ind App 89 (PC).
1942 All 302 (307) [AIR V 29] (DB).
1941 Mad 129 (145) [AIR V 28] (DB).
1942 Pat 104 (106) [AIR V 9] (DB). (Principles of justice, equity and good conscience for instance should be identical with corresponding relevant rules on the Common Law of England.)
('74) 22 Suth W R 279 (281) : 1 Ind App 364 (PC).
('83) ILR 7 Bom 341 (359) (FB).
[*See* 1936 Rang 141 (142) [AIR V 23] (DB). (Decision of Court of law as opposed to Court of equity and which is inequitable should not be followed in India.)
('89) ILR 16 Cal 677 (682) : 16 Ind App 44 (PC).
1951 Bom 105 (Pr 9) [AIR V 38 C 22] : I L R (1951) Bom 318 : 52 Cri L Jour 779 (DB). (Even though the decisions of the English Courts are not binding, they are of weight, especially when they deal with questions of general principle in regard to which the law could not possibly be different in England and India.)]
[*See also* 1937 Sind 129 (144) [AIR V 24] (FB). (Drafting inaccurate.)]

[294] 1928 Mad 23 (23) [AIR V 15] (DB).
1932 Mad 445 (452) [AIR V 19] (DB).
1930 Lah 920 (926) [AIR V 17] (DB).
1925 Oudh 337 (346) [AIR V 12] (DB).
[*See* ('85) ILR 11 Cal 301 (310) : 12 Ind App 23 (PC). (There is no room in India for the rule of English law in favour of a tenancy in common; the presumption is generally the reverse.)]
[*See also* 1932 Rang 27 (34, 49) [AIR V 19].]

law of this country is different from that of England or America, English or American decisions should be quoted with greatest care.[295] It has been held that on a question of Common Law a decision of the House of Lords is to be preferred to an earlier decision of the Privy Council.[296]

(3) Where the point is a novel one and there is no precedent in India dealing with it.[297]

(4) Where the Indian Act makes express reference to the Court in England and to the principles and rules on which such Court acts.[298]

See also the undermentioned cases.[299]

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[295] 1942 Bom 18 (19) [AIR V 29] (FB).
1938 Rang 289 (289) [AIR V 25] (DB).
1938 Sind 116 (121) [AIR V 25] (DB).
1933 Mad 293 (296) [AIR V 20] (DB).
12) 16 Ind Cas 601 (606) (DB) (Mad). (Great care to be taken in applying to India, English rules with regard to equitable rights.)
[*See* 1942 All 344 (347) [AIR V 29] (DB).
1935 Cal 316 (327) [AIR V 22] (DB). (Provisions of statutory enactments must always and necessarily be somewhat less elastic than those to be gathered from the Common Law which in effect is enshrined in judgments in decided cases. Courts have to administer and to apply as accurately as lies in their powers the precise words of the relevant statutory enactments.)]
[*See also* 1951 All 736 (739) (Prs 22, 23) [AIR V 38 C 193] : ILR (1952) 1 All 825 (FB). (It is dangerous to apply the decision of an English Court construing an English Act of Parliament not in *pari materia* with the Indian Statute and not even forming the foundation of those statutes, and allow it to prevail over Indian decisions interpreting very similar enactments : 1932 P C 207 [AIR V 19] (PC), Rel. on.)]

[296] 1947 Sind 154 (159) [AIR V 34 C 57] : ILR (1946) Kar 416.
[*See also* 1948 Sind 100 (Pr 4) [AIR V 35 C 30] : ILR (1947) Kar 253 (FB). (But strictly speaking, a decision of the House of Lords cannot be said to be "binding" on any Indian Court, though there can be no question about the House of Lords being "the supreme tribunal to settle English Law," and about all Courts, which are bound to follow the English Law, being bound by the decisions of the House of Lords.)]

[297] 1935 Cal 33 (34) [AIR V 22].

[298] 1931 P C 234 (239) [AIR V 18] (PC).
('94) ILR 19 Bom 293 (296). (English rules applied where no provision for payment of wife's costs is found in the Divorce Act.)
('02) ILR 29 Cal 619 (620). (Do.)
'82) ILR 6 Bom 416 (419). (Absence of provisions in Divorce Act—English rules applied.)
'79) ILR 4 Cal 260 (269, 281). (Do.)

[299] 1943 P C 34 (38) [AIR V 30] (PC). (Though the Indian Act is to be interpreted according to the meaning of the words used in it, passages from English decisions laying down general principles can be referred to in interpreting the sections of the Indian Act when the meaning is not clear.)
1936 Lah 337 (338) [AIR V 23] (DB). (It may be permissible to refer to the principles of English law, if there is any ambiguity in the language used by the statute, and to adopt the interpretation which is in conformity with those principles.)

PART I

THE UNION AND ITS TERRITORY

Name and territory of the Union.

1. *(1)* India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

(3) The territory of India shall comprise —

(a) the territories of the States;

(b) the territories specified in Part D of the First Schedule; and

(c) such other territories as may be acquired.

JAMMU AND KASHMIR

For temporary provisions with respect to the State of Jammu and Kashmir, see ART. 370 (1). In exercise of the powers conferred by that article, the President has made the Constitution (Application to Jammu and Kashmir) Order, 1950. Clause 3 of that Order is as follows:

> "3. In addition to the provisions of ART. 1 and ART. 370 of the Constitution, the only other provisions of the Constitution which shall apply in relation to the State of Jammu and Kashmir shall be those specified in the Second Schedule to this Order, and shall so apply subject to the exceptions and modifications specified in the said Schedule."

These exceptions and modifications are indicated under the respective articles.

COGNATE PROVISIONS

Part A States. — Andhra, Assam, Bihar, Bombay, Madhya Pradesh, Madras, Orissa, Punjab, Uttar Pradesh and West Bengal.

Part B States. — Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

Part C States. — Ajmer, Bhopal, Bilaspur, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura, Vindhya Pradesh.

Part D. — The Andaman and Nicobar Islands.

Cooch-Bihar was originally a Part C State. This has now merged into West Bengal and has ceased to be a separate State. See Constitution (Amendment of the First and Fourth Schedules) Order, 1950.

Synopsis

1. Scope of the article.
2. "India, that is Bharat."
3. Union of States.
4. Part A, Part B and Part C States.
5. Jammu and Kashmir.
6. The territory of India.
7. "Such other territories as may be acquired"—Cl. (c).

Article 1
Notes 1–3

1. Scope of the article. — The Preamble to the Constitution declares the resolution of the people of India to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC. This article states what is to be the *form* of this Republic. The article also declares the *name* of the Republic and what shall be its territory.

Articles 2, 3 and 4 provide for the admission of new States into the Indian Union, for changing the areas and boundaries of existing States and for the formation of new States.

2. "India, that is Bharat." — There was a controversy as to what should be the name of the Union. This controversy was finally compromised on the basis that the English text should contain the words "INDIA, that is BHARAT" and that in the Hindi and other Indian language texts, the name BHARAT should come first and INDIA afterwards.

In this connection it may be noted that Pakistan propagandists opposed the use of the name "India" after partition. But the United Nations recognised that in spite of the separation of a part and its formation into another State, India would continue as the same country for international purposes.

3. Union of States. — The word UNION has been taken from the Preamble to the British North America Act, 1867. The word "Union" has also been used in the Preamble to the Constitution of the United States of America. It may be noted that the word 'federation' or 'confederation' has not been used, in this Constitution.

The expression "Union of States" indicates that the Constitution is a federation. But it is not a federation based on an agreement among the units and the component units cannot secede from it. As the Preamble to the Constitution makes it clear, the Constitution is a creation of the people of India and not of the States, the States, themselves, being the creation of the people of India. In this connection the position of the States under the Constitution of the United States of America may be referred to. Under that Constitution, the States have an *independent* existence. In the *County of Lane* v. *The State of Oregon*,[1] the Supreme Court of America observed :

> "The people of the United States constitute one nation, under one Government, and this Government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own Government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States."

It may be noted in this connection that originally India had a unitary Constitution under which the Provincial Governments were

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Article 1 — Note 3

[1] (1868) 7 Wall 71 (76) : 19 Law Ed 101 (104).
[*See also* (1798) 1 Law Ed 648 (649) : 3 Dall 386, *Calder* v. *Bull*.]

practically the agents of the Central Government. Under the Government of India Act, 1935, a federal system was established. But though the part relating to Provincial autonomy was given effect to, the Federation did not come into existence. In spite of the grant of Provincial autonomy the Provinces under the Government of India Act, 1935, were not sovereign States and they had no voice in the formation of the Union under this Constitution.

Thus, the Union of India under the Constitution is not based on *agreement* among the States which are the component parts of the Union.

The other features of this Union may be summarised as follows :

Unlike under the federal system contemplated by the Government of India Act, 1935, there is a uniform political system for the whole country. There is no distinction in essential principles between the political system applicable to what were formerly British Indian Provinces and Indian States.

As already noticed, the Constitution has been framed *by* the people of India *for* the people of India. The component Units, namely, the States (or what were previously the Provinces and the Indian States) had, as such, no voice in the framing of the Constitution. In fact, the Constitution contains provisions both as to the Union as well as the component States.

Consistently with the above features of the Constitution, it may be noted that the Constitution recognises only one form of citizenship for the whole country and not a double citizenship, one for the States and the other for the Union, as under the American Constitution.

The national character of the Constitution is also emphasised by the fact that the Executive of the Union is empowered to give such directions to a State as may appear to it to be necessary for that purpose. (ART. 257). Similarly, under ART. 258 there is provision for delegation to the State of the executive power of the Union. The *residuary* legislative power is vested in the Union (ART. 248) as under the *Canadian* Constitution and unlike under the Constitution of the United States.[2] There are similar provisions spread all over the Constitution. There is provision even for supersession of the State authority by the Central power in certain cases. (See for example ARTS. 356 and 365). Reference may also be made to ARTS. 2 and 3 which empower the Union Parliament to admit or establish new States and also to make changes with regard to the area, boundaries, etc. of the existing States. It may also be noted that there is no equality of representation of the States in the Council of States.

At the same time, the component States are not mere *administrative units* acting as agents to the Central Government. In this connection, the observations of Lord Watson in *Maritim Bank of*

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[2] (1914) 1914 App Cas 237 (253) : 83 L J P C 154 (PC), *A. G. for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.*
(1798) 1 Law Ed. 648 (649) : 3 Dall 386, *Calder* v. *Bull.*

Article 1
Note 3

Canada v. *New Brunswick*[3] in regard to the position of the Provinces under the British North America Act, 1867, may be quoted:

> "The object of the Act was neither to weld the provinces into one, nor to subordinate provincial Governments to a Central authority, but to create a federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy."

These observations may be taken as fairly descriptive of the position of States under the Indian Constitution also.

Thus, the Constitution combines the features of a federation as well as a unitary system. In fact, the desire of the makers of the Constitution to establish a strong Central authority is evident throughout. In times of emergency, the federal Government can be made into a unitary one.

"State," "Union," "Federation,"—Meaning

The word "State" is used in different senses, for example:—(i) the people or community of individuals, united more or less closely in political relations, inhabiting the same country; (ii) the country or territorial region inhabited by such a community; (iii) the Government under which the people live; (iv) the combined idea of people, territory and Government.[4] The meaning of "State" and "Union of States" was given in the following words by Chief Justice Chase of the Supreme Court of America in *Texas* v. *White*:[5]

> "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a Government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it one people and one country."

In Salmond's JURISPRUDENCE,[6] "States" are classified as follows:

> "States are of two kinds, being either *unitary or composite*. A unitary or simple State is one which is not made up of territorial divisions which are States themselves. A composite State, on the other hand, is one which is itself an aggregate or group of constituent States; that is to say, of territorial groups performing separately all the functions of a State, as defined, subject to their ties to a larger group; so that if that tie were severed these organisations could perform all the functions independently, as is the position of the separate States of the American Union.

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[3] (1892) 1892 App Cas 437 (441, 442) : 61 L J P C 75 (PC).

[4] (1869) 19 Law Ed 227 (236) : 7 Wall 700, *Texas* v. *White*.

[5] (1869) 19 Law Ed. 227 (236) : 7 Wall 700.

[6] Salmond's Jurisprudence, 9th Edition, 1937, p. 191.

"Such composite States can be classed as imperial, federal or confederate according to whether in legal theory there exists a Central Government from which the authority of all the others is derived, as was the case of the British Empire before the Statute of Westminster III at least, and of the Mogul Empire in India to a large extent earlier, or in legal theory the separate parts have complete independence within their own sphere, not derived from central authority, but as regards all outside powers are completely parts of the larger whole, and have no power of separating from it, as is the case of the United States, or the separate parts, although permanently united, have not only complete and underived independence internally, but also independent existence as regards the outside world, and theoretically and practically authority to terminate the union, as was the case of the States composing the old Holy Roman Empire of the German nation—parts of which were recognised as having authority even to make war on the others, although theoretically deriving their authority from a common source."

As regards the meaning of the word "federal" the following observations of Lord Haldane in *Attorney-General for Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.*[7] may be quoted :

"In a loose sense, the word "federal" may be used . . . to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions."

It was held by Lord Haldane in the above case that the Constitution established under the British North America Act, 1867, was not a "federation" in the strict sense of the term. The reason was that although the Constitution was based on a treaty of Union among the then Provinces, yet the Act established a new Dominion and Provincial Governments with defined powers and duties both derived from the Act which was their legal source.

As already stated, the Indian Constitution is not based upon any agreement or compact between the component units and further it prescribes a form of Government not only for the Union but also for the component States. Hence, according to Lord Haldane's test, the Indian Constitution cannot be said to be a "federation" in the *strict* sense of the term, like the Constitution of the United States of America or the Constitution of Australia under the Commonwealth of Australia Act, 1900.[8]

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[7] **(1914) 1914 App Cas 237 (253) : 83 L J P C 154 (PC).**

[8] **(1914) 1914 App Cas 237 (254) : 83 L J P C 154 (PC),** *A. G. for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.*

4. Part A, Part B and Part C States.—The respective States comprised in each class are given above in the foot notes to the article, under the title Cognate Provisions.

The States comprised in the Indian Union and the territories of the respective States are specified in SCH. I of the Constitution. The States are divided into three categories and classified as falling under Parts A, B and C of the above Schedule.

The Constitution makes separate provision about the governance of each class of these States. Part VI (ARTS. 152 to 237) deals with Part A States; Part VII (ART. 238) deals with Part B States, and Part VIII (ARTS. 239 to 242) deals with Part C States.

It will be seen that Part A States comprise units which formerly constituted British Indian Provinces, Part B States comprise units which formerly were Indian States governed by Indian Princes and Chiefs and Part C States comprise units some of which constituted British Indian territory formerly and some were included in States governed by Indian Princes and Chiefs.

In the integration into the Indian Union of the territories comprised in what were formerly "Princely" States, three main patterns are discernible.—

(i) In some cases, the former States were completely merged in the adjoining Provinces, e. g. Baroda and Kolhapur which were merged in the Bombay Presidency, and Pudukotah which was merged in the Madras Presidency.

(ii) The States which corresponded to what are now Part B States were not "merged" into the adjoining Provinces but continued as distinct units with their previous rulers as "Rajpramukhs". Some of these States were formed into "Unions" of which some were placed in Part B, e. g., Madhya Bharat comprising of the former Indore and Gwalior States, Pepsu, Rajasthan, etc. and some were placed in Part C, e. g., Kutch, Himachal Pradesh.

(iii) Some Princely States kept their original identity but were included in Part C States and not Part B States which means that their former rulers ceased to be the heads of the States unlike in the Part B States, and their Government was assumed by the Union.

5. Jammu and Kashmir.—The State of Jammu and Kashmir is one of the States specified in Part B of the First Schedule. Hence, the State of Jammu and Kashmir and its territory form part of the Indian Union according to this article. But this State is placed on a special footing, and there is a special article dealing with it, namely, ART. 370. For further information about Jammu and Kashmir and its place in the Constitution, see ART. 370 and notes thereunder. See also the foot-notes to the text of ART. 1.

6. The territory of India. — The importance of State territorry lies in the fact that it is the space within which a State exercises its supreme authority.[1]

Though India is a *Union of States*, yet, the territory of India is not limited to the territories of the States, but includes the Andaman and Nicobar Islands which are not included in the territory of any "State", (cl. (3) (b)) and also any other territory that may be acquired.

The territories of the several States comprised in the Indian Union are specified in SCH. I.

Clause (3), sub-cls. (b) and (c), show that the territory of the Indian Union is not confined to the *geographical* limits of India.

The following points about what will be included in the territory of a country may be noted :

Harbours, estuaries and bays landlocked belong to the territory of the nation which possesses the shores round them.[2]

Where the configuration and dimensions of a bay are such as to show that the nation occupying the adjoining coast occupies the bay, it is part of the territory.[3]

It was held by six of the Judges in *R.* v. *Keyn*[4] that the sea within three miles of the coast of England is part of the territory of England and that English criminal law extends over those limits. But the majority (seven) held that English criminal Court had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limits of three miles from the shore of England.

7. "Such other territories as may be acquired".—Cl. (c) —Clause (c) shows that the Constitution recognises the legality of acquiring new territories for the Union. International Law recognises various modes of acquiring new territory, e.g., conquest, occupation, cession, etc. See also Hulsbury's LAWS OF ENGLAND.[1] The Constitution does not specify any particular methods of acquiring new territory as being legal or constitutional. Thus, acquisition by "conquest" is not expressly excluded as an unconstitutional method.

The new area may be acquired by cession, accretion, conquest or subjugation.[2]

"Cession" is one of the modes in which territories may be acquired. The term "cession" is wide enough to include a voluntary

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Article 1 — Note 6

[1] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.* (Oppenheim's International law, Vol. 1; Peace VIth Edition, Page 408 quoted.)

[2] (1877) 2 App Cas 394 (419) : 46 L J P C 71, *Direct United States Cable Company* v. *Anglo American Telegraph Company.*

[3] (1877) 2 App Cas 394 (419) : 46 L J P C 71, *Direct United States Cable Company* v. *Anglo-American Telegraph Company.*

[4] (1876) 2 Ex Div. 63 (86, 149, 151, 238 and 239) : 46 L J M C 17.

Article 1 — Note 7

[1] Halsbury's Laws of England, (2nd Edition), Vol. XI, page 10.

[2] 1953 Mad 647 (650) [AIR V 40 C 251] : ILR (1953) Mad 763, *Masulipatnam Municipality* v. *M. Mahalakshmamma.*

Article 1
Note 7

cession by the general consent of the inhabitants of the territory. It is not necessary that the cession must be by the *ruling power*.[3]

Thus, in *Edgar Sammut* v. *Strickland*[4] (a case from Malta) their Lordships of the Privy Council observed as follows:

> "The contention of the respondent on this part of the case is founded on the proposition that the prerogative of the Crown to legislate by Orders-in-Council and Letters Patent for the Government of a possession (using the word in the widest sense) is restricted to cases where the possession was acquired either by conquest or by cession, but the word 'cession' is employed by the respondent in this connection in a limited sense so as to exclude a voluntary cession by the general consent of the people. This involves the division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent or desire of the inhabitants. Their Lordships must observe that there seems to be no authority in any case or recognised text-book on constitutional law for this distinction. The leading writers have always divided the possessions of the Crown outside the United Kingdom into those acquired by conquest, by cession and by settlement."

The cession of a territory becomes effective only on *actual transfer* of sovereignty and not merely on an agreement to transfer.[5]

Exercise of dominion over a territory by the Government of a country for a long period acquiesced in by other nations, so as to show exclusive occupation by the former, is a circumstance of very great importance before the tribunal of any country to show that the territory belongs to the country exercising such dominion.[6] In a British Court, declaration by a British Act that a certain territory is British territory is conclusive.[7]

Under S. 57, sub-s. (10), Evidence Act, the Court can take judicial notice of the fact whether a place is part of Indian territory or not. A declaration by the political department of the Government of India was treated as final in the undermentioned case.[8] When possession is taken over by Government Notification of a certain place from a foreign power, the Government can make provision for its administration also and can extend the operation of the laws in force in the Dominon to the new area also.[9]

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[3] 1939 P C 39 (43) [AIR V 26] (PC), *Edgar Sammut* v. *Strickland.*

[4] 1939 P C 39 (43) [AIR V 26] (PC).

[5] 1952 All 6 (Pr 40) [A I R V 39 C 2] (F B), *Pratap Vikram Shah* v. *Upendra Bahadur Shah.*

[6] (1877) 2 App Cas 394 (420) : 46 L J P C 71, *Direct United States Cable Company* v. *Anglo American Telegraph Company.*

[7] (1877) 2 App Cas 394 (420) : 46 L J P C 71, *Direct United States Cable Company* v. *Anglo American Telegraph Company.*

[8] 1953 Mad 647 (648) [AIR V 40 C 251] : ILR (1953) Mad 763, *Masulipatnam Municipality* v. *Mahalakshmamma.* (('35) 1935 Mad Cr Cas 424 (A), Ref.)

[9] 1953 Mad 647 (650) [AIR V 40 C 251] : I L R (1953) Mad 763, *Masulipatnam Municipality* v. *Mahalakshmamma.*

Article 2 provides for the admission of new States into the Union. Under this article, territory acquired by India can be formed into new States as component parts of the Indian Union.

There are many areas within the geographical limits of India which are under foreign rule. These may be acquired and formed into new States or incorporated with existing States.

Under the Constitution of the United States, a distinction has been made by the Supreme Court of America between a territory being *incorporated* in the Union or becoming a part of the United States and such territory merely *belonging* to the United States.[10] Thus, the Island of Porto Rico became by Treaty of Cession territory appurtenant to the United States but not part of the United States.[11] An alien people may not be incorporated in the United States by mere cession of territory without the express or implied approval of the Congress.[12] So also, mere conquest of territory by force of arms does not by itself make it part of the United States unless and until the legislative authority makes it so. Till then the territory is only under military occupation.[13]

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2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

Admission or establishment of new States.

COGNATE PROVISIONS

Laws made under this article must provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters — See Art. 4.

Synopsis

1. Scope of the article.
2. "Parliament." — See ART. 4, NOTE 2.
3. "Admit into the Union, or establish."
4. Procedure for admission of new State.
5. Position of newly admitted State.

1. Scope of the article. — Under ART. 1, India shall be a Union of States and the States shall be those specified in Parts A, B and C of SCH. I. This article read with ART. 4 provides for the inclusion into the Union of *new* States, i. e., States that are at present *not* specified in Parts A, B and C of SCH. I. In this way the article operates in modification of ART. 1.

It may, however, be noted that where a new State is established or admitted into the Union, ART. 4 provides for the suitable amendment of the First and Fourth Schedules. This means that at the time of admission the new State will be entered in the First Schedule, so that the word "specified" in ART. 1 (2) really means "specified or to be specified."

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[10] (1922) 66 Law Ed 627 (631) : 258 U S 298, *Balzac* v. *Porto Rico*.
(1903) 195 U S 138 (143) : 49 Law Ed 128 (130), *Dorr* v. *United States*. ((1922) 258 U S 298 : 66 Law Ed 627 (631), *Balzac* v. *Porto Rico*, Foll.)
(1901) 45 Law Ed 1088 (1106) : 182 U S 244 (287), *Downes* v. *Bidwell*.

[11] (1901) 182 U S 244 (287) : 45 Law Ed 1088 (1106), *Downes* v. *Bidwell*.

[12] (1901) 182 U S 244 (312) : 45 Law Ed 1088 (1116), *Downes* v. *Bidwell*.

[13] (1850) 13 Law Ed 276 (280, 281) : 9 Howard 603, *Fleming* v. *Page*.

2. "Parliament." — See NOTE 2 on ART. 4.

3. **"Admit into the Union, or establish."** — The word "admit" refers to the admission of a territory which is already constituted into a State while the term "establish" refers to the creation of a new State. The creation of a new State need not necessarily refer to unoccupied territory or territory occupied by an unorganized people. Thus, cl. (a) of ART. 3 provides various ways in which a new State may be formed out of existing States themselves. But inasmuch as the formation of new States out of the existing States has been separately provided for in ART. 3 (a), the establishment of a new State mentioned in this article would seem to refer to the establishment of such State in the territory specified in Part D of SCH. I or a newly acquired territory (see ART. 1 (3) (b) and (c)) and not to the formation of a new State out of existing States under ART. 3 (a).

4. **Procedure for admission of new State.** — A new State can be admitted or established only by the Union Parliament and that by law. Such law must comply with the requirements of ART. 4. But the restrictions as to President's recommendations, etc., in the Proviso to ART. 3 do not apply to such a law.

Though the creation or admission of a new State by law under this article, read with ART. 4, effects an alteration in the Constitution, it does not amount to *amendment* of the Constitution for purposes of ART. 368 and the special procedure under that article need not be followed. (See ART. 4 (2).)

5. **Position of newly admitted State.** — The constitutional position of a newly admitted State will depend entirely on the terms and conditions imposed by Parliament. As seen in the notes on ART. 1, there is no right of equality among the constituent States of the Indian Union.

Position under the American Constitution

Under the American Constitution (ART. IV, S. 3), upon the admission of a State it stands upon an equal footing with the original States in all respects whatsoever.[1] The power of Congress under ART. IV, S. 3 to admit new States into the Union extends only to their admission on an equal footing with their sister States.[2] Even if a condition is included in the Act for the admission of a new State into the Union, the condition will become invalid after admission if it infringes the equality of the State with the other States.[3] The expression "this Union" in ART. IV, S. 3 of the American Constitution, refers

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Article 2 — Note 5

[1] (1900) 44 Law Ed 382 (384) : 176 U S 83, *Bollin* v. *Nebraska.*

[2] (1911) 55 Law Ed 853 (858) : 221 U S 559, *Coyle* v. *Smith.*

[3] (1911) 55 Law Ed 853 (858) : 221 U S 559, *Coyle* v. *Smith.*

to a Union of States equal in power, etc., and the Congress cannot make it a Union of unequal States by imposing conditions while admitting new States.[4] On admission of a new State all constitutional laws are binding on the people in the new States and the old ones, whether they consent to be bound by them or not.[5]

Formation of new States and alteration of areas, boundaries or names of existing States.

3. Parliament may by law—

(*a*) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(*b*) increase the area of any State;

(*c*) diminish the area of any State;

(*d*) alter the boundaries of any State;

(*e*) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the boundaries of any State or States specified in Part A or Part B of the First Schedule or the name or names of any such State or States, the views of the Legislature of the State or, as the case may be, of each of the States both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President.

GOVERNMENT OF INDIA ACT, 1935.

"*290.* (1) Subject to the provisions of this section, His Majesty may by Order in Council—

(a) create a new Province;

(b) increase the area of any Province;

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[4] (1911) 55 Law Ed 853 (858) : 221 U S 559, *Coyle* v. *Smith*. (The power under Art. IV, S. 3, U. S. Constitution, is to admit "new States into this Union." "This Union" was and is a Union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a Union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an Act of Congress accepted as a condition of admission.)

[5] (1845) 11 Law Ed 565 (571) : 3 How 212, *Pollard* v. *Hagan*.

(c) diminish the area of any Province;

(d) alter the boundaries of any Province;

Provided that, before the draft of any such Order is laid before Parliament, the Secretary of State shall take such steps as His Majesty may direct for ascertaining the views of the Federal Government and the Chambers of the Federal Legislature and the views of the Government and the Chamber or Chambers of the Legislature of any Province which will be affected by the Order, both with respect to the proposal to make the Order and with respect to the provisions to be inserted therein."

[NOTE. — After the Independence Act of 1947 and under the section as adapted by the India Provisional Constitution Order, 1947, the above power was vested in the *Governor-General*.[1] Now under this Constitution the corresponding power is vested in the Parliament.]

Synopsis

1. Scope of the article.
2. "Parliament" — See ART. 4, NOTE 2.
3. Analogous law.

1. Scope of the article.—Article 2 provides for the formation or admission of new States from territory specified in Part D of SCH. I and newly *acquired territory.* This article provides for the formation of new States by re-distribution of the areas of *existing* States. The article also provides for altering the area, boundaries or name of any State included in the Indian Union.

The authority under the article is conferred on the Parliament and Parliament has to act by enacting a law. But under the proviso the legislation cannot be initiated except on the recommendation of the President. Further, where the boundaries or name of any State are to be altered, the views of the Legislature of such State are to be first *ascertained.* But the *consent* of the States concerned or their Legislatures is not necessary.

The requirements of the proviso only apply to the action under this article and not to the action taken under ART. 2.

Any law under this article must also comply with the requirements of ART. 4 and provide for the matters therein specified.

Clause (a) describes the different ways in which a new State may be formed by re-distribution of the areas of the existing States. One of these methods is "by uniting any territory to a part of any State". This means that a new State may be formed by adding a piece of newly acquired territory to a portion of a pre-existing State. The new territory need not by itself be formed into a separate State.

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[1] In exercise of this power, the Governor-General issued Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948, by which French loges of Calicut and Masulipatam were included in the Dominion of India and treated as part of the Madras Presidency and as parts of Calicut and Masulipatam respectively. It was held in A.I.R. 1953 Mad. 647 (650) that the French loge of Masulipatam became thereby included in the Municipality of Masulipatam without any fresh notification under the Madras District Municipalities Act.

The Andhra State Act, (30 of 1953) is an instance of an Act for forming a new State out of an existing State. The Act has the following sub-title: "An Act to provide for the formation of the State of Andhra, the increasing of the area of the State of Mysore and the diminishing the area of the State of Madras and for matters connected therewith". As an example of alteration of boundaries of a State under cl. (d), see the Assam (Alteration of Boundaries) Act, 1951 (47 of 1951).

2. "Parliament". — See ART. 4, NOTE 2.

3. **Analogous law.**—There was a corresponding provision in the Government of India Act, 1935, namely, S. 290 (1), relating to the creation of new Provinces or alteration of the area or boundary of an existing Province. The provision has been reproduced above after the text of ART. 3. Section 290 (2) of the above Act corresponded to ART. 4 of the Constitution. This provision is given under ART. 4. (See ART. 4, NOTE 4.)

U. S. Constitution

Under the Constitution of the United States, ART. IV, S. 3, the Congress has power to admit new States to the Union.

Laws made under Articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.

4. *(1)* Any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

COGNATE PROVISION

Article 368 deals with procedure for amendment of this Constitution.

Synopsis

1. Scope of the article.
2. "Parliament."
3. Clause (2) — Amendment of the Constitution.
4. Analogous law.

1. **Scope of the article.** — Article 2 provides for the admission and creation of new States out of new territory not previously included in any State. Article 3 provides for the formation of new States by re-distribution of the area of existing States and for th

Article 4
Notes 1–3

alteration of the areas, boundaries or names of States. It is provided in the above articles that these changes should be carried out by law enacted by Parliament.

This article provides that such law must provide for all incidental and consequential amendments including amendments of the First and Fourth Schedules. The First Schedule specifies the States which are the members of the Union and also their respective territories. The Fourth Schedule specifies the number of seats to which each State shall be entitled in the Council of States. It is obvious that when action is taken under Art. 2 or Art. 3 above, alterations would be necessary in the First and Fourth Schedules also for effectuating the measures.

It is expressly provided in cl. (2) that the changes effected by Parliament by law in the above manner or other consequential changes similarly effected will not amount to amendment of the Constitution for purposes of Art. 368. Hence such changes may be carried out by a simple majority, subject to the requirements laid down by the proviso to Art. 3 being complied with in cases covered by Art. 3.

2. "Parliament." — Articles 2 and 3 show that the "laws" therein referred to are to be made by "Parliament." "Parliament" means the two Houses of Parliament and the President.[1] (See Art. 79.)

It may be noted that under Art. 368, the word "Parliament" is not used and tha it is provided that an amendment of the Constitution may be initiated only by the introduction of a Bill in "either House of Parliament." This, however, does not mean that the agency to make the amendment under Art. 368 is different from that under Arts. 2 to 4 and that it is not "Parliament."[2]

3. Clause (2)—Amendment of the Constitution. — See also ote 1.

The Constitution provides for three classes of amendments of its provisions. *First*, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in Arts. 4, 169 and 240 fall within this class, and they are specifically excluded from the purview of Art. 368. *Secondly*, those that can be effected by a special majority as laid down in Art. 368. All constitutional amendments other than those in the first category come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House present and voting; *thirdly*, those that require, in addition to the special majority above mentioned, ratification by resolutions passed by not less than one half of the States specified in Parts A and B of Sch. I. This class comprises

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Article 4 — Note 2

[1] 1951 S C 458 (Prs 6, 7) [A I R V 38 C 60] : I L R 30 Pat 1176 : 1952 S C R 89 (S C), *Shankari Prasad* v. *Union of India.*

[2] 1951 S C 458 (Prs 6, 7) [A I R V 38 C 60] : I L R 30 Pat 1176 : 1952 S C R 89 (S C), *Shankari Prasad* v. *Union of India.*

amendments which seek to make any change in the provisions referred to in the proviso to ART. 368.[1]

4. Analogous law. — Section 290 (1) of the Government of India Act, 1935, corresponds to ART. 3 and has been given under that article. Section 290 (2) of the above Act corresponding to this article is given below :

> "*290 (2).*—An Order made under this section may contain such provisions for varying the representation in the Federal Legislature of any Governor's Province, the boundaries of which are altered by the Order and for varying the composition of the Legislature of any such Province, such provisions with respect to apportionments and adjustments of and in respect of assets and liabilities, and such other supplemental, incidental and consequential provisions as His Majesty may deem necessary or proper :
>
> Provided that no such Order shall vary the total membership of either Chamber of the Federal Legislature."

Article 4 — Note 3

[1] 1951 S C 458 (Prs 6, 7) [A I R V 38 C 60]: I L R 30 Pat 1176 : 1952 S C R 89 (S C), *Shankari Prasad* v. *Union of India.*

PART II

CITIZENSHIP

Citizenship at the commencement of the Constitution.

5. At the commencement of this Constitution, every person who has his domicile in the territory of India and —

(*a*) who was born in the territory of India; or

(*b*) either of whose parents was born in the territory of India; or

(*c*) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement,

shall be a citizen of India.

COGNATE PROVISIONS

Article 5 came into force on 26-11-1949—See Art. 394.

"Commencement of this Constitution" — Meaning of — See Art. 394. The expression is used to refer to the 26th of January 1950.

Rights of citizenship of certain persons who have migrated to India from Pakistan—See Art. 6.

Rights of citizenship of certain migrants to Pakistan notwithstanding anything in Art. 5—See Art. 7.

Persons of Indian origin residing outside India—Rights of citizenship of. notwithstanding anything in Art. 5.—See Art. 8.

Person voluntarily acquiring citizenship of a foreign State not to be a citizen of India—See Art. 9.

Citizenship, naturalisation and aliens—Laws with respect to—See Sch. VII List 1, Entry 17.

Synopsis

1. Scope and applicability of the article.
2. "At the commencement of this Constitution."
3. "Person" whether includes a corporation.
4. Domicile.
5. "In the territory of India."
6. "Ordinarily resident." — Clause (c).
7. Intending evacuee.

7a. Onus of proof.

8. Commonwealth citizenship.
9. Applicability to Jammu and Kashmir.

1. **Scope and applicability of the article.**—It is the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what classes of persons shall be entitled to citizenship.[1] Since municipal law determines how citizen-

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Article 5 — Note 1

[1] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*. 1952 Mad 734 (735) (Prs 5, 6) [AIR V 39] (DB), *L. C. Menzes* v. *State of Madras*.

ship may be acquired it is possible for a person to have a *dual nationality.*[2]

Articles 5 to 11 deal with the question of citizenship of the Indian Union.

The Constitution recognizes only one type of citizenship, viz., citizenship of India as a whole and not a double citizenship, one of the whole country and the other of a particular State. This is in contrast with the principle under the Constitution of the United States of America where the same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these Governments will be different from those he has under the other.[3] (See ART. 1, NOTE 3.)

> "Citizens are the members of the political community to which they belong. They are the people who compose the community and who, in their associated capacity, have established or submitted themselves to the dominion of a Government for the promotion of their general welfare and the protection of their individual as well as their collective rights."[4] "The 'nationals' of a State are all those persons, natural or artificial, which it has the right to protect abroad, with respect to whose conduct abroad, it has a right to legislate and whom it is under a duty to receive back into its territory if a foreign State desires to deport them."[5]

The question of citizenship is important because citizenship carries with it various rights and obligations which do not belong to a mere resident of the country.

The citizen owes allegiance to the State and the State owes a duty of protection of the *rights* of its citizens. The duty of a Government to afford protection is, however, limited always by the power conferred upon it for that purpose.[6] For instance, in ART. 14, equality before the law and the equal protection of the laws are guaranteed to all *persons.* But under ART. 15 the right of not being discriminated against on grounds of religion, race, caste, sex or place of birth is conferred only on citizens. Similarly, under ART. 16 the right of equality of opportunity relating to employment under the State, is confined to

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(1938) 83 Law Ed 1320 (1323) : 307 U S 325, *Perkins* v. *Elg.*
(1898) 42 Law Ed 890 (897) : 169 U S 649, *United States* v. *Wong Kim Ark.*

[2] (1938) 83 Law Ed 1320 (1320) : 307 U S 325, *Perkins* v. *Elg.*
[*See* (1903) 1 K B 444 (458), *Rex* v. *Lynch.* (This was a case of a person being a British subject under British law and Dutch subject under Dutch law.)]

[3] (1873) 21 Law Ed 394 (408) : 16 Wall 36, *Slaughter House Cases.* (Cited in (1876) 92 U S 542 : 23 Law Ed 588 (590), *United States* v. *Crinkshank.*)

[4] (1876) 23 Law Ed 588 (590) : 92 U S 542, *United States* v. *Crinkshank.*
1952 Mad 734 (735) (Pr 6) [AIR V 39] (DB), *L. C. Menzes* v. *State of Madras.* (The fundamental basis of a man's nationality is his membership of an independent political community and it is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other.)

[5] 1952 Mad 734 (735) (Pr 5) [AIR V 39] (DB), *L. C. Menzes* v. *State of Madras.* (Quoting from British Nationality by Clive Parry.)

[6] (1876) 23 Law Ed 588 (590) : 92 U S 542, *United States* v. *Crinkshank.*

citizens. So also, the rights regarding freedom of speech, etc., guaranteed by ART. 19, are conferred only on citizens and not on others. Reference may also be made to the fact that the right to various high offices, such as those of. President (ART. 58), Vice-President (ART. 66 (3)), Governor of a State (ART. 157), Judges of the Supreme Court (ART. 124 (3)), High Court Judge (ART. 217 (2)), Attorney-General (ART. 76), and Advocate-General (ART. 165), is confined to citizens of India. So also, the right to vote for election to the House of the People and the Legislative Assembly of a State, is confined to a citizen of India (ART. 326). Similarly, only a citizen of India can become a member of Parliament (ART. 84) or of the Legislature of a State (ART. 191 (1) (d)).

Essentials of citizenship under this article

The basic condition for citizenship under this article is that the person must have his domicile in the territory of India. In addition to this it is also necessary that one or other of the conditions mentioned in cls. (a) to (c) must be fulfilled. These alternative conditions are as follows :

(1) The person must have been born in the territory of India (cl. (a)). It is not necessary, if this condition is fulfilled, that the person's *parents* must have been born in the Indian territory. Thus, a person domiciled in India and born in India, would be an Indian citizen although both his parents were foreigners.

(2) The second alternative basis for citizenship under this article is that the person must be one either of whose parents was born in the territory of India, the qualification of domicile being always understood (cl. (b)). So a person domiciled in India but not born in India, would be entitled to Indian citizenship, if either of his parents was born in India. Thus, for instance, a child born to an Indian, of an English woman in England, and having his domicile in India, would be a citizen of India.

(3) In the third alternative, a person having his domicile in India can claim Indian citizenship even though neither he nor either of his parents was born in India, provided that the person was ordinarily resident in the territory of India for not less than five years immediately before the commencement of the Constitution (26th January 1950) (clause (c)).

Thus, an Englishman born in England of parents born in England would still be a citizen of India if he had his domicile in India and if he was ordinarily resident in India for five years before the commencement of the Constitution.

As stated already, the conditions mentioned in cls. (a), (b) and (c) are not sufficient by themselves to confer citizenship. The fulfilment of these conditions will confer citizenship only on a person who has the basic qualification specified in the beginning of the article, namely, having his *domicile* in the territory of India.[7] Thus, where it is not proved that a person has his *domicile* in India, the fact that he had been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution, will not confer the right of citizenship on him.[8]

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[7] 1951 Bhopal 1 (Pr 7) [A I R V 38 C 1] : 52 Cri L Jour 1239, *B. Choudhary v. State of Bhopal.*

It will be seen that citizenship under the Constitution is not made to depend upon the *race*[9] of a person as under the Constitution of Burma, although the place of birth affords one test.

The provisions of this article have to be read with ARTS. 6 to 9. Article 6 extends the right of citizenship to persons who (though not covered by this article) have migrated to India from Pakistan if the conditions specified in that article are satisfied. Similarly, under ART. 7, a person, who would have been a citizen of India if ART. 5 had stood alone, would not be such a citizen if he has left India and migrated to Pakistan after 1st March 1947. Under ART. 8, provision is made for the recognition as a citizen of India under certain circumstances, of a person not having his domicile in India and not ordinarily resident in India. Article 9 provides that a person who has *voluntarily* acquired the citizenship of a foreign State, cannot be a citizen of India, although he may be otherwise qualified under ARTS. 5, 6 or 8 for Indian citizenship.

Article 11 expressly reserves the power of the Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. "The Constitution is concerned with defining who are the founding members of the Indian Republic and does not fetter the discretion of Parliament to legislate on questions of citizenship."[10] The subjects of citizenship, naturalisation and aliens are exclusively within the legislative jurisdiction of the Parliament. (See SCH. VII, LIST 1, Entry 17).

Residents of Pakistan. — See NOTE 5.

Citizenship of persons of newly acquired territory. — See NOTE 5.

United Kingdom, citizenship of :

Briefly, and subject to exceptions and omissions, any person born in the United Kingdom and colonies after coming into force of the British Nationality Act, 1948, is a citizen of the United Kingdom by birth.[11] Under the Common Law of England, every child born of alien parents was a natural born subject unless the child was born of an ambassador or other diplomatic agent of a foreign State or of an alien enemy in hostile occupation of the place.[12]

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[8] 1951 Bhopal 1 (Pr 7) [A I R V 38 C 1] : 52 Cri L Jour 1239, *B. Choudhary* v. *State of Bhopal.*

[9] *See* 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.* (The territory of a State is totally independent of the racial character of its inhabitants of the State.)

[10] The Republic of India by Alan Gledhill, page 166.

[11] Republic of India by Alan Gledhill, page 165.

[12] (1898) 42 Law Ed 890 (894) : 169 U S 649, *United States* v. *Wong Kim Ark.*

United States Constitution, citizenship under :

Amendment XIV, S. 1, United States Constitution, provides *inter alia* that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of United States and of the State wherein they reside. This provision includes as citizens of the United States children born in the territory of United States, of whatever race or colour, and domiciled in United States except alien enemies and diplomatic representatives.[13] The above Amendment of the United States Constitution was meant to establish citizenship of free *Negroes*[14] which had been denied in the opinion of Chief Justice Taney in *Dred Scott* v. *Sandford*.[15] The words "subject to the jurisdiction thereof" in the above Amendment were meant to exclude : (i) children born of alien enemies in hostile occupation, and (ii) children of diplomatic representatives of foreign States.[16] The above Amendment creates a citizenship of the United States and also of the particular State in which the person resides. The Indian Constitution does not recognise such dual citizenship, one of the Union and the other of the State.

2. **"At the commencement of this Constitution."** — This article and Art. 6 apply only to the question of citizenship *at the commencement of the Constitution.*[1] They do not apply to the question of citizenship at any subsequent time. But under Art. 10, a person who is a citizen of India at the commencement of the Constitution would, subject to any law that may be made by Parliament, continue to be so.

Under Art. 394, the words "commencement of this Constitution" have been defined as referring to the 26th of January, 1953 though, under the same article, Arts. 5, 6, 7, 8 and 9, and other articles specified therein are to come into force at once, i. e., from 26th November 1949.

Articles 7 and 8 are not limited in their applicability to the question of citizenship at the commencement of the Constitution as above defined.

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[13] (1898) 42 Law Ed 890 (910) : 169 U S 649 (705), *United States* v. *Wong Kim Ark.* (Child born in U. S. of Chinese parents, who are subjects of the Chinese Emperor but have a permanent domicile and residence in U. S. and are not officially connected with the Chinese Emperor, is a U. S. citizen.)

[14] (1898) 42 Law Ed 890 (900) : 169 U S 649 (676), *United States* v. *Wong Kim Ark.*

[15] (1857) 15 Law Ed 691 (700, 701) : 19 How 393. (Overruled in (1898) 42 Law Ed 890 : 169 U S 649.)

[16] (1898) 169 U S 649 (705) : 42 Law Ed 890 (910), *United States* v. *Wong Kim Ark.*

Article 5 — Note 2

[1] *See* 1952 Cal 838 (839) (Pr 5) [AIR V 39] : 1952 Cri L Jour 1686 (DB), *Supdt. & Remr. of L. A. W. B.* v. *Rab Nawaz Khan.* (The registration of a person under Art. 6 (b) (ii) will not confer on such person the status of citizen of India with effect from a date prior to 26th November 1949 which is the date of the coming into force of Art. 6, under Art. 394.)

The question arises as to the law applicable to the determination of the question of citizenship of a person not covered by ART. 7 or ART. 8 and *born after the commencement of the Constitution.* For instance, take the case of a person born in India after 26th January 1950 of parents who were citizens of India on that day. There can be no question of the right of citizenship of such a person *at the commencement of the Constitution*, as he was not in existence at that date. Hence, ART. 5 cannot apply to him. His case is also not covered by the other articles. With reference to what law is the question of citizenship of such a person to be determined ? Article 11 specially reserves the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. It may be expected that Parliament will make a law dealing with the question of citizenship on a *permanent* footing instead of the obviously temporary or transitory footing that has now been adopted. In this connection it may be noted that the subjects of citizenship, naturalisation and aliens are subjects within the exclusive jurisdiction of the Parliament : See SCH. VII, LIST 1, Entry 17.

Till provision is made by Parliament in this behalf, there seems to be no escape from the position that, assuming citizenship is a matter of positive constitutional or legislative provision, children of Indian citizens born after 26th January 1950 will be in the anomalou ssituation of not being the citizens of India. It is obvious that this position must be set right as early as possible.

3. "Person" whether includes a corporation. — Under ART. 367, the General Clauses Act, 1897, is applicable to the interpretation of this Constitution. Under S. 3 (42) of that Act, "person" shall include any company or association or body of individuals, whether incorporated or not. It has, therefore, been held by the Supreme Court that the word "person" in ART. 31 is wide enough to include both a natural person and an artificial person and so, a corporation.[1] But the definition in S. 3 (42), General Clauses Act, is subject to the clause in the beginning of the section, "unless there is anything repugnant in the subject or context."

Hence, the question is whether in the context in which the word "person" occurs in this article, it is to be taken as including a corporation or company. It seems to be clear from cls. (a) and (b) that this article only refers to a *natural* person and not to an artificial person like a company; and that a company as such cannot claim any rights as a citizen under the Constitution.[2] The observation in the under-

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Article 5 — Note 3

[1] 1951 S C 41 (61) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

[2] Article 39, cl. (a) uses the expression "men and women", which shows "citizen" includes only natural person and that a corporation is not included within the meaning of the word "citizen".

1952 Punj 9 (Prs 54, 55, 104) [AIR V 39 C 2] : ILR (1952) Punj 11 (DB), *Jupiter General Insurance Co.* v. *Rajagopalan.*

mentioned Madras case,[3] however, that it is difficult to speak of a company having a domicile does not seem to be justified, as Dicey's CONFLICT OF LAWS[3a] specifically gives a rule for determining the domicile of a corporation. (See also NOTE 4.)

From the above, it is clear that a company as such is not entitled to the Fundamental Rights conferred on a *citizen* under ART. 19.[4] The Supreme Court while holding that the word "person" in ART. 31 includes an artificial person like a company has left open the question whether the word "person" in ART. 5 is also so inclusive.[5]

4. **Domicile.**—As seen in NOTE 1, an indispensable qualification for citizenship of India is that a person in question must have his *domicile* in India. The term "domicile" is very difficult of definition and no completely satisfactory definition seems to have as yet been formulated. Dicey in his "CONFLICT OF LAWS" defines "domicil" as follows :

> "The domicil of any person is, in general, the place or country which is in fact his permanent home but is in some cases the place or country, which, whether it be in fact his home or not, is determined to be his home by a rule of law."[1]

1951 Mad 974 (Pr 8) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.*
[*See also* (1916) 60 Law Ed 1010 (1016) : 241 U S 295, *Bankers Trust Co.* v. *Texas & P. R. Co.* (Under U. S. Constitution a Railway Company incorporated under Act of Congress, to carry on its activities and operations in different States, cannot be regarded as a citizen of a particular State.)]

3. 1951 Mad 974 (Pr 8) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.*

3a. Digest of the Law of England with reference to the Conflict of Laws by A. V. Dicey, 2nd Edition (1908), Pages 160, 161, 162 and 163. (The domicil of a corporation is the place considered by law to be the centre of its affairs, which (i) in the case of a trading corporation, is its principal place of business, i. e., the place where the administrative business of the corporation is carried on, (ii) in the case of any other corporation, is the place where its functions are discharged.)
[*See also* (1902) 1902 App Cas 484 (501) : 71 L J K B 857, *Janson* v. *Driefontein Consolidated Mines Ltd.* (*Lord Brampton*:—Company incorporated under laws of South African Republic for working mines — Majority of its share-holders subjects of U. K.—Company must be treated as a subject of the Republic notwithstanding the nationality of its share-holders.)]

4. 1952 Punj 9 (Prs 54, 55, 104) [AIR V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Insurance Co.* v. *Rajagopalan.*
1951 Mad 974 (Pr 8) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.*

5. 1951 S C 41 (61) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (S C) *Charanjit Lal* v. *Union of India.*
[*See also* (1885) 30 Law Ed 118 (118) : 118 U S 394, *Santa Clara County* v. *Southern Pacific R. R. Co.* (14th Amendment of United States Constitution which forbids a State to deny to *any person* within its jurisdiction the equal protection of laws applies to corporation.)]

Article 5 — Note 4

1. Digest of the Law of England with reference to the Conflict of Laws, by Dicey, 2nd Edition, Page 82.

As Wharton points out in his Law Lexicon two things must concur to constitute domicile: first, residence, and secondly, the intention of making it the home of the party.[2] Thus, a place where a person ordinarily resides will not necessarily be his domicile.[3] This is clear from this article itself, which in cl. (c) clearly treats "ordinary residence" as something quite distinct from "domicile" referred to in the beginning of the article. Hence, where it is not proved that a person has his domicile in the territory of India, the mere fact that he has been ordinarily resident in the territory of India for five years immediately before the 26th January 1950 will not entitle him to the rights of citizenship in India.[4] In this connection, the following observations of Lord MacNaghten in *Winanns* v. *Attorney-General*[5] may be quoted:

> "'Residence and domicil' as Lord Westbury points out[6] 'are two perfectly distinct things . . . . Although residence may be some small *prima facie* proof of domicil, it is by no means to be inferred from the fact of residence that domicil results even although you do not find the party had any other residence in existence or in contemplation' Lord Chelmsford's opinion—*Udny* v. *Udny*[7]—was that 'in a competition between a domicil of origin and an alleged subsequently acquired domicil there may be circumstances to shew that however long a residence may have continued, no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil'."

Domicile and nationality are also two quite different conceptions.[8] There may be a change of nationality without a change of *domicile*.[9]

[*See also* (1862) 31 L J Ex 314 (320) : 6 Law Tim 438, *Attorney-General* v. *Rowe*. (1858) 28 L J Ch 396 (400) : 7 H L C 124, *Whicker* v. *Hume*.]

[2] Wharton's Law Lexicon, 14th Edition, page 344.

[3] *See* 1952 Bom 451 (452) (Pr 2) [AIR V 39] : I L R (1953) Bom 51 : 1952 Cri L Jour 1600 (DB), *Vithal Maruti* v. *State*. (Domicile as the word is used in the Bombay Beggars Act, 13 of 1945, is not used in its technical sense but only means *residence* in the Province of Bombay without present intention of removing it from the Province of Bombay — The place of *birth* is not a necessary element of "domicile" (under Bombay Beggars Act, 13 of 1945).)

1952 Mad 736 (Pr 15) [AIR V 39] : I L R (1952) Mad 361 (DB), *Seethalakshmi* v. *Veerappa*. (The enemy character of a person under English Common Law (which applies to India) attaches to a person irrespective of his *nationality* or his *domicile* if he is *residing or living in* enemy territory or enemy occupied territory.)

[4] 1951 Bhopal 1 (Pr 7) [AIR V 38 C 1] : 52 Cri L Jour 1239, *B. Choudhary* v. *State of Bhopal*.

[5] (1904) 1904 App Cas 287 (290) : 73 L J (KB) 613.

[6] (1869) L R 1 H L Sc 307 (320, 321), *Bell* v. *Kennedy*.

[7] (1869) L R 1 H L Sc 441 (455).

[8] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*. ((1869) L R 1 H L Sc 441, *Udny* v. *Udny*, Foll.)

[9] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*. ((1932) 147 Law Tim 382, *Wahl* v. *Attorney-General*, Foll.)

Article 5
Note 4

Every person is ascribed by law on his birth two distinct legal states—(i) his political status, i. e. the tie of political and national allegiance to a particular country; (ii) the civil status which relates to his personal rights. Political status depends on different laws in different countries, but the civil status is governed universally by one single principle, namely, that of domicile.[10] As has been pointed out by Lord Westbury in *Udny* v. *Udny*[11] :

> "The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal states or conditions : one by virtue of which he becomes the subject of some particular country binding him by the tie of national allegiance, and which may be called his political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend."

No person can at any time be without a domicile.[12] Ordinarily, a person can have only one domicile at one time although by statute he may possibly have one domicile for the purpose of testate or intestate succession and another domicile for all other purposes.[13] A domicile once acquired is retained until it is changed in the case of an independent person by his own act[14] and in the case of a dependent person by the act of someone on whom he is dependent. It is open to a person to acquire a new domicile of choice by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*) but not otherwise.[15] "Law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate and the domicil of the mother if illegitimate. This has been called domicil of origin and is involuntary. Other domicils including domicil by operation of law, as on marriage, are domicils of choice. For, as soon as an individual is *sui juris* it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished and remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice"[16]

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[10] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*. (Quoting (1869) L R 1 H L Sc 441, *Udny* v. *Udny*.)

[11] (1869) L R 1 H L Sc 441 (457).

[12] (1869) 1 H L Sc 441 (457), *Udny* v. *Udny*. (Per *Lord Westbury*.)

[13] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*. (Four conditions for the animus necessary for the change of domicile are:—(i) the intention must amount to a purpose or choice; (ii) it must be an intention to reside permanently or for an indefinite period; (iii) it must be an intention of abandoning i.e. ceasing to reside permanently in the country of former domicile; (iv) intention to change political allegiance is also a test, but there is some doubt.)
As to domicile for purposes of succession, see Ss. 5 to 19 of the Succession Act.

[14] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*. (A man may change his domicile without divesting himself of nationality: *Boldrini* v. *Boldrini*, (1932) 1932 Probate 9.)

[15] 1953 Cal 530 (534) [AIR V 43 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*. (Dicey's Conflict of Laws, 6th Edition, page 89.)

The onus of proving that a new domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown.[17]

The residence, requisite for a new domicile, need not be long, provided there is the intention of permanently residing in a place.[18] "If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."[19]

Where a person's intention to reside permanently in India was dependent on his obtaining a job in India and the condition was never satisfied and the intention was abandoned, the element of '*animus*' necessary for change of domicile is lacking.[20]

It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence and where his establishment is kept up.[21]

As a result of the Indian Independence Act, a person, who had originally the domicile of British India, would automatically acquire

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[16] (1869) 1 H L Sc 441 (457, 458), *Udny* v. *Udny*. (Per *Lord Westbury*—Note: The whole of Lord Westbury's judgment in this case is worth special study on the subject of Domicile.)

[*See also* (1871) L R 12 Eq 617 (644) : 41 L J Ch 74, *Douglas* v. *Douglas*. (The intention required to effect a change of domicile (as distinguished from the acts embodying it) is an intention to settle in a new country as a permanent home.)]

[17] (1904) 1904 App Cas 287 290 : 73 L J K B 613, *Winans* v. *Attorney-General*.

[18] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*.

[19] (1868) L R 1 H L Sc 307 (319), *Bell* v. *Kennedy*.

[20] 1953 Cal 530 (535) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah*.

[21] (1878) L R 3 App Cas 336 (343):47 L J P C 26 (PC), *Platt* v. *Attorney-General of New South Wales*.

Article 5
Note 4

the domicile of either India or of Pakistan (unless he had subsequently acquired the domicile of some other country outside the territories which originally formed British India).[22]

See also NOTE 5.

Domicile of married woman

On marriage, a woman acquires the domicile of her husband.[23] Under S. 15, Succession Act, 1925, by marriage a woman acquires the domicile of her husband, if she had not the same domicile before. Under Succession Act, 1925, S. 16, the wife's domicile during her marriage follows the domicile of her husband though it ceases to do so if they are separated by the sentence of a competent Court or if the husband is undergoing a sentence of transportation.

Under S. 2, Divorce Act, 1869, a decree for dissolution of marriage cannot be granted except when parties to the marriage are domiciled in India at the time when petition is presented.[24]

A woman acknowledged by her husband as his wife can claim her husband's domicile though it is not clear in what form that marriage was solemnised.[25]

Domicile of company

Every company has a domicile.[26] The domicile of origin of a company is the place where it is registered.[27] The domicile of origin of a company cannot be changed and continues to be its domicile throughout its existence.[28]

See also NOTE 3.

It is not proposed to enter into all the details about the law of domicile here. The subject is of importance not only for determining the question of citizenship under the Constitution but also for various other matters including questions as to the applicability of the laws of particular countries to the particular cases under the Divorce Act, matters relating to succession, etc.

Reference in this connection may be made to Part II of Succession Act, 1925, (Ss. 4 to 19) entitled "Of Domicile." Decisions which would be relevant under the Succession Act would also be relevant for the question of citizenship. Law Lexicons like Wharton's LAW LEXICON, Stroud's JUDICIAL DICTIONARY, Ramnath Aiyer's LAW LEXICON, etc., may be usefully consulted both for the principles relating to the subject and for leading decisions appearing on it. So also, books on Conflict of Laws and International Law will be useful as sources of information and authorities.

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[22] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.*

[23] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.* (In determining the domicile of parties in proceedings for dissolution of marriage it is the domicile of the husband alone which is to be considered.)

[24] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.* (Husband's domicile is also the domicile of the wife.)

[25] 1951 Pat 434 (Pr 8) [AIR V 38 C 112] : ILR 30 Pat 21 (DB), *Sayeedah Khatoon* v. *State of Bihar.*

[26] (1940) 2 K B 80:109 L J K B 769, *Gasque* v. *Inland Revenue Commissioners.*

[27] (1940) 2 K B 80:109 L J K B 769, *Gasque* v. *Inland Revenue Commissioners.*

[28] (1940) 2 K B 80:109 L J K B 769, *Gasque* v. *Inland Revenue Commissioners.*

5. **"In the territory of India."** — Under ART. 1 cl. (3), the territory of India shall comprise the territories of the States, the territories specified in Part D of SCH. I, namely, the Andaman and Nicobar Islands, and such other territories as may be *acquired.* The term "States" refers to States specified in Parts A, B and C of SCH. I. Thus, the expression "territory of India" in this article does not include territory which after the partition has been included in Pakistan. At the same time, citizenship is not limited to persons having their domicile in any of the States which constitute the Union. Even a person having his domicile in a newly *acquired* territory which has not been yet admitted into the Union as a State will be entitled to citizenship. Similarly, a person domiciled in the Andaman and Nicobar Islands is entitled to citizenship though those Islands are not "States" composing the Union.

Residents of newly acquired territory

Two of the different modes of acquisition of nationality are by subjugation after conquest or by cession of territory.[1]

The inhabitants of the subjugated and ceded territory acquire *ipso facto* by such subjugation or cession the nationality of the State which acquires the territory.[2]

If the old State does not disappear altogether (as British India has done), it is possible to have a stipulation in the treaty of cession, if any, which binds the acquiring State to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration.[3]

Where under theaty of cession the inhabitants of the ceded territory are allowed the option of retaining their citizenship of the ceding State, the acquiring State may expel them if they choose to retain their old citizenship, unless there is an express provision against such expulsion.[4] Otherwise, the whole population of the ceded territory might consist of aliens and endanger the safety of the acquiring State.

In the case of complete merger or cession of a State and its total disappearance (as in the case of British India), it is not open to a

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Article 5 — Note 5

[1] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.*

[2] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.*

[3] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.*

[4] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.* (1922) 91 L J P C 18 (19) : (1922) 1 App Cas 105 (PC), *Gout* v. *Cimitian.* (Cyprus was annexed by Great Britain by the Cyprus Annexation Order-in-Council dated 5th November 1914 — Ottoman subjects born in Cyprus and resident in Cyprus were declared British subjects — Ottoman subjects resident in Cyprus on 5th November 1914 were given the option of retaining the Ottoman nationality by giving notice but were requirel if they elected to retain Ottoman nationality to leave Cyprus within 2 months.)

person who was a citizen of that State to claim after its disappearance either citizenship or domicile with reference to that State.[5]

Residents of territory allotted to Pakistan

The effect of the Indian Independence Act (1947) was that the British withdrew their sovereignty from what was previously British India, and after dividing the territory of British India into two parts, ceded each part to each of the two Dominions which were created.[6] Hence, under the principles of International Law, persons previously domiciled in each division of the territory became *ipso facto* the subjects of the State to which that division was ceded.

A person domiciled in a territory allotted to Pakistan acquires the domicile of Pakistan, although he had left British India and was resident abroad at the time of the independence and partition.[7]

A person who was a habitual resident of British India before partition and had left India and was residing abroad at the time of partition, does not continue to be a British Indian citizen after partition and Indian independence.[8]

See also ARTS. 6 and 7.

6. "Ordinarily resident"—Clause (c). — It has already been seen in NOTE 4 that having one's "domicile" in a place and being "ordinarily resident" in a place are not identical.[1] As to the meaning of the words "ordinarily resident" the following passage from the judgment of Somervell C. J. in *Macrae* v. *Macrae*[2] is instructive :

> "Ordinary residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place—in this case he left his wife; in another case he might have disposed of his house —and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."

The meaning of the words "reside" and "ordinarily reside" with their variations is often discussed in cases on income-tax. One such case is *Levene* v. *Inland Revenue Commissioners*,[3] in which there are valuable dicta by Viscount Cave, L. C., on the meaning of these expressions.

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[5] 1953 Cal 530 (534) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.*

[6] 1953 Cal 530 (533) [AIR V 40 C 201] (SB), *R. E. Attaullah* v. *J. Attaullah.*

[7] 1953 Cal 530 (532, 533)[AIR V 40 C 201] (SB), *R.E. Attaullah* v. *J. Attaullah.*

[8] 1953 Cal 530 (533, 534)[AIR V 40 C 201] (SB), *R.E. Attaullah* v. *J. Attaullah.*

Article 5 — Note 6

[1] *See* (1922) 91 L J P C 18 (20):(1922) 1 AppCas 105 (PC), *Gout* v. *Cimitian.* (The words "ordinarily resident" must be taken in their usual and ordinary meaning and their meaning is not subject to the considerations applicable in the determination of domicile.)]

[2] (1949) 1949-2 All E R 34 (36) : 1949 L J R 1671.

[3] (1928) 1928 App Cas 217 (225).

Article 5
Note 6

At the end of his judgment, His Lordship observed :

"The expression 'ordinary residence' is found in the Income-tax Act of 1806 and occurs again and again in the later Income-tax Acts where it is contrasted with usual (casual?) or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."

Viscount Cave, L. C., re-affirmed his views in *Inland Revenue Commissioners* v. *Lysaght*[4] in which it was held that the fact that a person visits a country at regular intervals and for recurrent business purposes does not make the visits more than temporary ones or give them the character of residence in that country. It was also held in that case that a person is *ordinarily resident* in a country for income-tax purposes if his residence there is not casual or uncertain but is in the ordinary course of his life.

The Income-tax Act, 1922, contains special definitions of the terms "resident" and "ordinarily resident" (see Ss. 4A and 4B of the Income-tax Act, 1922). Except where there are such statutory definitions governing a case, the meaning of the word "reside" must be taken to be accurately indicated by the definition in the OXFORD ENGLISH DICTIONARY, which gives the meaning as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained, he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.[5]

In determining the question of ordinary residence the *motive* of a person in leaving one place and taking up his residence in another is immaterial.[6]

It may be noted here that the words used in S. 20 of the Code of Civil Procedure, 1908, are "actually and voluntarily resides". Under

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[4] (1928) 1228 App Cas 234 (240). ((1927) 2 K B 55 : 96 L J K B 462, Reversed.)

[5] (1928) 1928 App Cas 234 (240), *Inland Revenue Commissioners* v. *Lysaght.* (Words "resident" and "ordinarily resident" in the English Income-tax Act, 1918, are not used in any special or technical sense and question of residence or ordinary residence is one of fact — A person is ordinarily resident in a country for income-tax purposes if his residence there is not casual or uncertain but is in the ordinary course of his life—Decision of Court of Appeal, (1927) 2 K B 55: 96 L J K B 462, *Lysaght* v. *Inland Revenue Commissioners*, Reversed.)

(1928) 1928 App Cas 217 (222), *Levene* v. *Inland Revenue Commissioners.*

[*See* (1928) 1928 S C 205 : 13 Tax Cas 443, *Peel* v. *Commissioners of Inland Revenue.*

(1926) 10 Tax Cas 673 : 1926 Sc L T 365, *Reid* v. *Inland Revenue Commissioners.*

(1918) 87 L J K B 831 (832) : 118 Law Tim 305, *Byrne* v. *Hedges.* (Question whether a person was "ordinarily resident" in Great Britain within the meaning of the Military Services Act, 1916, is one of fact.)

(1918) 119 Law Tim 376 (378) : 88 L J K B 599, *Donne* v. *Letts.*

(1917) 1917 S C (J) 26, *Pannifax* v. *Brown.* (Temporary residence is included in ordinary residence.)]

[6] (1922) 91 L J P C 18 (21) : (1922) 1 App Cas 105 (PC), *Gout* v. *Cimitian.*

Expln. 1 to the above section it is expressly provided that where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence. It is obvious that the meaning of the words "ordinarily resident" in this article cannot be the same as that conveyed by the words "actually and voluntarily resides" in S. 20 of the Civil Procedure Code. (See A.I.R. COMMENTARIES on Civil P. C., 5th (1950) Edn., S. 20, for the meaning of the expression "actually and voluntarily resides.")

7. Intending evacuee. — A mere declaration under S. 19 of the Administration of Evacuee Property Ordinance (1949) (now see Administration of Evacuee Property Act, 1950) that a person is an intending evacuee does not in any way injure that person. A person who is declared to be an intending evacuee under S. 19 is still a citizen of India under ART. 5 of the Constitution and is entitled to all the Fundamental Rights declared in Part III of the Constitution.[1]

7a. Onus of proof.— Where an order for deportation is served on a person, that person, if he can make out a *prima facie* case that he is a citizen and not an alien, is entitled to a writ of *certiorari* and on the return to that writ being made, to a judicial determination of the question of his status.[1]

8. Commonwealth citizenship. — Section 1 of the British Nationality Act, 1948 (11 & 12 Geo VI c. 56) runs as follows:

> "1. (1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in sub-section (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.
>
> *British nationality by virtue of citizenship.*
>
> (2) Any person having the status aforesaid may be known either as a British subject or as a Commonwealth citizen; and accordingly in this Act and in any other enactment or instrument whatever, whether passed or made before or after the commencement of this Act, the expression 'British subject' and the expression 'Commonwealth citizen' shall have the same meaning.
>
> (3) The following are the countries hereinbefore referred to, that is to say, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon."

Article 5 — Note 7

[1] **1951 Mad 930 (Prs 18, 19) [A I R V 38 C 329] (DB),** *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.*

Article 5 — Note 7a

[1] **1951 Pat 434 (Pr 3) [A I R V 38 C 112] : ILR 30 Pat 21 (DB),** *Sayeedah Khatoon* v. *State of Bihar.*

By virtue of S. 1 of India (Consequential Provision) Act, 1949, (12, 13 & 14 Geo VI, C. 92), the provisions of existing laws would continue to apply until a provision to the contrary is made by the proper authority even after the coming into existence of the Constitution. Hence, S. 1 of the British Nationality Act above quoted continues to apply to India even after the coming into force of the Constitution. The same result is also reached by the application of ART. 372 of the Constitution.

Article 5 or other articles relating to citizenship do not refer to Commonwealth citizenship which may be dealt with by Parliament under ART. 11 if and when it thinks fit to do so.

See also ART. 9 NOTE 2.

9. Applicability to Jammu and Kashmir. — Part II of the Constitution dealing with citizenship does not apply to the State of Jammu and Kashmir. See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, cl. (3).

Rights of citizenship of certain persons who have migrated to India from Pakistan.

6. Notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—

(*a*) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(*b*) (*i*) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(*ii*) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the

Article 6
Note 1

form and manner prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

COGNATE PROVISIONS

Article 6 came into force on 26-11-1949—See ART. 394.

"Commencement of this Constitution"—Meaning of — The expression refers to 26-1-1950—See ART. 394.

Rights of citizenship of certain migrants to Pakistan notwithstanding anything in Art. 6—See ART. 7.

Person voluntarily acquiring citizenship of a foreign State not to be a citizen of India—See ART. 9.

Synopsis

1. Scope of the article.
2. "Territory of India."—See ART. 1 NOTE 6.
3. "Territory now included in Pakistan."
4. "Shall be deemed to be a citizen of India."
5. "Commencement of this Constitution."
6. "Any of his grandparents."
7. "India as defined in the Government of India Act, 1935."
8. "Migrated,."—See ART. 7 NOTE 2.
9. "Ordinarily resident." — See ART. 5 NOTE 6.
10. Dominion of India.
11. "Resident."—Cl. (b) (ii) Proviso.
12. Permit system for entry into India—Validity. — See Notes on ART. 7.

1. Scope of the article. — As already seen in the notes on ART. 5, ART. 5 enunciates the general rule as to citizenship of India, while the succeeding ARTS. 6, 7, 8 and 9 create exceptions to that general rule. Of these articles, ARTS. 6 and 7 are concerned with immigrants from and to Pakistan. The two articles make special provision as regards such immigrants. Article 6 deals with immigrants from Pakistan into India and ART. 7 deals with immigrants from India to Pakistan.

As seen under ART. 5, the Constitution has adopted a *territorial* basis for citizenship of India and not a racial or religious one. Citizenship is made to depend upon domicile within the territory of India coupled with the birth of the person or of either of his parents in India or the fact that such person was ordinarily resident in the territory of India for not less than five years immediately preceding the coming into force of the Constitution.

The territory of India for the above purpose refers to the territory of India *under the Constitution* and excludes Pakistan, although Pakistan was part of India prior to independence. But owing to mass migrations which took place on account of the division of the country into two separate States, it was found necessary to make special provision with regard to such migrants. These special provisions are contained in this article and ART. 7.

Article 6 Note 1

Article 6, which deals with the question of migrants from Pakistan into India, is, like ART. 5, limited in its applicability to the *commencement of the Constitution*, i. e. 26-1-1950, and deals with citizenship as at that date.

To claim the right of citizenship under this article, the following conditions must be satisfied:

(1) The person claiming citizenship must have migrated from Pakistan into India.

(2) He or either of his parents or any of his grand-parents must have been born in India as defined in the Government of India Act, 1935 as originally enacted, that is, in undivided pre-partition India.

But not all such migrants will be *ipso facto* deemed to be citizens of India under this article. To determine the question whether such persons would be deemed to be citizens under this article the date of their migration into India has to be seen. The 19th of July 1948 marks the dividing line. Those who migrated before 19-7-1948 would be deemed to be citizens of India automatically if they had been ordinarily residents in the territory of India since the date of their migration.

Those who migrated after 19-7-1948 would be deemed to be citizens of India only if they have been registered as citizens as required by ART. 6 (b) (ii). Under that clause registration as citizen can be made in such cases only where the application for such registration was made before the commencement of the Constitution i. e., 26-1-1950. (See ART. 394). Further, under the proviso to that clause, no person shall be registered as citizen under cl. (ii) unless he has been resident in the territory of India for at least six months immediately preceding the date of his application. Reading the proviso and cl. (ii) together it is, therefore, clear that a migrant from Pakistan cannot get himself registered as a citizen of India unless he had migrated before 26-7-1949 and had resided in India from that date till 26-1-1950. As to requirement of permit for *entering* India from Pakistan, see ART. 7, NOTE 3.

To sum up, migrants from Pakistan (who satisfy the qualification as to the place of their birth or of their parents or grand-parents) will be deemed as Indian citizens under this article if they have migrated before 19-7-1948 and have been ordinarily residents in the territory of India since the date of their migration. If they have migrated after 19-7-1948 but before 26-7-1949 they can get themselves registered as citizens of India by presenting an application for the purpose at any time before 26-1-1950, provided that they have been residents in India for the previous six months. Migrants from Pakistan after 26-7-1949 cannot have this privilege of getting themselves registered as citizens, and so they will not be deemed to be citizens of India under this article.

"Migrants from Pakistan" will include those who, having previously migrated from India to Pakistan, (after 1st March 1947 and thereby forfeited their right to Indian citizenship under ART. 7) have subsequently returned to India. But whether they return before 19-7-1948 or after, they will have to get themselves registered as citizens of India under cl. (b), as all such persons will be deemed to have migrated to the territory of India only after 19-7-1948 for the purpose of cl. (b) (ii) of ART. 6. (See ART. 7, proviso.) Moreover, it would be necessary for such persons to obtain a permit for re-settlement or permanent return before they can get themselves registered as citizens of India. (See proviso to ART. 7.)

Clause (b) (ii) contains an ambiguity. The wording of the clause creates an ambiguity as to whether it is the registration as a citizen of India that has to be made before the commencement of the Constitution, or whether it is the application for registration that has to be made before the commencement of the Constitution. But in view of the fact that the words 'application made' are more proximate to the words 'before the commencement of this Constitution' than the words 'he has been registered', it is conceived that it would be sufficient for the purpose of the clause if the application was made before the commencement of Constitution though it was not disposed of before that date. Moreover, the other construction would lead to very great hardship and would result in migrants being penalised for delays in the disposal of their applications for which they may not be responsible.

It would be seen from the above that this article shuts out from Indian citizenship all migrants from Pakistan after 26-7-1949. This means that under the article as it stands the thousands of Hindus and others who have been compelled to leave Pakistan, especially East Bengal, and find asylum in India, after that date, will be denied rights of Indian citizenship. It is hoped that Parliament in exercise of its powers under ART. 11, will ere long pass the necessary legislation to obviate this hardship.

2. Territory of India. — See ART. 1, NOTE 6.

3. "Territory now included in Pakistan." — The meaning of this expression has to be gathered from the Indian Independence Act, 1947 (10 & 11 GEO. VI, C. 30) although that Act has now been repealed by this Constitution. (See ART. 395.) Under S. 2 (2) of that Act the territories of Pakistan would be the following :—

(a) the territories which on 15-8-1947 were included in the Provinces of East Bengal and West Punjab as constituted under Ss. 3 and 4 of the Act ;

(b) the territories which at the date of the passing of the Act, namely 18-7-1947, were included in the Province of Sind and Chief Commissioner's Province of British Baluchistan ; and

(c) the territories included in what was previously the North-West Frontier Province.

4. "Shall be deemed to be a citizen of India." — The wording in ART. 5 is 'shall be a citizen of India'. But once a person is deemed to be a citizen, his rights and obligations cannot be different from those of a person who is a citizen.

5. **"Commencement of this Constitution."** — See also ART. 5 NOTE 2.

This article also applies only to the determination of citizenship as at the commencement of the Constitution, that is, 26-1-1950.[1]

6. **"Any of his grandparents."** — Grandparents will include both maternal and paternal grandparents and hence the use of the word 'any' and not 'either' as in the case of parents.

7. **"India as defined in the Government of India Act, 1935."**—The definition of "India" was contained in S. 311 (1) of the Government of India Act, 1935, and ran as follows :—

> " 'India' means British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time, after ascertaining the views of the Federal Government and the Federal Legislature, declare to be part of India."

And the definitions of "British India" and "tribal areas" contained in the same section are as follows :—

> " 'British India' means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces."

> " 'Tribal areas' means the areas along the frontiers of India or in Baluchistan which are not part of British India or of Burma or of any Indian State or of any foreign State."

India thus comprised the Governors' Provinces, Chief Commissioners' Provinces, Indian States and tribal areas.

The following were the Governors' Provinces : Madras, Bombay Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orissa and Sind: (See S. 46).

The following were the Chief Commissioners' Provinces : British Baluchistan, Delhi, Ajmer-Merwara, Coorg and the Andaman and Nicobar Islands, and Panth Piploda : (See S. 94 of the Act).

8. **"Migrated."**—See ART. 7, NOTE 2.

9. **"Ordinarily resident".**—See ART. 5 NOTE 6.

10. **Dominion of India.** — Under S. 1 of the Indian Independence Act, 1947, two independent Dominions were set up in India,

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Article 6 — Note 5

[1] *See* 1952 Cal 838 (839) (Pr 5) [AIR V 39] : 1952 Cri L Jour 1686 (DB), *Supdt. & Remr. of L. A., W. B.* v. *Rab Nawaz Khan.* (*Held* registration under cl. (b) (ii) does not confer citizenship from a date anterior to the coming into force of Art. 6, i. e. 26th November 1949 (see Art. 394) — It is submitted that under this article citizenship counts from the "commencement of the Constitution", i. e., 26th January 1950 (see Art. 394) and not the coming into force of *this article*.)]

known respectively as India and Pakistan. Immediately before the commencement of this Constitution India was a Dominion as so constituted. As the application for registration as citizen is to be made before the commencement of the Constitution, the application is required to be made to an officer appointed by the Government of the Dominion of India.

11. **"Resident"—Cl. (b) (ii) Proviso.** — It is significant that the migrant from Pakistan applying to get himself registered as a citizen of India, is only required to have been resident and not ordinarily resident in India, for six months before his application. It is conceived that the word 'resident' in proviso to cl. (b) (ii) has the same meaning as the word 'resides' in S. 20 of the Code of Civil Procedure. The word 'resident' also occurs in S. 4 of the Indian Income-tax Act, 1922, and decisions bearing on the meaning of the word in that section, may be usefully referred to.

See also NOTE 6 on ART. 5.

12. **Permit system for entry into India — Validity.** — See Notes on ART. 7.

Rights of citizenship of certain migrants to Pakistan.

7. Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause *(b)* of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

COGNATE PROVISION

Article 7 came into force on 26-11-1949 — See ART. 394.

Synopsis

1. Scope of the article.
2. Migration, meaning of.
3. Permit system.
4. Territory of India, meaning of— See ART. 1 NOTE 6.
5. "Territory now included in Pakistan."—See ART. 6 NOTE 3.

1. **Scope of the article.**—This article deals with the question of right of citizenship of a person who migrates to Pakistan. According to the article a person who migrates to Pakistan after 1-3-1947

from India shall not be deemed to be a citizen of India, although he may be otherwise qualified to be treated as such citizen under Art. 5 or Art. 6.[1] Thus, for instance, even a person having his domicile in India and born within the territory of India, cannot be deemed to be a citizen of India if he migrates to Pakistan after 1-3-1947. This incidentally shows that migration has nothing to do with domicile and that a person may be held to migrate to Pakistan even if he continues to have his domicile in India.[2]

This article only applies to persons migrating to *Pakistan*. If a person migrates to any other country, he will not necessarily lose his Indian citizenship. Whether he continues to be a citizen will depend upon whether he has changed his domicile. Further, if he has voluntarily acquired the citizenship of a foreign State, he will under Art. 9 cease to be an Indian citizen.

Even in the case of migrants to Pakistan this article will not apply so as to deprive them of their Indian citizenship if they have migrated *before* 1-3-1947. In their case also, the question of their continued Indian citizenship will depend upon their having changed their domicile to Pakistan or having voluntarily acquired the citizenship of Pakistan.

It has been seen in Note 1 on Art. 6 that persons migrating to India from Pakistan can become citizens of India under certain circumstances. It has also been seen there that persons who have first migrated from India to Pakistan so as to forfeit their citizenship of India may regain their Indian citizenship by returning to the territory of India, provided certain conditions are satisfied Such persons will be treated as migrants from the territory of Pakistan to India so as to be entitled to the benefit of the provisions of Art. 6. But it would be necessary for them to obtain a permit from *the proper authorities* for resettlement or permanent return.[3] Such permit is not necessary under this article in the case of persons migrating to India from Pakistan for the first time and not returning to India after having once migrated to Pakistan from India.[4] Of course even

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Article 7 — Note 1

[1] 1951 Nag 185 (Prs 2, 7) [AIR V 38 C 39] : ILR (1951) Nag 328 : 52 Cri L Jour 74 (DB), *Mohammad Hanif* v. *State of Madhya Pradesh.*
1951 Nag 38 (Pr 22) [A I R V 38 C 12] : I L R (1951) Nag 523 (DB), *Mohammad Ibrahim* v. *High Commr. for India in Pakistan.*

[2] 1951 Kutch 38 (Pr 3) [AIR V 38 C 25] : 52 Cri L Jour 585, *Mandhara Jakab* v. *Kutch Govt.*

[3] 1953 All 178 (179) [AIR V 40 C 77] (DB), *Kulsum Bibi* v. *District Magistrate Kanpur.* (A person who migrates to Pakistan from India after 1st March 1947 and returns to India subsequently cannot have his Indian citizenship revived unless (a) he returns to India under a permit for re-settlement or permanent return; or (b) he is registered as a citizen of India by the diplomatic or consular representative of India in a foreign country under Art. 8.)
1951 All 16 (Pr 7) [AIR V 38 C 4] : 1952 Cri L Jour 338, *Badruzzaman* v. *The State.* (Permit applied for but refused.)

[4] 1951 Nag 38 (Pr 24) [AIR V 38 C 12] : ILR (1951) Nag 523 (DB), *Mohammad Ibrahim* v. *High Commr. for India in Pakistan.* (The proviso to Art. 7 contem-

such persons will have to satisfy the requirement of ART. 6 before they can be considered as citizens of India. A permit was necessary for *entering* India from Pakistan under the Influx from Pakistan (Control) Act, 1949 (now repealed) unless the person was exempted under the Rules. (See NOTE 3.)

2. **Migration, meaning of.** — According to the Webster's DICTIONARY, "to migrate" means "to go from one place to another, especially to move from one country, region or place of abode or sojourn to another with a view to residence." So, the moving with a *view to residence* would appear to be essential for "migration".

The decisions on ART. 7 are also in consonance with this view. In *Shabbir Hussain* v. *U. P. State*,[1] for instance, it was remarked by Bhargava, J., that the expression "migrated from the territory of India to the territory now included in Pakistan" seems to have been used in ART. 7 in the sense of departure from one country to another with the intention of residence or settlement in the other country. A temporary visit to another country on business or otherwise cannot amount to migration.[2] Thus, it has been held that a woman born in India and married to a citizen in India taking up temporary residence in Pakistan for medical treatment would neither fall under sub-cl. (i) of the definition of "evacuee" contained in cl. (c) of S. 2, Bihar Administration of Evacuee Property Ordinance, 1949, nor under sub-cl. (ii), as the word "resident" occurring there must be construed as meaning a person who has taken up his or her residence in Pakistan permanently.[2a] Even if such a person comes within the definition of "evacuee" in the Ordinance, nevertheless, she is also a citizen of India and as such, is entitled to remain in India. If, while in Pakistan, her conduct was such as to create suspicions as to her loyalty to the Indian Union, she may, on her return to India, be subjected to such restrictions on her movements as Parliament may consider advisable but cannot be deported.[3]

Whether a person had migrated from one country to another or had gone there on a temporary visit is a question of fact which will

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plates permit for permanent return only to persons who have migrated to Pakistan.)

Article 7 — Note 2

[1] 1952 All 257 (Pr 67) [AIR V 39 C 90 (8)] : I L R (1952) 1 All 513 : 1952 Cri L Jour 553 (DB).

[2] 1953 Pat 112 (Pr 4) [AIR V 40 C 34] : I L R 32 Pat 131 (DB), *S. M. Zaki* v. *State of Bihar*. (The word "*migration*" definitely suggests an element of permanent change of residence and not merely movement from one place to another. A I R 1952 All 257, Foll.)
1952 All 257 (Pr 67) [AIR V 39 C 90 (8)] : ILR (1952) 1 All 513 : 1952 Cri L Jour 553 (DB), *Shabbir Husain* v. *U. P. State*.
1951 Pat 434 (Pr 4) [AIR V 38 C 112] : I L R 30 Pat 21 (DB), *Sayeedah Khatoon* v. *State of Bihar*.

[2a] 1951 Pat 434 (Pr 4) [A I R V 38 C 112] : I L R 30 Pat 21 (DB), *Sayeedah Khatoon* v. *State of Bihar*.

[3] 1951 Pat 434 (Pr 4) [A I R V 38 C 112] : I L R 30 Pat 21 (DB), *Sayeedah Khatoon* v. *State of Bihar*.

have to be decided on all the circumstances of the case.[4] Thus, where a person born and brought up in the Indian territory and doing business there sent some of his goods to Lahore in Pakistan and in order to dispose of the goods there he personally went there for a stay of two months, and had expressed his intention that he was going there only on a temporary visit and would return home after finishing his business and did so return, it was held that he had not migrated to Pakistan.[5]

The expression 'migration' in ART. 7 of the Constitution embraces in its scope two conceptions: (1) going from one place to another, and (2) the intention to make the destination a place of abode or residence in future. In the context of the Constitution, it has the notion of transference of allegiance from the country of departure to the country of adoption.[5a] Thus, where, the facts proved were that A left his home for Pakistan after 1st March 1947, that while in Pakistan he took up service which he lost later, that he came to India on a temporary visit about thirteen months after his departure, that the purpose for which he avowedly came to India was his marriage and taking away his family to Pakistan, that he wanted to return to Pakistan but his wife did not agree to accompany him, and that his application for re-conferment of the status of an Indian citizen on him was rejected, it was held that A had 'migrated' to Pakistan and was not a citizen of India.[6]

But migration does not connote necessarily intention to change one's *domicile.* Migration within the meaning of ART. 7 of the Constitution simply means departure from India to Pakistan for the purpose of residence, employment or labour and has no reference to domicile. So, where a person who, though domiciled in India, goes over to Pakistan for employment he has migrated to Pakistan and is no longer a citizen of India and has lost his Fundamental Rights and cannot, therefore, invoke ART. 13 of the Constitution to declare the Influx from West Pakistan (Control) Act, 1949, void.[7]

The view that migration does not necessarily involve intention to change one's domicile receives support from the wording of ART. 7 itself which begins with the words "notwithstanding anything in ARTS. 5 and 6." These words necessarily imply that a person who would otherwise be a citizen of India according to the article would be deemed to have ceased to be one if he has migrated to Pakistan after 1-3-1947. This necessarily means that though a person may have his domicile in India, he would cease to be a citizen, as under ART. 5 Indian citizenship necessarily requires Indian *domicile* in *every case.*

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[4] 1952 All 257 (Pr 67) [AIR V 39 C 90 (8)] : I L R (1952) 1 All 513 : 1952 Cri L Jour 553 (DB), *Shabbir Husain* v. *U. P. State.*

[5] 1952 All 257 (Pr 67) [AIR V 39 C 90 (8)] : I L R (1952) 1 All 513 : 1952 Cri L Jour 553 (DB), *Shabbir Husain* v. *U. P. State.*

[5a] *See* 1953 Pat 112 (Pr 4) [A I R V 40 C 34] : ILR 32 Pat 131 (DB), *S. M. Zaki* v. *State of Bihar.* (In the context in which the word "migrate" occurs, it indicates a movement from one place to another with a view to settle down in that country so as to affect the person's right of citizenship in the country from which he migrated.)

[6] 1951 All 16 (Pr 7) [AIR V 38 C 4] : 1952 Cri L Jour 338 (DB), *Badruzzaman* v. *The State.*

[7] 1951 Kutch 38 (Pr 3) [AIR V 38 C 25] : 52 Cri L Jour 585, *Mandhara Jakab* v. *Kutch Government.*

Women and children

A wife or child migrating to Pakistan after 1-3-1947 loses the Indian citizenship even though the husband or father continues to be an Indian citizen.[8]

Illustration.

The wife and minor children of a Muhammadan, resident of India, proceeded to Karachi after 1-3-1947 under a temporary permit and stayed there for more than six months. It was a time when great political changes were happening and migrations on a large scale were taking place from one country to another. There was no explanation why they stayed for such a long time in Pakistan before returning to India. It was held that they had migrated to Pakistan and lost Indian citizenship under this article though the husband and father remained an Indian citizen.[9]

3. Permit system. — As seen in NOTE 1, although a person, who has migrated from India to Pakistan after 1-3-1947, may return to India and get himself registered as a citizen of India under ART. 6 (b) (ii), it is necessary for him to obtain a permit for re-settlement or permanent return from the proper authorities.

Article 6 (b) (ii), relating to persons migrating from Pakistan to India (and not persons returing to India from Pakistan after having once migrated to Pakistan), does not itself require that such persons should obtain a permit for *entry* into India. But this does not affect the validity of any law which may impose such a requirement. Hence, if there is such a law there will practically be no difference as regards the requirement of such permit, between persons migrating from Pakistan to India for the first time and persons returning to India from Pakistan. The fact that in the latter case the proviso to ART. 7 requires a permit for *resettlement or permanent return,* does not affect the question of a permit being necessary in all cases for *entry* into India.

The Influx from Pakistan (Control) Ordinance, 1948, and the Influx from Pakistan (Control) Act, (23 of 1949) (now repealed by Act 76 of 1952) which superseded and re-enacted the Ordinance, were laws which required a permit for entry into India from Pakistan from *any* person. The provisions of the Act were wide enough to include not only migrants from Pakistan and persons returning from Pakistan after having once migrated to Pakistan so as to forfeit their Indian citizenship under the first paragraph of ART. 7, but also *citizens* of India who, for some reason or other, had gone to Pakistan and were returning to India.[1] The Influx from Pakistan (Control) Ordinance, 1948, and S. 7 of the Influx from Pakistan (Control) Act, 1949, were not *ultra vires* in so far as the persons of Indian domicile were concerned.[2] Further, even in relation to *citizens* of India the restrictions imposed by the Ordinance and the Act, by the introduction of permit system, being in the interest of the general public consequent on the partition of the country, and reasonable, were not inconsistent with ART. 19 (1) of the Constitution.[3] There is nothing in ARTS. 5 and 6 of the Constitution which precludes Parliament from enacting a law imposing the requirement of a permit for return to India.[4] Article 11 is wide enough to empower the Parliament to make a law restricting even the right of a *citizen* of India to enter India from outside the country.[5]

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[8] 1953 Sau 37 (Pr 5) [AIR V 40 C 17] (FB), *Khurshid* v. *State of Saurashtra.* 1953 All 178 (179) [A I R V 40 C 77] (DB), *Kulsum Bibi* v. *District Magistrate, Kanpur.* (This article applies also to children, migrating to Pakistan.)

[9] 1953 Sau 37 (Pr 5) [A I R V 40 C 17] (FB), *Khurshid* v. *State of Saurashtra*

In the case of a person not domiciled in India or Pakistan, a permit is not necessary for entry into India from Pakistan. But a passport as required by the Indian Passport Act, 1920, would be enough.

The power to grant a permit implies also a power to cancel one and it is competent to Parliament to provide for a cancellation of a permit. Rule 29 of the Permit System Rules was not in conflict with ARTS. 5 to 9 of the Constitution.[6] The effect of cancelling a permit was the same as if no permit was issued at all.[7] A permit could be cancelled even after it had been availed of, and the omission to hear the person before cancelling the permit and the omission to assign any reasons for cancelling the permit, did not infringe the Permit System Rules.[8]

4. Territory of India, meaning of. — See ART. 1 NOTE 6.

5. "Territory now included in Pakistan." — See ART. 6 NOTE 3.

Article 7 — Note 3

[1] 1951 Nag 43 (Prs 4, 10) [AIR V 38 C 13] : I L R (1951) Nag 552 : 1952 Cri L Jour 580 (DB), *Atau Raheman v. State of Madhya Pradesh.*

[2] 1951 Nag 185 (Pr 6) [AIR V 38 C 39] : ILR (1951) Nag 328 : 52 Cri L Jour 74 (DB), *Mohammad Hanif v. State of Madhya Pradesh.*
1951 Nag 43 (Prs 4, 10, 11) [AIR V 38 C 13] : I L R (1951) Nag 552 : 1952 Cri L Jour 580 (DB), *Atau Raheman v. State of Madhya Pradesh.*

[3] 1951 Nag 185 (Pr 7) [AIR V 38 C 39] : ILR (1951) Nag 338 : 52 Cri L Jour 74 (DB), *Mohammad Hanif v. State of Madhya Pradesh.*

[4] 1951 Nag 38 (Pr 28) [AIR V 38 C 12] : ILR (1951) Nag 523 (DB), *Mohammad Ibrahim v. High Commr. for India in Pakistan.*

[5] 1951 Nag 43 (Pr 10) [AIR V 38 C 13] : ILR (1951) Nag 552 : 1952 Cri L Jour 580 (DB), *Atau Raheman v. State of Madhya Pradesh.*

[6] 1951 Nag 38 (Pr 28) [AIR V 38 C 12] : ILR (1951) Nag 523 (DB), *Mohammad Ibrahim v. High Commr. for India in Pakistan.*

[7] 1951 Nag 38 (Pr 23) [AIR V 38 C 12] : ILR (1951) Nag 523 (DB), *Mohammad Ibrahim v. High Commr. for India in Pakistan.*

[8] 1951 Nag 38 (Pr 25) [AIR V 38 C 12] : ILR (1951) Nag 523 (DB), *Mohammad Ibrahim v. High Commr. for India in Pakistan.*

Rights of citizenship of certain persons of Indian origin residing outside India.

8. Notwithstanding anything in Article 5, any person who or either of whose parents or any of whose grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

COGNATE PROVISIONS

Article 8 came into force on 26.11.1949—See ART. 394.

"Commencement of this Constitution"—Meaning of—This expression refers to 26.1.1950—See ART. 394.

Person voluntarily acquiring citizenship of a foreign State not to be a citizen of India—See ART. 9.

Synopsis

1. Scope of the article.
2. "Any person who . . . was born in India."
3. "India as defined in the Government of India Act, 1935."—See ART. 6 NOTE 7.
4. "Ordinarily residing." — See ART. 5 NOTE 6.
5. "Any country outside India as so defined."
6. "Whether before or after the commencement of this Constitution."

1. Scope of the article. — This article is, like ART. 6, one by way of *extension* of the citizenship conferred by ART. 5. The effect of ART. 8 is to relax in cases coming under it the qualification prescribed by ART. 5 for Indian citizenship.

The following conditions must be satisfied for a person to be regarded as an Indian citizen by force of this article :

(1) He must have been born in India as defined in the Government of India Act, 1935, as originally enacted or either of his parents or any one of his grandparents must have been born in India as so defined.

(2) He must be ordinarily resident in a country outside India as so defined.

(3) He must have been registered as a citizen of India by the diplomatic or consular representative of India, in the country of his residence on his application in the prescribed form.

Article 8
Notes 1-6

If these conditions are satisfied he will be entitled to be regarded as an Indian citizen even though he may not have his domicile in India or he or his parents may never have resided in or even seen India. The provisions of this article, however, are subject to ART. 9. If a person acquires a foreign domicile and is consequently held to have 'voluntarily' acquired the citizenship of a foreign country, he cannot claim Indian citizenship also under this article. It may, however, be presumed that in such cases he will not be *registered* as a citizen of India under this article.

It will be seen that the effect of this article is to confer the right of Indian citizenship on a person born in pre-partition India or descended from parents or grandparents born in pre-partition India but now residing in a foreign country other than Pakistan. The privilege is not conferred upon residents of Pakistan.

Under this article, even a person who has migrated to Pakistan after 1-3-1947 and thereby lost his Indian citizenship under ART. 7, may, if he is ordinarily resident in a *foreign* country other than Pakistan, get himself registered as an Indian citizen by the diplomatic or consular representative of India in such foreign country.[1]

2. **"Any person who . . . was born in India."**—Compare similar wording in ART. 6 cl. (a).

3. **"India as defined in the Government of India Act, 1935."** — See ART. 6, NOTE 7.

4. **"Ordinarily residing."**—See ART. 5, NOTE, 6.

5. **"Any country outside India as so defined."** — These words show that a resident of Pakistan is not entitled to the benefit of this article. It may also be noted that the words used are "country outside India" and not "foreign State" as in ART. 9. A "country outside India" is not necessarily a foreign State. Under ART. 367 cl. (3), no doubt, a "foreign State" has been defined as meaning for the purpose of this Constitution any State other than India. But the proviso to the clause empowers the President to declare by Order any State not to be a foreign State for certain purposes. Even a country which is thus declared not to be a foreign State will be a country outside India for the purpose of this article.

6. **"Whether before or after the commencement of this Constitution."**—These words are significant. They show that unlike ART. 5 or ART. 6, this article deals with Indian citizenship not only at the date of the commencement of the Constitution but also at a subsequent time, although under ART. 11 the Parliament has power to alter the law about such citizenship.

Article 8 — Note 1

[1] 1953 All 178 (179) [AIR V 40 C 77] (DB), *Kulsum Bibi* v. *District Magistrate, Kanpur.*

Persons voluntarily acquiring citizenship of a foreign State not to be citizens.

9. No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.

COGNATE PROVISIONS

Article 9 came into force on 26-11-1949—See ART. 394.
Foreign State—For interpretation of, see ART. 367 (3).

Article 9 Notes 1–2

1. **Scope of the article.**—According to this article, even though a person might be a citizen of India or might be deemed to be a citizen of India under the foregoing articles, he will cease to be an Indian citizen if he has voluntarily acquired the citizenship of any foreign State. The emphasis is on the word "voluntarily".[1] Whether he has become a citizen of a foreign State must depend upon the law of that State. As seen in the notes on ART. 5, each country has the right to lay down by its laws the qualifications for its citizenship.

This article embodies a general principle which other countries also have adopted.[2]

Renunciation by declaration of alienage

Where a person is both a British and a Dutch citizen and is called on for military service in his former capacity, his renunciation of British citizenship after he is arrested for failure to present himself for military duty cannot form an answer to the charge.[3]

2. **Foreign State.** — This expression has been defined under ART. 367 (3) according to which the words 'foreign State' mean for the purpose of this Constitution any State other than India except a State which has been declared by the President under the proviso to the clause not to be a foreign State for any particular purpose or purposes.

Under this proviso the Constitution Declaration as to Foreign States Order, 1950, has been passed whereby, subject to the provisions of

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Article 9 — Note 1

[1] *See* (1939) 83 Law Ed 1320 (1323) : 307 U S 325, *Perkins* v. *Elg*. (Self expatriation presupposes a voluntary renunciation or abandonment of citizenship which cannot be imputed to an infant during his minority. Mere fact that a child born in the United States of naturalized parents may have acquired a citizenship in a foreign country under the law of that country on the resumption of such citizenship by his parents, does not necessarily mean that he has lost his United States citizenship.)

[2] *See* (1903) 1903-1 K B 444 (458) : 72 L J K B 167, *Rex* v. *Lynch*. (Under S. 6 of the Naturalization Act of 1870 (English), a British subject who voluntarily becomes naturalized in a foreign State is deemed to have *ceased to be a British subject*. But he cannot become naturalized in an enemy State in time of war and his act of becoming so naturalized will amount to treason.)

[3] (1917) 116 Law Tim 446 (447) : 33 Tim L R 317, *Vecht* v. *Taylor*.
[*See also* (1917) 2 K B 129 (139) : 86 L J K B 943, *Rex* v. *Middlesex Regiment*. (In this case it was held that the renunciation of British citizenship by declaration of alienage by a person after his enlistment in the army would not entitle him to discharge from the army before the end of the war, even assuming that he was entitled to make such a declaration.)]

Article 9 Note 2

any law that may be passed by Parliament, every country in the Commonwealth has been declaredn ot to be a "foreign State" for the purpose of the Constitution.

Continuance of the rights of citizenship.

10. Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen. ✓

Article 10 Note 1

1. Scope of the article. — Articles 5 and 6, it has been seen, relate to citizenship at the commencement of the Constitution. This article provides that a person who is deemed to be a citizen of India under any of the foregoing articles will continue to be an Indian citizen until and unless his status is affected by any law passed by Parliament. It may be noted in this connection that the Parliament of the Union has the exclusive legislative jurisdiction with regard to citizenship, naturalization and aliens : (See Sch. VII, List 1, Entry 17.)

Parliament to regulate the right of citizenship by law.

11. Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

Article 11 Note 1

1. Scope of the article. — As seen under Art. 5, the Constitution except under Art. 8 does not say who *shall* be entitled to the right of Indian citizenship. If the question arises with regard to a person who was not a citizen of India or was not deemed a citizen of India *at the commencement of the Constitution*, e. g., a person born of Indian citizens after the commencement of the Constitution, the Parliament has, under this article, expressly reserved to it plenary powers for legislating not only to cover such gaps in the provisions as to citizenship in the Constitution but also to make *any* provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. This means that Parliament can, by law, make any provision as to citizenship different from that contained in the Constitution. It may be noted that the subject of "citizenship, naturalization and aliens" falls exclusively within the legislative jurisdiction of the Union Parliament. (See Sch. VII, List 1, Entry 17.)

This article cannot be relied upon to validate the provisions of any law passed before the coming into force of the Constitution.[1]

Article 11 — Note 1

[1] 1952 All 257 (Pr 85) [AIR V 39 C 90 (8)] : ILR (1952) 1 All 513 : 1952 Cri L Jour 553 (DB), *Shabbir Hussain* v. *U. P. State.*

Article 11
Note 1

Restrictions on right of citizens to enter India

The wide and extensive power under ART. 11 includes lesser power to place restrictions even on citizens in the matter of entering the territory of India. Parliament can place restrictions on right of a citizen to enter India after having left it and having entered India, to observe the conditions subject to which he was allowed to enter. Section 7, Influx from Pakistan (Control) Act, 1949, (now repealed) was not unconstitutional and void after inauguration of the Constitution.[2]

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[2] 1951 Nag 43 (Prs 4, 10, 11) [AIR V 38 C 13] : ILR (1951) Nag 552 : 1952 Cri L Jour 580 (DB), *Atau Raheman* v. *State of Madhya Pradesh.*

PART III

FUNDAMENTAL RIGHTS

GENERAL

Synopsis

. The purpose of Fundamental Rights.
2. The content of Fundamental Rights.
3. The growth of the idea of Fundamental Rights in India prior to the Constitution.
4. Fundamental Rights under the American Constitution.
5. Fundamental Rights under the English Constitution.
6. Fundamental Rights under the Indian Constitution.
7. Laws repugnant to Fundamental Rights.
8. Against whom Fundamental Rights can be enforced.
9. Fundamental Rights and the Executive.
10. Rights not expressly declared as Fundamental Rights.
11. Directive Principles of State Policy.
12. American decisions.

Part III (General) Note 1

1. The purpose of Fundamental Rights. — A formal declaration of fundamental human rights is a characteristic feature of many modern written Constitutions. Reference may be made in this connection to Amendments I to X, XIII to XV and XIX to the Constitution of the United States of America, to ARTS. 4, 31, 44, 45, 49, 50, 55 to 58, 60 and 65 of the Swiss Constitution, to ARTS. 109 to 160 of the German Constitution of 1919, to ARTS. 118 to 128 of the Constitution of the Union of Soviet Socialist Republics and to ARTS. 40 to 44 of the Constitution of Ireland. Even in England, which has no written Constitution, the great Charters, Magna Carta, Petition of Rights and Bill of Rights are valued very highly as charters of freedom. Broadly speaking, the rights declared in these Constitutions relate to equality before the law, freedom of speech, freedom of the press, freedom of religion, freedom of assembly, freedom of association, security of person and security of property.[1]

Thus, the inclusion of a chapter on Fundamental Rights in the Constitution of India is in accordance with the trend of modern democratic thought.[2] The idea behind such inclusion is that the preservation of certain basic human rights against State interference is an indispensable condition of free society.

In *Moti Lal* v. *Uttar Pradesh Government*,[3] Sapru, J., observed as follows in describing the evolution of thought on Fundamental Rights in modern times :—

"The history of the evolution of thought on the rights of man takes us back into the seventeenth century or even earlier. From

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Part III-(General) — Note 1

[1] Constitutional Precedents, Third Series, Second Edition (1947) (Government Publication, p. 10.)

[2] 1951 All 257 (Pr 197) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government.*

[3] 1951 All 257 (Pr 196) [AIR V 38 C 51] : I L R (1951) 1 All 269 (FB).

Part III
(General)
Note 1

the time of Tom Paine's RIGHTS OF MAN, Jefferson's DECLARATION of RIGHTS, Rousseau, and the French Revolution, schools of thought have existed down to H. G. Wells and the U. N. O. discussions on human rights, which assert that man has certain natural or inalienable rights and that it is the function of the State, in order that human liberty might be preserved and human personality developed, to give recognition and free play to those rights. Fundamental Rights were practically to be found in every Constitution that came into existence after World War No. 1. After World War No. 2, as a result of the discussions on the proposed United Nations Charter of Human Rights, they have become even more visibly important in most Constitutions framed after that War."

The essential importance of Fundamental Rights, which are to be sacrosanct and immune from State interference, has been pointedly drawn attention to in American decisions, the American Constitution being perhaps the most typical example of a Constitution which includes a declaration of Fundamental Rights. Thus, in *Savings and Loan Association* v. *Topeka*[4] Justice Miller of the Supreme Court of America observed as follows :

> "There are such rights in every free Government beyond the control of the State. A Government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is, none the less, a despotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

✓

Similarly, in *Hurtado* v. *People of California*,[5] Justice Matthews of the Supreme Court of America observed as follows :

> "The limitations imposed by our constitutional law upon the action of the Governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the Government."

Again, in the same case, Justice Matthews made the following observations (at page 237 of Law Ed.) :

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[4] (1875) 22 Law Ed. 455 (461) : 20 Wall 655.

[5] (1884) 110 U S 516 (528, 529, 532) : 28 Law Ed. 232 (237, 238, 239).

> "In this country, written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their Governments, and the provisions of *Magna Charta* were incorporated into Bills of Rights. They were limitations upon all the powers of Government, legislative as well as executive and judicial."

The object of having a declaration of Fundamental Rights may also be gathered from the statements of the makers of the American Constitution. Jefferson, who was in Paris when the Federal Convention was at work, wrote to Madison in December, 1787, expressing general approval of the Constitution but strongly criticizing the absence of a Bill of Rights. "He desired such a declaration 'providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the *habeas corpus* laws, and trials by jury in all matters of fact, triable by the laws of the land and not by the law of the Nations'.[6] He wished 'to guard liberty against the legislative as well as executive branches of the Government'."[7]

Madison, who was the leading spirit in the preparation of the Amendments incorporating Fundamental Rights in the American Constitution, observed :

> "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[8]

Thus, the underlying idea of a Fundamental Right is that it must be capable of being enforced not only against the Executive but also against the Legislature, by *judicial process*. This point of view is also expressed by President William H. Taft of the United States of America in his special message to the Congress on 15th August, 1911.[9]

> "No honest, clear-headed man, however great a lover of popular Government, can deny that the unbridled expression of the majority of a community converted hastily into law or action would sometimes make a Government tyrannical or cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to

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[6] Doct. Hist. Const., Vol IV p. 412. (Quoted in The Supreme Court of the United States by Charles Evans Hughes, page 157).

[7] Letter to F. Hopkinson, March 13, 1789, id, Vol. V, p. 159. (Quoted in The Supreme Court of the United States by C. E. Hughes, at page 157).

[8] Annals of Congress, Vol. I, 1st Congress 1st and 2nd Sess., p. 439. (Quoted in The Supreme Court of the United States by C. E. Hughes, at page 160).

[9] President Taft, Special Message to Congress, 15 Aug., 1911, cited in A.B. Hall, Popular Government, pp. 170 — 171. (Taken from Fundamental Rights by M. Ramaswamy, 1946 Ed., page 3.)

secure sober action and a respect for the rights of the minority.... In order to maintain the rights of the minority and the individual and to preserve our constitutional balance, we must have Judges with courage to decide against the majority when justice and law require."

In *Gopalan* v. *State of Madras*,[10] Patanjali Sastri, J., also pointed out that paramountcy to State-made laws is the hall-mark of a Fundamental Right.

Thus, the aim of having a declaration of Fundamental Rights is that certain elementary rights of the individual such as his right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majorities in the Legislatures of the country should not be able to tamper with them.[11] In this connection, the following observations of Justice Jackson of the Supreme Court of America in *West Virginia State Board of Education* v. *Barnette*[12] may be quoted:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other Fundamental Rights may not be submitted to vote; they depend on the outcome of no elections."

For a discussion of the subject with particular reference to the Indian Constitution, see NOTE 6.

2. The content of Fundamental Rights. — As stated in NOTE 1, broadly speaking, the rights which are declared as Fundamental Rights in various Constitutions of the world relate to certain elementary human rights, which are regarded as essential for any free society. Some of the quotations given in NOTE 1 refer to what rights may be regarded as being such *essential* rights. In this connection reference may be made to the rights that are regarded as *fundamental* by American decisions relating to the well known "due process" clause of the American Constitution under which the conception of Fundamental Rights has been developed to a very great extent. The word "liberty" in this context is given a very wide connotation by American decisions as including not only freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to

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10. 1950 S C 27 (74) (Pr 115) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (S C). (His Lordship rejected the argument that a right which is enforceable only against the executive can be described as a "Fundamental Right".)

11. 1952 Mad 613 (Pr 30) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H.R.E., Madras.* (The Fundamental Rights were intended as a limitation on the legislative powers of the Parliament and State Legislatures and they were enacted for the benefit of minorities.)

12. (1943) 319 U S 624 (638) : 87 Law Ed. 1628 (1638).

Part III
(General)
Notes 2-3

the dictates of his own conscience, and generally to enjoy those privileges long recognized at Common Law as essential to the orderly pursuit of happiness by free men.[1]

In *Maxwell* v. *Dow*[2] a passage from the judgment of the Pennsylvania Court[3] is quoted. This passage also shows the wide conception of Fundamental Rights adopted under the American Constitution. This passage relates to the interpretation of the words "privileges and immunities of citizens of the several States" which occur in S. 2 of ART. IV of the United States Constitution and is as follows :

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads : Protection by the Government, the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole."

Reference may also be made in this connection to the chief liberties of the subject which are recognized by the English law. See NOTE 5.

3. The growth of the idea of Fundamental Rights in India prior to the Constitution. — Even prior to the present Constitution of India, the idea of Fundamental Rights was present in a tenuous form in the Indian polity.[1] Reference may chiefly be made in this connection to Ss. 298 and 299 of the Government of India Act, 1935. Section 298 (1) provided as follows :

> "No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India."

Part III-(General) — Note 2

[1] (1923) 262 U S 390 (400) : 67 Law Ed 1042 (1045), *Meyer* v. *Nebraska*.

[2] (1900) 44 Law Ed 597 (600) : 176 U S 581.

[3] (1823) 4 Wash C C 371 : Fed Cas No. 3,230, *Corfield* v. *Coryell*. (Washington J.)

Part III-(General) — Note 3

[1] *See* 1951 Mad 1015 (Pr 5) [A I R V 38 C 354] : 1952 Cri L Jour 170 (D B), *Venkataraman* v. *Commr. of Police, Madras*. (*Note* — In view of S. 298 (1) and S. 299 (1) and (2) of the Govt. of India Act it seems questionable whether it will be accurate to say (as it was said in this case) that prior to the 26th January 1950 there were no statutory Fundamental Rights conferred upon any citizen of India by any Act of the British Parliament.)

Part III
(General)
Note 3

Section 299 (1) and (2) provided as follows :—

> "(1) No person shall be deprived of his property in British India save by authority of law.
>
> (2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined."

In explaining the insertion of S. 298 (1) Sir Samuel Hoare observed as follows[2] :—

> "The Indian delegates were anxious to have some declaration of Fundamental Rights. The request that they pressed upon the Joint Select Committee and the various Round Table Conferences was that somewhere or other the effective words in Queen Victoria's Proclamation should be repeated. These are the words substantially from Queen Victoria's Proclamation. They have become consecrated by long usage in the minds of Indians and the wise course is to retain the words."

The provision in S. 298 (1), above referred to, in regard to the capacity to hold office had been on the statute book ever since 1833. It was S. 87 of the Government of India Act, 1833,[3] and S. 96 of the Government of India Act, 1915.[4]

Referring to the above provisions Bhagwati J., of the Bombay High Court in *Tan Bug Taim* v. *Collector of Bombay*,[5] observed that they constituted a statutory recognition of the fundamental principles of British jurisprudence.

But on the whole the demand for the inclusion of a declaration of Fundamental Rights in the Constitution Act was not favoured by the Joint Parliamentary Committee in its Report on which the Government of India Act, 1935, was based. The Committee observed as follows[6] :—

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[2] Parliamentary Debates, Vol 300, Cols 1048-1049 cited in Government of India Act, 1935, by N. Rajagopala Aiyangar, M. A. M. L., p. 314.

[3] Section 87 of the Government of India Act, 1833 (3 & 4 William IV, Chap. LXXXV, ran as follows : "87. That no native of the said territories, nor any natural-born subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any place, office, or employment under the said company."

[4] Section 96 of the Government of India Act, 1915 (5 & 6 Geo. V, Ch. 61) ran as follows : "No native of British India, nor any subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any office under the Crown in India."

[5] 1946 Bom 216 (235) [A I R V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594.

[6] Joint Parliamentary Committee Report, para 366, quoted in Government of India Act, 1935, by N. Rajagopala Aiyangar, at page 314.

"The question of so-called Fundamental Rights, which was much discussed at the three Round Table Conferences, was brought to our notice by the British India Delegation, many members of which were anxious that the new Constitution should contain a declaration of rights of different kinds, for reassuring minorities for asserting the equality of all persons before the law, and for other like purposes; and we have examined more than one list of such rights which have been compiled. The Statutory Commission observe with reference to this subject :—'We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective.' With these observations we entirely agree; and a cynic might indeed find plausible arguments, in the history during the last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of a Fundamental Right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma; for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared. An examination of the lists to which we have referred shows very clearly indeed that this risk would be far from negligible. There is this further objection, that the States have made it abundantly clear that no declaration of Fundamental Rights is to apply in State territories; and it would be altogether anomalous if such declaration had legal force in part only of the area of the Federation. There are, however, one or two legal principles which might, we think, be appropriately embodied in the Constitution, and we direct attention to them in the paragraphs which follow. There are others, not strictly of a legal kind, to which perhaps His Majesty will think fit to make references in any Proclamation which He may be pleased to issue in connection with the establishment of the new order in India."

With the advent of independence, the Constituent Assembly gave effect to the cherished desire of the nation to have a declaration of Fundamental Rights in its Constitution.

Introductory.

4. Fundamental Rights under the American Constitution. —The American Constitution affords perhaps the best example of a democratic constitution in which the idea of Fundamental Rights is developed. As originally drafted, the American Constitution, although it did contain some provisions relating to individual liberty, did not contain a full-fledged Bill of Rights. But this was not liked by many people and there was a wide-spread misgiving whether the powers of the new Federal Government would not be abused. Thomas Jefferson, who was in Paris when the Federal Convention was at work, wrote to Madison in December 1787, expressing general approval of the Constitution but strongly criticizing the absence of a Bill of Rights. (See NOTE 1). Hence, soon after the adoption of the Federal Constitution in 1787, ten Amendments were adopted and these became part of the Constitution on 5th December 1791. These ten Amendments are generally referred to as the American Bill of Rights. Madison was the prime mover in this matter and was mainly responsible for the preparation and incorporation of the Amendments. The period practically coincided with the period of the French Revolution. In the year 1789, the National Assembly of France adopted the famous Declaration of the Rights of Man and this Declaration greatly influenced the framers of the American Constitution. Further Amendments were subsequently adopted, the most famous of which was the 14th Amendment which was incorporated in the Constitution in 1868 immediately after the Civil War.

It is of interest to note that the first ten Amendments, which are generally referred to as the American Bill of Rights, were all aimed at securing individual rights against the *Federal Government*, while the famous Amendment XIV, S. 1, which is aimed at the States was passed several decades later. This was quite natural because the component States of the Union were originally independent States and the Federation was established on the basis of an agreement between them, to part with a fraction of their independence, and under the circumstances a feeling of apprehension as regards the misuse of the powers entrusted to the Federal Government was natural.

"Due Process of Law"

The leading feature of the conception of Fundamental Rights as developed under the American Constitution may be said to be the doctrine of "due process of law". Under Amendment V to the Constitution which is directed against the Federal Government it is provided *inter alia* that "no person shall be deprived of his life, liberty or property without due process of law." A similar provision is contained in Amendment XIV which relates to the powers of the States[1] and which provides *inter alia* "nor shall any State deprive any person of life, liberty or property without due process of law". The judicial interpretation of the due process clause may be said to constitute the main body of American law as to Fundamental Rights.

It is remarkable that although the phrase "due process of law" occurs both in the 5th and the 14th Amendments, there is a great increase in the case law as to the meaning and effect of the expression after the enactment of the 14th Amendment. The reason is that the 14th Amendment enables *State* actions and laws to be challenged

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Part III-(General) — Note 4

1. (1873) 21 Law Ed 394 (408) : 16 Wall 36, *Slaughter House Case.* (Under the U. S. Constitution, 14th Amendment, S. 1, a distinction is made between "privileges and immunities" of citizens of the *United States* and those of citizens of *States* and it is only the former that are protected by the above Amendment.)
(1900) 44 Law Ed 597 (599, 600) : 176 U S 581, *Maxwell* v. *Dow.* (Do.)

Part III
(General)
Note 4

before Courts of law, while the 5th Amendment is only aimed at the Federal Government and Legislature. When the 14th Amendment was introduced, it was availed of by many persons to question the validity of *State* laws and actions while only a comparatively few persons had availed themselves of the 5th Amendment to question the validity of *Federal* laws and activities.

The phrase "due process of law" represents an American conception of extraordinary pervasiveness.[2] The framers of the American Constitution did not attempt to define the expression with the result that it has a vague and indefinite content. Evidently, the framers of the American Constitution preferred flexibility to certainty when they chose the phrase "due process of law". It is not possible, therefore, to give an exhaustive definition of the phrase.[3] But apart from this, it was also not desirable to limit the meaning of the words by a rigid interpretation. In *Davidson* v. *Board of Admrs. of New Orleans*[4] Justice Miller of the Supreme Court of America, delivering the opinion of the Court, observed as follows :

> "Apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

On this point, the following passage from the book,[5] THE SUPREME COURT OF THE UNITED STATES by Charles Evans Hughes, may be quoted :

> "On this side of the water, the words of Magna Charta may have been misunderstood, but the spirit of Magna Charta dominated political thought. The Colonists invoked the 'rights of Englishmen'. They had a notion of rights that were fundamental, immutable, and they intended to make these rights secure. It matters not whether they were accurate in their understanding of the Great Charter, for the point is not what it meant when granted by King John, but what the Colonists thought it meant, and what the framers and ratifiers of our constitutional provisions intended by 'law of the land' or 'due process of law'. They did not attempt to define the meaning of the phrase; doubtless it appeared to them as having an indefinite content, and it was all the better for that. They wanted protection against tyranny, wherever and however it might hit, and they were not careful even to try to limit by exact definition the guaranty of their liberties. It would be easy to show that the requirements of

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[2] Supreme Court of the United States, by Charles Evans Hughes, p. 185.

[3] (1878) 96 U S 97 (101, 102) : 24 Law Ed 616 (619), *Davidson* v. *Board of Admrs. of New Orleans.* (*Miller J.*)

[4] (1878) 96 U S 97 (101, 102) : 24 Law Ed 616 (619).

[5] The Supreme Court of the United States, by C. E. Hughes, pp. 186-187.

> proper procedure in criminal cases, and in civil cases also, had a large place in their minds. But it would be going too far to insist that these requirements were all they had in view. They were also intent on safeguards against arbitrary Government. They were intent on protection against Legislatures as well as Executives . . . . .
>
> If they cherished a desire to resist both legislative and executive arbitrariness, they would naturally wish to have a guaranty of security in flexible terms. They preferred flexibility to certainty. The phrase 'due process of law' was vague, its meaning was unsettled, but it was not meaningless nor was it limited by anything short of the general purpose to afford immunity from any violation of Fundamental Rights.'

Meaning of "due process of law."

In tracing the development of the meaning and content of due process through judicial interpretation, there are certain features which may be noted. The phrase "due process of law" does not refer to a law enacted by the Legislature.[6] The very object of introducing the due process clause was to impose a check on legislative omnipotence, as well as executive tyranny. Dealing with the 5th Amendment, Justice Curtis of the Supreme Court of America observed as follows in the undermentioned case,[7] which raised the question whether certain distress warrants issued by the Solicitor of the Treasury under an Act of 1820,[8] were in accordance with the 5th Amendment :

> "That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. But is it 'due process of law'? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

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[6] The very opposite is the construction placed on the expression "procedure established by law" in Art. 21, by the Supreme Court in *Gopalan* v. *Sate of Madras*, AIR 1950 S C 27.

[7] (1856) 18 Howard 272 (276, 277) : 15 Law Ed 372 (374), *Den* v. *The Hoboken Land Improvement Co.*

[8] *See* Act of May 15, 1820, C 107, 3 Statutes at Large, 592.

Part III (General) Note 4

Similarly, in *Davidson* v. *Board of Admrs. of New Orleans*,[9] Justice Miller of the Supreme Court observed as follows :

> "It is easy to see that when the great Barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those Barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'No State shall deprive any person of life, liberty, or property without due process of law', can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation. It seems to us that a statute which declared in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."

In the *Dartmouth College case*,[10] Webster in his argument made the following classic statement :

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the Legislature. There would be no general permanent law for Courts to administer, or for men to live under. The administration of justice would be an empty form, and idle ceremony."

The expression "due process of law" was in the earlier stages, treated as referring to the English Common Law.[11] The words "due

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[9] (1878) 96 U S 97 (101, 102) : 24 Law Ed 616 (618-619).

[10] (1818) 4 Law Ed 629 (645) : 4 Wheaton 518, *The Trustees of Dartmouth College* v. *Woodward*.

[11] (1856) 18 Howard 272 (276, 277): 15 Law Ed 372 (374), *Den* v. *The Hoboken Land Improvement Co.*

Part III
(General)
Note 4

process of law", it was held, were intended to convey the same meaning as the words "by the law of the land" in Magna Charta. Lord Coke in his Commentary on the words "by the law of the land" (2 Inst. 50) says they mean due process of laws.[12] In his Commentary on *Dr. Bonham's case*,[13] the emnient jurist observed as follows :

> "And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for, when an Act of Parliament is against common rights or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

The theory that due process was the same as the Common Law of England and that the validity of governmental and legislative measures must be tested from the point of view of their being in accordance with the Common Law of England proved a hindrance to the enactment of measures required for the needs of a growing society. And accordingly the Courts evolved the principle that new procedures were due process if they served the ends of substantial justice.[14]

In *Hurtado* v. *People of California*[15] Matthews, J., rejected the argument that a process of law which was not sanctioned by the settled usage of law cannot be regarded as due process of law. He observed :

> "To hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."

In the same case,[16] Matthews, J., observed as follows :

> "There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from evey fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

Another aspect about the doctrine of due process is that the clause guarantees not only particular forms of procedure but the very

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1952 Punj 309 (313, 314) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

[12] *See* (1856) 15 Law Ed 372 (374): 18 Howard 272, *Den* v. *The Hoboken Land Improvement Co.* (Lord Coke's Commentary referred.)

[13] (1610) 8 Cokes' Rep. 107 (a) at p. 118 (a). (Cited in A I R 1952 Punj 309 (313) (FB).)

[14] 1952 Punj 309 (313) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

[15] (1884) 110 U S 516 (528, 529, 531) : 28 Law Ed 232 (236, 237). (Due process of law embodies a flexible conception.)

[16] (1884) 28 Law Ed 232 (237) : 110 U S 516, *Hurtado* v. *People of California.*

Part III (General) Note 4

substance of individual rights to life, liberty and property.[17] In *Hurtado* v. *People of California*[18] Justice Matthews of the Supreme Court of America observed as follows:

> "As these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation, but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property."

Hence, Courts began to examine the constitutionality of all Legislative measures in the light of their own political, social and economic ideas.[19] In other words, in virture of the due process clause, the Courts exercised the power of examining legislative enactments with a view to determine whether they formed an undue, arbitrary or unreasonable invasion of individual liberty and rights.[20]

It was, however, conceded that the Legislature had the power of making laws for the advancement of public welfare although such laws might trench upon private rights to a certain extent. This power was known as the 'Police Power' of the State which may be defined as the legal capacity of the Government to control the personal liberty of individuals for the protection of social interests or common good of the people.[21] But the Courts reserved to themselves the last word on the subject, by claiming and exercising the power to declare whether the legislative action was arbitrary or without reasonable relation to some purpose within the competency of the State to effect.[22]

Principle of Judicial Supremacy

It is in this sense that the American Constitution is said to be based on the principle of judicial supremacy in contrast to the English system which is based on the principle of Parliamentary supremacy. But this does not mean that under the American system the Court can deprive the Legislature of its discretion in its proper field. In THE SUPREME COURT OF THE UNITED STATES,[23] Charles Evans Hughes observes as follows:

> "Both Congress and the State Legislatures must have a wide field of legislative discretion that is essential to the exercise of legislative power. The due process clause does not substitute the

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[17] (1884) 110 U S 516 (531) : 28 Law Ed 232, *Hurtado* v. *People of California.*

[18] (1884) 110 U S 516 (531) : 28 Law Ed 232 (237).

[19] 1952 Punj 309 (313, 314) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

[20] (1923) 67 Law Ed 1042 (1045) : 262 U S 390, *Meyer* v. *Nebraska.*

[21] Constitutional Law of the United States by Willis, 1936 Edition, page 224.

[22] (1923) 67 Law Ed 1042 (1045) : 262 U S 390, *Meyer* v. *Nebraska.*

[23] Supreme Court of the United States by Charles Evans Hughes, p. 195.

Part III
(General)
Note 4

judgment of the Court for this discretion of the Legislature. The legislative action may be unwise without being arbitrary to the point of transcending the limits of its authority. Its action may be economically unsound without being constitutionally invalid. Even as to procedure, the Legislature is not bound to provide an ideal system. Changing social conditions require new remedies, the novel exercise of the Police Power, to care for both social and individual interests. Our Federal Constitution has vested in the Supreme Court, and the inferior Federal Courts, the judicial, not the legislative, power. Those who find fault with the multiplicity of laws, and with vexatious interferences, normally must address themselves to the Legislature, and not to the Courts; they have their remedy at the ballot box.

> "But there is a limit. To take familiar illustrations — no one would contend that the Legislature could take A's property and give it to B, or enact a law that no one under six feet in height should be allowed to sell groceries. It would naturally be said that constitutional provisions are not needed to protect against such legislative extravagances. But the point is that the framers of the Constitution were not content to take their chance with legislative omnipotence, and while such extreme measures might not be expected, there was reason for apprehension that there would be encroachments, likewise indefensible, because capricious and of an entirely arbitrary character. And thus the duty rests upon the Supreme Court which it cannot escape, to apply this test to legislation."

The Supreme Court of America also takes into account changes in the social and economic circumstances of the country in pronouncing upon the validity of legislation from the point of view of the question whether it constitutes an unreasonable and arbitrary infringement of individual rights in a manner not called for by the situation to meet which the legislation professes to have been passed. Thus, in *Euclid* v. *Ambler Realty Co.*,[24] the question was about the validity of a zoning ordinance. Mr. Justice Sutherland, delivering the opinion of the Supreme Court, observed as follows:

> "Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and

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[24] (1926) 71 Law Ed 303 (310): 272 U S 365.

unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall . . . . .

"The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue . . . .

"Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality . . . .

"A nuisance may be merely a right thing in the wrong place, —like a pig in the parlour instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

The late Sir Maurice Gwyer expressed the following opinion[25] about the part played by judicial decisions in America in the development of the law relating to Fundamental Rights under the American Constitution. Sir Maurice observed :

"It will, I think, be a matter of surprise to those unacquainted with the American cases to see how far the very broad and general language of the American Constitution has been extended by the Courts to protect the rights which the Constitution gives ; how reasonably on the whole the Courts have interpreted the language of the Constitution ; and not least, how consonant with justice and commonsense the general result of the decisions appears to be."

See also notes on ART. 21.

No formal declaration of Fundamental Rights

5. Fundamental Rights under the English Constitution. —England has no written Constitution. Nor is there any formal declaration of Fundamental Rights under the English Constitution. As observed by Lord Wright in *Liversidge* v. *Anderson*,[1] "in the Consti-

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[25] Foreword to "Fundamental Rights" by M. Ramaswamy, page vi.

Part III — (General) — Note 5

[1] (1941) 3 All E R 338 (372) : 110 L J K B 724.

Part III (General) Note 5

tution of England . . . there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved." Thus, the notion of Fundamental Rights is foreign to the British Constitution. Dicey in his LAW OF THE CONSTITUTION[2] observes as follows:

> "There is in the English Constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English Constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament. To put what is really the same thing in a somewhat different shape, the relation of the rights of individuals to the principles of the Constitution is not quite the same in countries like Belgium, where the Constitution is the result of a legislative act, as it is in England, where the Constitution itself is based upon legal decisions. In Belgium, which may be taken as a type of countries possessing a Constitution formed by a deliberate act of legislation, you may say with truth that the rights of individuals to personal liberty flow from or are secured by the Constitution. In England the right to individual liberty is part of the Constitution, because it is secured by the decisions of the Courts, extended or confirmed as they are by the Habeas Corpus Acts."

The following passage from Halsbury's LAWS OF ENGLAND[3] may also be quoted in this connection:

> "The so-called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law or statute. Where public authorities are not authorised to interfere with the subject, he has liberties. It follows that, apart from the general provisions ensuring the peaceful enjoyment of rights of property, and the freedom of the subject from illegal detention, duress, punishment, or taxation, contained in the four great charters or statutes which regulate the relations between the Crown and people,[4] the liberties of the subject are not expressly defined in any law or code. Further, since Parliament is sovereign the subject cannot possess guaranteed rights such as are guaranteed to the citizen by many foreign Constitutions. But

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[2] Dicey's Law of the Constitution, 9th Edition, 1952, p. 197.

[3] Halsbury's Laws of England, 2nd Edition, Vol. 6, pages 389, 390 (Para. 435).

[4] Namely, Magna Carta, 1297 (25 Edw. 1); The Petition of Right, 1627 (3 Car. 1, C. 1); the Bill of Rights, 1688 (1 Will. & Mar. Sess. 2, C. 2) and the Act of Settlement, 1700 (12 & 13 Will. 3, C. 2).

it is well understood that certain liberties are highly prized by the people,[5] and that in consequence Parliament is unlikely, except in emergencies, to pass legislation constituting a serious interference with them."[6]

Liberties of the subject under English law

Although there is no formal declaration of Fundamental Rights placing them beyond the reach of ordinary legislation, the four great Charters, the Magna Carta, the Petition of Right, the Bill of Rights and the Act of Settlement, are constitutional documents of fundamental importance which are prized by the people very much. With regard to the Magna Carta, it has been observed by Pollock and Maitland, in THE HISTORY OF ENGLISH LAW,[7] that "with all its faults this document becomes and rightly becomes, a sacred text, the nearest approach to an irrepealable fundamental statute that England has ever had."

But in spite of the great sanctity attached to the Magna Carta and other great Charters and statutes on which the liberties of the subject are founded under the English law, such liberties, as already stated, are not beyond legislative interference since Parliament is supreme and can pass any law it deems fit. It was observed by Lord Wright in *Liversidge* v. *Anderson*,[8] that the liberty of a subject in England "is a liberty confined and controlled by law, whether common law or statute."

The most important liberties recognized by the English law are the following[9]:

"(1) The right of personal freedom, or immunity from wrongful detention or confinement, which is ensured by the action of false imprisonment and by the writ of *habeas corpus*, re-inforced by the Habeas Corpus Acts, under which, upon probable cause being shown by an affidavit, either of the prisoner himself, or of some other person on his behalf, a writ may be obtained directing the person having charge of the prisoner to produce his body before the King's Bench Division, in order that the reason of his detention may be inquired into.

(2) The right of property, which is protected by various proprietary and delictual actions, in particular the actions of trespass *quare clausum fregit*, and of trespass *de bonis asportatis*.

(3) The right to freedom of speech or discussion, which means that any person may write or say what he pleases, so long as he does not infringe the law relating to libel or slander, or to blasphemous,

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[5] The absence of constitutional guarantees makes necessary, and perhaps stimulates, a strong public opinion on this subject.

[6] This was done without trouble during the Great War by the Defence of the Realm Acts, but the right of the civilian subject to trial by jury was, after a short period of suppression, restored. The Emergency Powers Act, 1920 (10 & 11 Geo. C. 55), carefully forbids the setting up of arbitrary tribunals or the enforcement of military or industrial conscription and preserves the right to strike.

[7] Pollock & Maitland, the History of English Law, Vol. 1, page 152.

[8] (1941) 3 All E R 338 (372) : 110 L J K B 724.

[9] Halsbury's Laws of England, 2nd Edition, Vol. 6, page 391 (Pr 437).

obscene, or seditious words or writings. This right is closely connected with and covers that of freedom of conscience.

(4) The right of public meeting, which means that any persons may meet together, so long as they do not thereby trespass upon private rights of property or commit a nuisance, or infringe the law relating to public meetings or unlawful assemblies.

(5) The right of association, which arises from the fewness of the restrictions on the making of contracts and the constitution of trusts, from the ease with which companies can be formed under the Companies Act, and trade unions under the Trade Union Acts and from the laxity of the law of conspiracy.

It seems that there should be added to this list the following rights, which appear to have become well-established :

(6) The right of the subject to have any case affecting him tried in accordance with the principles of natural justice, particularly the principles that a man may not be a judge in his own cause, and that no party ought to be condemned unheard, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case.

(7) The right to strike, or the right of the subject to withhold his labour, so long as he commits no breach of contract, or tort, or crime."

Check on Executive and not on Legislature

The fundamental difference between the American conception of individual liberty and freedom and the English conception is that in America written Constitutions were intended to act as limitations on the power of the *Legislature as well as of the Executive*, while in England the maxims of liberty and justice are only applied as guards against *executive* usurpation and tyranny.[10] In *Hurtado* v. *People of California*,[11] Justice Matthews of the Supreme Court of America observed as follows :

> "The concessions of Magna Carta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favour of the commons by limiting the power of Parliament ; so that Bills of Attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary Acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land ; for notwithstanding what was attributed to Lord Coke in *Bonham's*

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[10] 1950 S C 27 (Pr 234) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.
1952 Punj 309 (313, 314) [A I R V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab*.
(1884) 28 Law Ed 232 (237) : 110 U S 516, *Hurtado* v. *People of California*.
(1878) 96 U S 97 (101, 102) : 24 Law Ed 616, *Davidson* v. *Board of Admrs. of New Orleans*.
(1871) L R 6 C P 576(582):40 L J C P 285, *Lee* v. *Bude and Torrington Junction Railway Co.*

[11] (1884) 28 Law Ed 232 (237) : 110 U S 516 (531).

Part III (General) Note 5

Case,[12] the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the commons. In this country written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their Governments, and the provisions of Magna Carta were incorporated into Bills of Rights. They were limitations upon all the powers of Government, legislative as well as executive and judicial. . . . . .

"As these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation ; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property."

But as regards the *Executive,* English law is extremely jealous and the Executive can in no way affect the liberty of the British subject except in accordance with law. In *Eshugbayi* v. *Government of Nigeria,*[13] Lord Atkin observed as follows :

"In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the Executive."

It follows from the principle of parliamentary supremacy adopted in England that the Judiciary cannot question the validity of any parliamentary enactment on the ground of its arbitrarily or unreasonably affecting the liberties of the subject as the American Courts can do in the case of legislative enactments there. As observed by Lord Shaw of Dunfermline[14] :

"The corrective of the action of Parliament as a human and fallible institution is not a legal corrective, lies not with the Judiciary but lies with Parliament itself, acted upon by a fresh wave of public opinion, a higher sense of duty, a wider range of experience or a broader perspective in the regions of applied justice."

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[12] (1610) 8 Coke's Rep 115 (118a) : 77 E R 638 and 646.

[13] 1931 P C 248 (252) [AIR V 18] : 1931 App Cas 662 (PC).

[14] Lord Shaw, American Law Review, April 1911, Vol. 45. p. 275, Note 'Where the Legislature is free and Judiciary is bound' cited in Haines, the American Doctrine of Judicial Supremacy, p. 2 (1914). (Quoted in M. Ramaswamy's Fundamental Rights, page 2.)

Part III
(General)
Note 5

In *Lee* v. *Bude and Torrington Junction Rly. Co.*,[15] Willis, J., observed as follows :

> "I would observe, as to these Acts of Parliament, that they are the law of this land ; and we do not sit here as a Court of Appeal from Parliament. It was once said, — I think in Hobart,[16]—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the Legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it ; but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

Hence, the term "unconstitutional" as applied to a parliamentary statute in England means merely contrary to general principles which are supposed to lie at the basis of the British Constitution and does not signify that the Act is void.[17] Even if an Act of Parliament is in contravention of the Magna Carta or Petition of Right, it will not be void.[18]

It is interesting to note that even in England, at one time, Lord Coke expressed the opinion that the Magna Carta and the Common Law were the supreme law of the land and controlled both the King and Parliament.[19] In his commentary on *Bonham's case*,[20] the eminent jurist observed as follows :

> "And it appears in our books, that in many cases, the Common Law will control Acts of Parliament, and sometimes adjudge them to be utterly void ; for, when an Act of Parliament is against common rights or reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void."

Although Coke's Institutes and Commentaries were given wide currency in England, the only visible effect that they produced in that country was that their brilliant author was removed from the office of the Chief Justice of the King's Bench in 1616 on the ground that he had expressed extravagant opinions in his writings. The

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15. (1871) L R 6 C P 576 (582) : 40 L J C P 285.

16. (1724) Hobart 85 (87) : 80 E R 235 (237), *Day* v. *Savadge*.

17. 1952 Punj 309 (314) (Pr 10) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab*.

18. 1952 Punj 309 (314) (Pr 10) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab*.

19. *See* 1952 Punj 309 (313) [AIR V 39] : ILR (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab*. (Quoting Lord Coke.)

20. (1610) 8 Coke's Rep 107a (118a) : 77 E R 638 and 646. (Cited in A I R 1952 Punj 309 (313) (FB).)

sovereignty of Parliament was affirmed and established by the Revolution of 1688 with the legal consequence that the validity of any law passed by the Parliament could not be questioned by any person or body on any ground. But the views expressed by Coke profoundly affected public opinion in United States and the Colonists adopted in their Constitution the doctrine that a statute which is opposed to common right and reason is void, and that it is the duty of the judges to declare it to be so.[21] (See NOTE 4.)

Commonwealth Constitutions

The Constitutions of Canada, Australia and South Africa, which were drawn up by persons dominated by basic principles of English law, do not contain any formal declaration of Fundamental Rights in the sense of the American Constitution.

6. Fundamental Rights under the Indian Constitution. — The Constituent Assemby has deliberately departed from the British conception and adopted a formal declaration of Fundamental Rights in the Constitution.[1] As seen in NOTE 5, liberty of the subject under the English law does not depend upon a formal declaration of Fundamental Rights. Nor is such liberty beyond the competence of British Parliament to affect by legislation. The British conception of liberty is directed against *executive* usurpation and tyranny and has as its foundation the principle that no member of the Executive can take any action detrimental to the right to liberty or property of a subject except in so far as such action may be supportable by any law (see NOTE 5). But the British conception does not envisage a check on the power of *Parliament* to make any law it pleases, although it may affect the liberty of the subject. Under English law, Parliament is supreme and the validity of laws enacted by the Parliament is beyond question in any court of law. The American conception is radically different from the British conception on this point. Under the due process clause of the American Constitution, the laws passed by the Legislature can be declared void by the Courts if they arbitrarily or unreasonably trench upon individual rights and liberties. Thus, the American Constitution is based on the theory of judicial supremacy over the Legislature, while the British Constitution is based on the doctrine of parliamentary sovereignty. (See NOTE 4).

In so far as India has adopted in its Constitution a formal declaration of Fundamental Rights which are to be beyond the competence of any Legislature to affect except to the extent and under the conditions laid down by the Constitution, the Indian Constitution has made a departure from the British model and has adopted the

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[21] 1952 Punj 309 (313) [A I R V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

Part III-(General) — Note 6

[1] 1951 All 257 (Pr 195) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Govt.* (Insertion of Fundamental Rights in the Constitution is a deliberate departure from British ideas.)

Part III
(General)
Note 6

American model.[2]

This chapter on Fundamental Rights is divided under the following sub-heads :

(i) General (Arts. 12-13) ;
(ii) Right to equality (Arts. 14-18) ;
(iii) Right to freedom (Arts. 19-22) ;
(iv) Right against exploitation (Arts. 23-24) ;
(v) Right to freedom of religion (Arts. 25-28) ;
(vi) Cultural and educational rights (Arts. 29-30) ;
(vii) Right to property (Arts. 31-31B) ; and
(viii) Right to constitutional remedies (Arts. 32-35).

It is not proposed to discuss here in detail the various Fundamental Rights guaranteed by the Constitution. The notes on the respective articles may be referred to for this purpose. But a few general features may be noticed here.

Firstly, under Art. 13, it is provided that all laws which are repugnant to the Fundamental Rights shall be void to the extent of the repugnance. This provision applies not only to future laws, that is, laws made after the coming into force of the Constitution but also to laws already in existence.

The second point that may be noted is that some of the rights granted are limited to citizens while in the case of others such a limitation does not exist. The rights given to citizens only are the following :

(i) Non-discrimination on grounds of religion, race, caste, sex or place of birth (Art. 15 and Art. 16 (2)).
(ii) Equality of opportunity in matters of public employment (Art. 16 (1) and (2)).
(iii) The freedom of speech and expression (Art. 19 (1) (a)).
(iv) The right to assemble peaceably and without arms (Art. 19 (1) b)).
(v) The right to form associations or unions (Art. 19 (1) (c)).
(vi) The right to move freely throughout the territory of India (Art. 19 (1) (d)).
(vii) The right to reside and settle in any part of the territory of India (Art. 19 (1) (e)).
(viii) The right to acquire, hold and dispose of property (Art. 19 (1) (f)).
(ix) The right to practise any profession or to carry on any occupation, trade or business (Art. 19 (1) (g)).
(x) The right to conserve distinct language, script or culture (Art. 29 (1)).

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[2] *See* 1951 Mad 1015 (1019) (Pr 5) [AIR V 38 C 354]: 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.* (The Indian Constituent Assembly has decided that there should be a chapter on Fundamental Rights in the Constitution of India similar to what are contained in the Constitution of the United States or of the Irish Republic.)

Part III (General) Note 6

(xi) Non-discrimination with regard to admission in State-maintained or State-aided educational institutions, on ground only of religion, race, caste or language (ART. 29 (2)).

The rights, which are granted to all persons, citizens and non-citizens alike, are the following :

(i) Equality before the law and equal protection of the laws (ART. 14).

(ii) Protection against the practice of untouchability (ART. 17.)

(iii) Protection against punishment under *ex post facto* laws (ART. 20 (1)).

(iv) Protection against double prosecution and punishment for the same offence (ART. 20 (2)).

(v) Protection against being compelled to be a witness against oneself in a criminal case (ART. 20 (3)).

(vi) Protection of life and personal liberty (Art. 21).

(vii) Certain rights on being arrested (ART. 22).

(viii) The right to the benefit of constitutional prohibition of traffic in human beings and forced labour (ART. 23).

(ix) The right to the constitutional prohibition of the employment of children in factories, etc. (ART. 24).

(x) Freedom of conscience and free profession, practice and propagation of religion (ART. 25).

(xi) The freedom of every religious denomination or sect to establish and maintain their own religious and charitable institutions and to manage them (ART. 26).

(xii) Protection from being compelled to pay any tax for the promotion and maintenance of any particular religion or religious denomination (ART. 27).

(xiii) Freedom as to attendance at religious instruction or religious worship in educational institutions (ART. 28).

(xiv) The right of minorities to establish and administer educational institutions (ART. 30).

(xv) The right to private property and rights on compulsory acquisition of property (ART. 31).

(xvi) The right to constitutional remedies (ART. 32).

One feature which has to be noted is that the provisions as to Fundamental Rights in the constitution are, unlike those in the American Constitution, very detailed. Further, there are certain provisions which are purely the outcome of the peculiar social conditions of India. For example, see the following provisions :

(a) ART. 15 (2) — Non-exclusion from shops, public restaurants, etc., on grounds only of religion, race, caste, etc.

(b) ART. 15 (4) — Provision as to backward classes and scheduled castes and tribes.

(c) ART. 17 — Abolition of untouchability.

The next feature which may be noticed is that there is not only a formal declaration of Fundamental Rights, but there is also a special provision for their enforcement. The right to move the Supreme Court for the enforcement of Fundamental Rights is itself a guaranteed Fundamental Right. There is no similar provision in the American Constitution.[3]

The rights, which are guaranteed under Part III of the Constitution as Fundamental Rights, are not merely natural rights recognized by the Constitution but are rights "conferred" by the Constitution.[4]

Right to personal liberty and property

Perhaps, the most important question that falls to be considered in connection with the Fundamental Rights in the Indian Constitution is the way in which the right to personal liberty and property is dealt with under the Constitution. For a full discussion of the subject, reference may be made to the notes on ARTS. 19, 21 and 31. But a few important points may be noted here.

In the first place, a distinction is made in the Constitution between the total deprivation of liberty or property of a person and the restriction of personal freedom in regard to certain specific matters. The subject of deprivation of life and total deprivation of personal liberty is dealt with in ART. 21. The subject of deprivation of property is dealt with in ART. 31. The imposition of restrictions on personal freedoms without total deprivation of personal liberty or property is dealt with in ART. 19. While the restriction of personal freedom under ART. 19 is made a matter in respect of which the *reasonableness* of any law that may be made by the State may be scrutinized by the Court with a view to seeing whether the restriction keeps within the limits permitted by the Constitution, the Courts have no jurisdiction to consider the reasonableness or otherwise of a law relating to the deprivation of life or total deprivation of liberty or property. In such cases, the Constitution in effect provides that the deprivation may take place if it is in accordance with *law*. (See ARTS. 21 and 31.) The term "law" in the context has been authoritatively pronounced by the Supreme Court to refer to a positive legislative enactment and not principles of natural justice.[5] (See notes on ART. 21.) But in the case of mere restraints on personal freedom not amounting to total deprivation of liberty or property, the scheme of the Constitution is this: Article 19, cl. (1), enumerates seven freedoms and guarantees them to all citizens. These relate to freedom of speech and expression, freedom of assembly, freedom of association, the right of free movement throughout the country, the right to reside and settle in any part of the country, the right to acquire, hold and dispose of property and the right to practise any profession or right to carry on any trade or business. In regard to these matters the article proceeds in cls. (2) to (6) to lay down that the Legislature may impose reasonable restrictions for certain purposes which are specified. Hence, the Courts have the power to see whether any restriction by legislation of the freedoms guaranteed by cl. (1) of ART. 19 are : (a) for the purposes contemplated by cls. (2) to (6) and (b) whether the restrictions are reasonably necessary for the achievement of such purposes.

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[3] 1950 S C 124 (126) (Pr 5) [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (S C), *Romesh Thappar* v. *State of Madras*.

[4] 1952 S C 252 (262) (Pr 7) [AIR V 39] : 1952 S C R 889, 1020, 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh*.

1952 Madh B 57 (66) (Pr 31) [AIR V 39 C 25] : ILR (1952) Madh B 178 (FB), *Ram Dubey* v. *Government of Madhya Bharat*.

[5] 1950 S C 27 (Prs 234, 235) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*. (The Indian Constitution has not accepted even *procedural* "due process" of law so as to make a law passed by the Legislature void if it prejudicially affects the liberty of a subject by making it liable to be violated without the observance of formalities which justice and fair play may require.)

Even in regard to the deprivation of life or total deprivation of personal liberty or property the Constitution does not give a *carte blanche* to the Legislature. For instance, ART. 20 (1) prohibits punishment by *ex post facto* legislation. Similarly, ART. 20 (2) prohibits a person being prosecuted and punished for the same offence more than once. Similarly, ART. 22 confers upon any person, who is arrested, certain Fundamental Rights such as the right to be taken before a Magistrate within twenty-four hours of the arrest or the right to consult or be defended by a legal practitioner of the arrested person's own choice. Similarly, under ART. 31 a person cannot be deprived of his property except for a public purpose and except on payment of compensation. Where any legislative enactment depriving a person of his personal liberty or of his property contravenes any of these provisions which have been referred to just now, the enactment would be void under ART. 13 and the Courts would be bound and entitled to declare it to be so.

Compromise between judicial supremacy and parliamentary supremacy

The above discussion as to the manner in which the question of liberty has been dealt with in the Constitution leads to the very important topic of whether the Indian Constitution has adopted the American principle of judicial supremacy or the British principle of parliamentary supremacy. With regard to this matter, it can be stated at the outset itself that in view of the clear provisions of ART. 13, it is obvious that the Constitution has rejected the British principle of parliamentary supremacy under which once a law has been passed by the Parilament its validity cannot be questioned in any way by the Judiciary. Article 13 clearly entitles Indian Courts to sit in judgment over the validity of laws passed by the Legislature and to see whether they contravene any of the Fundamental Rights conferred by the Constitution.

In *The State of Madras* v. *V. G. Row*,[6] Patanjali Sastri, C. J., observed as follows :

> "Our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If then,

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[6] 1952 S C 196 (199) (Pr 13) [AIR V 39]: 1952 S C R 597: 1952 Cri L J 966 (S C).

the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the Fundamental Rights as to which this Court has been assigned the role of sentinel on the *qui vive.* While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

But at the same time, in view of the provisions of ARTS. 21 and 31 under which the deprivation of a person of his life or personal liberty or property will be constitutional if it is according to "law"—which has been authoritatively held to mean only a law made by the Legislature and not principles of natural justice,[7]—the Court has no power to examine whether any legislation under which a person is deprived of his life, personal liberty or property is reasonable and in accordance with the principles of natural justice or whether it is arbitrary or oppressive.

A comparison with the American Constitution is called for at this point. Under the 5th and 14th Amendments of the American Constitution, a person cannot be deprived of his life, liberty or property without due process of law. As seen in NOTE 4, the words "due process of law", according to American decisions, are not confined to law made by the Legislature, but are wide enough to embrace principles of natural justice. Hence, under the American Constitution the Courts have the power of seeing whether a law of the Legislature which affects a person's life, liberty or property is in consonance with the principles of natural justice or whether it is unreasonable, arbitrary and uncalled for in the circumstances of the situation.

As stated already, Courts in India have no power to pronounce upon the reasonableness or otherwise of laws relating to the deprivation of life or total deprivation of liberty or property (ARTS. 21 and 31).

Where the question is only of deprivation of certain freedoms specified in ART. 19, the Courts have the power to consider the reasonableness or otherwise of legislative provisions affecting such freedoms. But even here the power of the Courts is not so wide as that of the Court under the American Constitution under the due process clause, for the power is restricted to examining the reasonableness of legislative provision, in relation to the particular objects which are specified in the respective clauses of ART. 19.

It may also be mentioned that Courts are entitled to consider the reasonableness of legislative provisions under certain other articles relating to Fundamental Rights. For instance under ART. 14, when an Act of the Legislature is impeached as contravening the principle of equality before the law it is open to the Court to consider whether the differentiation which is attacked is justified on any reasonable ground relating to the subject-matter of legislation.

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[7] 1950 S C 27 (Prs 234, 235) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[*See* 1952 Mad 613 (Pr 30) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Under the American Constitution Courts enjoy a far wider power to question the reasonableness of legislative measures than under the Indian Constitution.)]

To sum up :

(i) Courts under the Indian Constitution have the power to question the validity of the laws made by the Legislature on the ground of their contravention of Fundamental Rights;

(ii) Courts have a limited right of questioning the reasonableness of legislative provisions, e.g., under ART. 14 or ART. 19; and

(iii) Courts have no power to question the reasonableness of legislative provisions relating to deprivation of life or personal liberty or property.

Thus, the Constitution has struck a balance between the British theory of parliamentary supremacy and the American theory of judicial supremacy and has evolved a principle of its own combining both the elements.[8] ✓

The conception of personal liberty under the Indian Constitution

Article 21 clearly deals with the *total* deprivation of a person of his personal liberty. Article 19 (1), sub-cls. (a) to (e) and (g) deal with certain specified forms of personal liberty. Where a person is not totally deprived of his personal liberty but is only subjected to restrictions in regard to the exercise of his personal liberty in certain matters which are not covered by ART. 19 (1), what is the legal posision ? The matter may be looked at from two points of view:

(i) Such a case may be regarded as covered by ART. 21. This involves the construction of the word "deprived" in ART. 21 as including not only total deprivation of personal liberty but also partial deprivation of such liberty. If such a construction were adopted, then under ART. 21, the restriction on personal liberty will be unconstitutional unless it is in "accordance with law."

(ii) If the word "deprived" in ART. 21 is taken to refer only to *total* deprivation of personal liberty, even then, the practical result will be the same and the restriction will not be valid unless it is according to some *law*. The established principle of British jurisprudence, which may be regarded as also forming part of our legal system, is that the personal liberty of any person cannot be affected by mere executive action of the Government in the absence of some provision of *law* to sustain such action.[9]

(See also notes on ARTS. 19 and 21.)

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[8] 1950 S C 27 (Pr 235) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*.

[9] 1931 P C 248 (252) [AIR V 18] (PC), *Eshugbayi* v. *Govt. of Nigeria*. (*Lord Atkin*—"In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice.")

Part III
(General)
Note 6

Limitations on individual rights

It has been seen in NOTE 4 that even under the American Constitution Courts in applying the due process clause have recognized the "Police Power" of the State, that is the power of the State to make laws restricting individual rights when such restriction is necessary for the promulgation of measures for the commonweal. It is only when in exercising this power the Legislature has, in the view of the Court, acted unreasonably, arbitrarily, oppressively or otherwise in a manner not justified by the circumstances of the situation that the legislative enactment impinging on individual rights is held to be *ultra vires.* The same principle of a balance between individual right and freedom and social control has also been recognized in our Constitution. In this connection the following observations of B. K. Mukherjea, J., in *Gopalan* v. *State of Madras*[10] may be quoted :

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights, as was observed by the Supreme Court of America in *Jacobson* v. *Massachusetts,*[11] are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society; on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very protection of these liberties the society must arm itself with certain powers. No man's liberty would be worth its name if it can be violated with impunity by any wrongdoer and if his property or possessions could be preyed upon by a thief or a marauder. The society, therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search, imprison and punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused. The police may arrest any man and throw him into prison without assigning any reasons; they may search his belongings on the slightest pretext; he may be subjected to a sham trial and even punished for crimes unknown to law. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."

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10. 1950 SC 27 (Pr 170) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (S C)

11. (1905) 197 U S 11 (26, 27) : 49 Law Ed 643 (650).

A typical example of the above principle is seen in ART. 19 where the seven freedoms guaranteed in the first clause are made subject to the power of the Legislature to impose reasonable restrictions in public interest for the purpose of securing certain objects. But it must be remembered that in every case it is the rights which are fundamental and not the restrictions.[12] In *Ram Singh* v. *State of Delhi*,[13] Bose, J., of the Supreme Court observed as follows :—

> "I do not doubt the right of Parliament and of the Executive to place restrictions upon a man's freedom. I fully agree that the Fundamental Rights conferred by the Constitution are not absolute. They are limited. In some cases the limitations are imposed by the Constitution itself. In others, Parliament has been given the power to impose further restrictions and in doing so to confer authority on the Executive to carry its purpose into effect. But in every case it is the *rights* which are fundamental, not the limitations; and it is the duty of this Court and of all Courts in the land to guard and defend these rights, jealously. It is our duty and privilege to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the Executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms, and in the case of the Executive, to see further that it does not travel beyond the powers conferred by Parliament. We are here to preserve intact for the peoples of India the freedoms, which have now been guaranteed to them and which they have learned through the years to cherish, to the very fullest extent of the guarantee, and to ensure that they are not whittled away or brought to nought either by Parliamentary legislation or by executive action."

Object of Fundamental Rights in the Indian Constitution

The general purpose of including a formal declaration of Fundamental Rights in the written constitutions of the world has already been discussed in NOTE 1. Turning to the Indian Constitution in particular, the object of the Fundamental Rights is not only to ensure the inviolability of certain essential rights against political changes inevitable in any democratic form of Government but to impress upon the people of India the fact of their having attained a new level of national existence. In *Motilal* v. *Uttar Pradesh Government*[14] Sapru, J., observed as follows :

> "The object of these Fundamental Rights, as far as I can gather from a reading of the Constitution itself, was not merely to provide security to and equality of citizenship of the people living

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[12] 1951 S C 270 (Pr 22) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (S C), *Ram Singh* v. *State of Delhi*.

[13] 1951 S C 270 (Pr 22) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (S C). (The Constitution authorises restrictions to be imposed on Fundamental Rights as for example under Art. 19.)

[14] 1951 All 257 (296) (Prs 201, 202) [AIR V 38 C 51]: ILR (1951) 1 All 269 (FB).

Part III
(General)
Note 6

in this land and thereby helping the process of nation-building, but also, and not less importantly, to provide certain standards of conduct, citizenship, justice and fair play. In the background of the Indian Constitution, they were intended to make all citizens and persons appreciate that the paramount law of the land has swept away privilege and has laid down that there is to be perfect equality between one section of the community and another in the matter of all those rights which are essential for the material and moral perfection of man.

"Most of these rights were to be found in the Constitution of the German Republic. The function of these Fundamental Rights as conceived by the Weimar Constitution was 'to supply standards and prescribe limits for the Legislature, the Executive and administration of justice both in the Federation and in the States. They were intended according to a writer whose language I adopt, to put no bricks in the building but to be the bread of life of the Constitution. The object behind them was that they should sink deeply into the soul of the nation and they had, therefore, to offer more than dry paragraphs'."

Reference may also be made to the high ideals set forth in the Preamble to the Constitution and in the Directive Principles of State Policy (Part IV). The guarantee of Fundamental Rights may be regarded as part of the method adopted to achieve the high ideal of establishing a society founded on the principle of justice, liberty, equality and fraternity, proclaimed in the Preamble. Further, the successful working of democratic institutions also depends on the miantenance of individual freedom and individual rights, especially the right of free speech and expression, inasmuch as democratic Government is truly Government by discussion. And the freedom of influencing public opinion is indispensable for the success of democracy.

The Fundamental Rights declared in Part III are, however, liable to abrogation or modification by an amendment of the Constitution carried out in the manner laid down in ART. 368. Such an amendment has in fact been effected since the coming into force of the Constitution by the Constitution (First Amendment) Act, 1951.[15] Further, under ART. 358, the freedom of speech, etc., granted under ART. 19 may be suspended and be made subject to legislation or executive action during the currency of Proclamation of Emergency. Similarly, under ART. 359, where a Proclamation of Emergency is in operation, the President may by order suspend the right to move any Court for the enforcement of any Fundamental Rights.

The appreciative opinion of Sir Maurice Gwyer as regards the working of the American Constitution and the part played by the Judiciary in America in the development of the conception of Fundamental Rights there and the evolution and maintenance of a proper balance between individual right and freedom and social control in

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[15] *See* amendments to Arts. 15 and 19 and insertion of Arts. 31A and 31B.

the interests of an advancing and progressive nation in the changing conditions of the world, has been quoted at the end of NOTE 4. With the utmost respect it seems it would not be too much to claim that the experience of the working of the Indian Constitution under the guidance of the Supreme Court and the High Courts is parallel to the experience in America and that the result has been nothing but beneficial to the cause of freedom combined with order and good government in this country.

7. Laws repugnant to Fundamental Rights. — Under ART. 13 it has been expressly provided that laws, which are inconsistent with Fundamental Rights, shall be void. As seen in NOTE 6, this provision makes it clear that the Fundamental Rights guaranteed by the Constitution are not meant merely to be pious enunciations of certain principles supposed to be at the basis of the Constitution[1] but are intended to operate as a positive limitation on the power of the Legislature. In this respect the Indian Constitution, as seen in NOTE 6, adopted the principle of the American Constitution under which laws repugnant to the Fundamental Rights declared by the Constitution are void and Courts can declare them to be so. In *Marbury* v. *Madison*,[2] Chief Justice Marshall of the Supreme Court of America observed as follows :

> "Certainly all those who have framed written constitutions, contemplate them as forming the Fundamental and Paramount law of the nation, and, consequently, the theory of every such Government must be, that an Act of Legislature, repugnant to the Constitution, is void. . . . . .
>
> "If an Act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on.
>
> "It is emphatically the province and duty of the judicial department to say what the law is; those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.
>
> "So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution,

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Part III-(General) — Note 7

[1] *See* 1952 Punj 309 (314) (Pr 10) [AIR V 39] : ILR (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab*. (The term "unconstitutional" in connection with statutes passed by the British Parliament only means that they are contrary to general principles supposed to lie at the basis of the British Constitution and does not signify that they are *void*.)

[2] (1903) 2 Law Ed 60 (73) : 1 Cranch 137.

disregarding the law; the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution and not such ordinary Act, must govern the case to which they both apply.

"Those, then, who controvert the principle that the Constitution is to be considered, in Court, as a paramount law, are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution, and see only the law.

"This doctrine would subvert the very foundation of all written Constitutions. It would declare that an Act which, according to the principles and theory of our Government, is entirely void, is yet, in practice completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such Act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

In *Gopalan* v. *State of Madras*,[3] Patanjali Sastri, J., also pointed out that the characteristic of a Fundamental Right is its paramountcy to ordinary State-made laws. Said his Lordship :

"The insertion of a declaration of Fundamental Rights in the forefront of the Constitution, coupled with an express prohibition against legislative interference with these rights (ART. 13) and the provision of a constitutional sanction for the enforcement of such non-interference by means of a judicial review (ART. 32) is, in my opinion, a clear and emphatic indication that these rights are to be paramount to ordinary State-made laws."

To use the language of Kania, C. J., in the same case,[4] the Fundamental Rights constitute "express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation." The Part on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive orders except to the extent provided in the appropriate article in Part III.[5] In *Hurtado* v. *People of California*,[6] Justice Matthews of the Supreme Court of America observed as follows:

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3. 1950 S C 27 (74) (Pr 115) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC).

4. 1950 S C 27 (42) (Pr 26) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*
[*See also* 1951 Punj 93 (Pr 15) [AIR V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab.* (The phraseology of *Kania C. J.* adopted.)]

5. 1951 S C 226 (228) [AIR V 38 C 40] : 1951 S C R 525 (S C), *State of Madras* v. *Sm. Champakam Dorairajan.*

6. (1884) 28 Law Ed 232 (238) : 110 U S 516.

> "It is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial', so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, Acts of attainder, Bills of pains and penalties, Acts of confiscation, Acts reversing judgments and Acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

As seen in NOTE 6, the Indian Constitution does not empower Courts to examine the validity of legislation from the point of view of its being reasonable and in consonance with principles of natural justice, except within certain limits. In this respect, the power of Courts under the Indian Constitution is definitely more limited than that of the Courts under the American Constitution. Nevertheless, the principle inculcated in the above quotation, namely, that it is not every Act legislative in form that is law and that an Act of the Legislature repugnant to Fundamental Rights is void, is equally applicable under the Indian Constitution.

It is the duty of the Court to uphold the Constitution whenever the matter arises in the course of litigation before it. To use the language of Chief Justice Marshall in *Marbury* v. *Madison*,[7] "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule."

But an Act passed by the Legislature cannot be declared to be void merely on the ground of its being opposed to what the Court conceives to be the *spirit* of the Constitution, when there is nothing express in the Constitution against a piece of legislation on the basis of which it can be declared void.[8] As observed by Kania, C. J., in *Gopalan* v. *The State of Madras*[9]:

> "It is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of

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[7] (1903) 2 Law Ed 60 (73) : 1 Cranch 137.

[8] 1950 S C 27 (42) (Pr 26) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*.

[9] 1950 S C 27 (42) (Pr 26) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC).

the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the Judiciary powers too great and too indefinite either for its own security or the protection of private rights."

However repugnant an Act of the Legislature may, therefore, be to the Court's own ideas of right and wrong, it cannot declare it void where it does not infringe any Fundamental Right as expressly declared by the Constitution or otherwise transgress the provisions of the Constitution. In *Fram Nusserwanji Balsara* v. *The State of Bombay*,[10] Chagla, C. J., observed as follows :

> "While the Court must always be vigilant to prevent any encroachment by the Legislature upon Fundamental Rights which have been guaranteed, it must also remember that it is not a third chamber sitting in judgment on the policy laid down by the Legislature and which has been embodied in the legislation which it is considering. However repugnant any legislation may be to the conception which the Court has of what is right and wrong, and however drastic the provisions of such legislation may be, if it does not in fact contravene any of the articles of the Constitution which lay down Fundamental Rights, then it would be the duty of the Court to uphold such legislation. The line to be drawn between the powers of the Legislature and the powers of the Court may sometimes be indistinct and uncertain, but that a line exists must never be forgotten. The powers conferred upon the Courts of law by our Constitution are immense, but the very immensity of those powers must require of us a wise and unfailing restraint."

Under the American Constitution, Amendment IX, it is provided as follows : "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." It has, therefore, been held under the American Constitution that although there is no express limitation in the Constitution, an Act contrary to the first principles of the social compact is void.[11] As already seen, the established view under the Indian Constitution is that an Act cannot be declared void unless it is repugnant to any express provision of the Constitution.

Who can raise question of constitutionality of law

No one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law.[12] In *McCabe* v. *Atchison*,[13] Hughes, J., of the Supreme Court of America observed as follows :

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10. 1951 Bom 210 (217) (Pr 18) [AIR V 38 C 42] : ILR (1951) Bom 17 : 52 Cri L Jour 80 (FB).

11. (1798) 1 Law Ed 648 (649) : 3 Dall 386 (388), *Calder* v. *Bull.*

12. 1951 S C 41 (44) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

[*See also* 1953 S C 384 (385) (Pr 7) [AIR V 40 C 86] (S C), *Nain Sukh Das* v. *U. P. State.*]

13. (1914) 235 U S 151 (162) : 59 Law Ed 169 (174).

> "It is an elementary principle that in order to justify the granting of this extraordinary relief, the complainant's need of it and the absence of an adequate remedy at law must clearly appear. The complainant cannot succeed because some one else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial interference."

Another principle which Courts should observe is that in constitutional law a Court should not formulate rules or decide questions beyond the necessities of immediate issues.[14] In *Euclid* v. *Ambler Realty Co.*,[15] Justice Sutherland of the Supreme Court of America observed as follows :

> "In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned."

See also ART. 13, NOTES 1 and 9.

8. Against whom Fundamental Rights can be enforced.—Constitutional safeguards are as a rule directed against the State and its organs and not against private individuals.[1] Civil rights guaranteed against State action cannot be infringed by purely private conduct except when it is supported by State authority.[2] In *Civil Rights Cases*,[3] the Supreme Court of America observed as follows :

> "Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private

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[14] (1926) 272 U S 365 (395, 397) : 71 Law Ed 303 (314, 315), *Euclid* v. *Ambler Realty Co.*

[15] (1926) 272 U S 365 (397) : 71 Law Ed 303 (314, 315).

Part III (General) — Note 8

[1] 1952 S C 59 (Pr 3) [AIR V 39 C 14] : 1952 S C R 391 (SC), *P. D. Shamdasani* v. *Central Bank of India.*

1950 S C 27 (Pr 115) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

(1880) 25 Law Ed 667 (669) : 100 U S 339, *Ex parte Commonwealth of Virginia.* (Provisions of the 14th Amendment of the U. S. Constitution have reference to State action exclusively and not to action of individuals.)

[2] (1883) 27 Law Ed 835 (841) : 109 U S 3, *Civil Rights Cases.*

[3] (1883) 27 Law Ed 835 (841) : 109 U S 3.

wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the Courts or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment, and amenable therefor to the laws of the State where the wrongful acts are committed."

See also ART. 19, NOTE 12.

As to the meaning of "State" see notes on ART. 12.

9. Fundamental Rights and the Executive. — As will be seen in the notes on ART. 12, the State includes all branches of the Government, legislative, executive or the judicial, and hence Fundamental Rights which are directed against state action are applicable to all the three branches of the Government. Where any Fundamental Right is infringed by an order or act of the Executive, it is the duty of the High Court[1] or the Supreme Court to set it aside. The High Court will be reluctant to interfere with an order of the Executive unless it is satisfied that such an order is in conflict with the provisions of the Constitution or the law.[2] ✓

See also Notes on ARTS. 32 and 226.

10. Rights not expressly declared as Fundamental Rights.—Under the Constitution of United States, Amendment IX, it is provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." It has accordingly been held under the American Constitution that even though there may be no express limitation on the power of the Legislature imposed by the Constitution, an Act of the Legislature which is contrary to first principles of social compact will be *ultra vires*.[1] In *Calder* v. *Bull*,[2] Justice Chase of the Supreme Court of America observed as follows :

Part III (General) — Note 9

[1] 1952 Hyd 36 (Pr 3) [AIR V 39 C 17] : ILR (1952) Hyd 180 : 1952 Cri L Jour 340 (DB), *Kistareddy* v. *Commr., City Police.* (Such a power exists under Art. 226.

[2] 1952 Hyd 36 (Pr 3) [AIR V 39 C 17] : ILR (1952) Hyd 180 : 1952 Cri L Jour 340 (DB), *Kistareddy* v. *Commr., City Police.*

Part III (General) — Note 10

[1] (1798) 1 Law Ed 648 (649) : 3 Dall 386, *Calder* v. *Bull.*

[2] (1798) 1 Law Ed 648 (649) : 3 Dall 386.

Part III
(General)
Note 10

"I cannot subscribe to the omnipotence of a state Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their constitutions, or forms of Government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: the nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican Governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican Governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the Government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in Governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our State Governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime, or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal or State Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican Governments." ✓

Under the Indian Constitution, the Supreme Court has authoritatively laid down that unless there is an express provision in the

Constitution with which the Act of a Legislature conflicts, it cannot be held to be void merely on the ground of its being inconsistent with what the Court considers to be the spirit of the Constitution.[3] In other words, a right which has not been *expressly declared* to be a Fundamental Right in Part III is not a Fundamental Right. This, however, does not mean that a person has no other legal rights than those included in the Fundamental Rights. It only means that a person's legal rights even as against the State can either be Fundamental Rights or ordinary legal rights. For instance, under ART. 265, no tax shall be levied or collected except by authority of law. Although this article gives rise to a *constitutional* right, the right is not a Fundamental Right and so cannot be enforced by the Supreme Court under ART. 32,[4] as the remedies under ART. 32 are only applicable to Fundamental Rights. In this connection, see ART. 19, NOTE 2.

The Supreme Court of Burma seems to have been inclined in the undermentioned case[5] to the view that an electoral right is a Fundamental Right to which the special remedy of moving the Supreme Court might apply although the right was not expressly mentioned as a Fundamental Right in Chapter II of the Burma Constitution. The Court observed as follows on the point :

> "The question that arises out of the first submission is—Is an electoral right one of the Fundamental Rights mentioned in Chapter II of the Constitution? It is not mentioned by name as such but what is to be remembered is that the Constitution is based on democratic principles. The right to elect a representative to a local body or a National Assembly is a most valuable right which a citizen can have in a democratic country. It is a right by means of which he cannot only express his convictions and opinions freely but along with several others he can shape and mould the life of a nation. To withhold it is to stifle a nation. It is the essence of political life in a democratic country. As a right it is, therefore, a much more valuable right than a right to a patent or a right to easement. A right to a patent or a right to easement has been held to be property. . . . .
>
> "Is the word "property", as used in the Constitution, to be interpreted in a comprehensive or a restricted sense? In *U Htwe's case*[6] this Court observed :
>
> 'In the case of the interpretation of a Constitution, we must interpret it not only to avoid absurdity or inconsistency, but we

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[3] 1950 S C 27 (42) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.* (It is only in express constitutional provisions limiting legislative power that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment.)

[4] 1951 S C 97 (100) (Pr 12) [AIR V 38 C 11] : 1951 S C R 127 (S C), *Ramjilal* v. *Income-tax Officer.*

1951 Raj 139 (Pr 12) [AIR V 38 C 63], *Manak Chand* v. *Municipal Council.*

[5] ('49) 1949 Bur L R (S C) 170 (183), *Bo Thein Swe* v. *The Union of Burma.*

[6] ('48) 1948 Bur L R 541 (553), *U Htwe* v. *U Tun Ohn.*

Part III (General) Notes 10-11

must interpret it in such a way as to make it most beneficial to the widest possible amplitude of its powers.'

If so interpreted, an electoral right may come within the purview of either S. 16 or S. 17 (1) of the Constitution."

Under the Indian Constitution it must be taken as settled law that no right can be regarded as Fundamental Right unless it is expressly included in Part III of the Constitution.[6a]

The difference between a legal right which is a Fundamental Right and one which is not a Fundamental Right is only that a Fundamental Right cannot be affected by ordinary legislation while an ordinary right can be so affected. But as regards the executive it is bound to respect an ordinary legal right of a subject in the same way as a Fundamental Right. For it is an established principle of British jurisprudence which may be treated as constituting a part of the Indian law also, that no member of the executive can interfere with the liberty or property of a subject except on the condition that he can support the legality of his action before a Court of Justice.[7]

Although the executive cannot infringe civil rights, whether amounting to Fundamental Rights or not, where there is no question of infringement of civil right, the Executive is not debarred from acting, as for instance, running a State bus service, merely because there is no legislative enactment authorising it to do so.[8]

A right of appeal is purely a creature of *statute* and is not a *fundamental* right.[9]

11. Directive Principles of State Policy. — The chapter on Directive Principles of State Policy (Part IV) is a special feature of this Constitution. The distinction between Fundamental Rights and Directive Principles is that the former are really enforceable and laws inconsistent with the Fundamental Rights are void under Art. 13, while the Directive Principles of State Policy have been expressly declared to be not enforceable by any Court of law (Art. 37). When there is a conflict between a Fundamental Right as declared by Part III and the Directive Principles of State Policy, the Fundamental Right will prevail.[1] So long as there is no infringement of any Fundamental Right, however, there can be no objection to the State acting according to the Directive Principles set out in Part IV.[2] The Directive Princi-

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[6a] 1950 S C 27 (42) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1388 (SC), *Gopalan* v. *State of Madras.*

[7] 1931 P C 248 (252) [AIR V 18] (PC), *Eshugbayi* v. *Government of Nigeria.*

[8] 1951 All 257 (Prs 112, 113) [AIR V 38 C 51]: ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government.*

[9] 1953 Nag 14 (16) (Pr 8) [AIR V 40 C 8] : I L R (1953) Nag 936 : 1953 Cri L Jour 251 (DB), *Shrikisan* v. *Dattu.* (A I R 1951 Hyd 89, Foll.)

Part III (General) — Note 11

[1] 1951 S C 226 (228) (Pr 8) [AIR V 38 C 40] : 1951 S C R 525 (S C), *State of Madras* v. *Sm. Champakam Dorairajan.*

[2] 1951 S C 226 (228) (Pr 8) [AIR V 38 C 40] : 1951 S C R 525 (S C), *State of Madras* v. *Sm. Champakam Dorairajan.*

Part III (General) Notes 11–12

ples may be taken into consideration in determining if a provision of law is "reasonable." (See NOTES on ART. 19.)

12. American decisions. — In interpreting the Fundamental Rights, American precedents relating to what may appear to be analogous provisions should not be blindly followed.[1] In *Mahadeb Jiew* v. *B. B. Sen*,[2] the Calcutta High Court observed as follows :

> "The craze for American precedents can soon become a snare. A blind and uncritical adherence to American precedents must be avoided, or else there will soon be a perverted American Constitution operating in this land under the delusive garb of the Indian Constitution."

Some of the salient points of difference between the American approach and the Indian approach to the question of Fundamental Rights have been discussed in NOTE 6.

See also Preamble, NOTE 8.

General

Definition.

12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

JAMMU AND KASHMIR

Part III of the Constitution does not apply to the State of Jammu and Kashmir. See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, cl. 3.

COGNATE PROVISIONS

For Rules to be made by the Supreme Court as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III, see ART. 145 (1) (c).

Proclamation of Emergency in operation—Suspension of the enforcement of the rights conferred by Part III during emergencies. — See ART. 359.

Local authority—Definition of—See ART. 367 (1) read with General Clauses Act, 1897, S. 3 (31).

Local authorities — Laws with respect to—See SCH. VII, LIST 2, Entry 5.

Article 12 Note 1

1. Scope of the article. — This article defines for the *purpose of this Part*, the words "the State". The expression "the State" occurs in several of the articles of this Part, e. g. ARTS. 13 (2), 14, 15, 16, etc. In all these articles the words "the State" must be understood

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Part III (General) — Note 12

[1] 1951 Cal 563 (569) (Pr 37) [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen*. (Language and theme of Art. 15 are different from those of 19th Amendment of the American Constitution which prohibits the denial or abridgment of right to vote on account of sex.)

[2] 1951 Cal 563 (Pr 37) [AIR V 38 C 165].

according to the definition given in this article, unless the context otherwise requires. This definition also applies to Part IV (Directive Principles of State Policy).—See ART. 36.

It will be noticed that the article uses the word "includes" for the purpose of the definition. As seen in Preamble, Note 10, the word "includes" usually shows that the definition is not exhaustive.[1] It also usually shows that the meaning which the expression may otherwise have is not limited or restricted in any way by the definition. But this is not necessarily the case always and in some contexts the word "includes" may be equivalent to "mean".

A 'State' has been defined by the Author of the 9th Edition of Salmond's JURISPRUDENCE[2] as follows : "A State or political society is an association of human beings established for the attainment of certain ends."

The definition in this article is more specific, and refers to the particular authorities enumerated in the article. These authorities are (i) the Government and Parliament of India, (ii) the Government and the Legislature of each of the States which are component parts of the Indian Union, (iii) all local authorities within the territory of India or under the control of the Government of India and (iv) other authorities within the territory of India or under the control of the Government of India.

By the expressions "the Government and the Parliament of India" and "the Government and the Legislature of each of the States" the article obviously means the executive and the legislative authorities at the Centre and in the several States.[3] The word "Government" in this article will include the President acting in his official capacity and hence the President acting in such capacity is included in the term "State" as defined in this article.[4]

The term "local authority" may be understood as referring to the authorities mentioned in Entry 5 of LIST 2 (State List) of SCH. VII. The entry runs as follows :' 'Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts,

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Article 12 — Note 1

[1] 1936 P C 230 (232) [AIR V 23] (PC), *Moolla Sons* v. *Rangoon Offl. Assignee.* (The words used being "shall include" the provision (S. 3 (25) of the General Clauses Act, 1897, defining immovable property), is not in the strictest sense a definition as the description given does not purport to be exhaustive.)
('01) 1901 All W N 10 (10), *Queen-Empress* v. *Narpat Singh.*
('78) I L R 2 Mad 5 (7) :2 Weir 123 (DB), *The Empress* v. *Ramanjiyya.*
Ramnatha Aiyar's Law Lexicon, page 573.

[2] Salmond on Jurisprudence, 9th Edition, by J. L. Parker, page 165.

[3] 1951 Hyd 1 (Pr 14) [AIR V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.* (The Nizam of Hyderabad acting as the legislative authority under Art. 387, was held to be subject to the provisions of Part III though previous to the Constitution his legislative power was absolute and unlimited.)

[4] 1952 Punj 143 (Pr 4) [AIR V 39 C 52] : I L R (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.* (President's order can be questioned as contravening Art. 15 (1) under which the "State" is forbidden to discriminate against any citizen on ground of religion, sex, etc.)

Article 12
Note 1

district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration." Thus, Village Panchayats will be local authorities and will be covered by the expression "the State" in this article. A Municipal Committee will clearly be a 'local authority' within the meaning of this article and any rule or bye-law made by it in contravention of the provision of this clause, may be declared void and appropriate relief granted.[5]

The question arises as to the meaning of "or other authorities". According to the Webster's DICTIONARY, "authority" means a person or body exercising power or command. According to Odham's DICTIONARY also, "authority" means a person or group of persons having the power or legal right to command and be obeyed. Thus, apart from the context, the word "authorities" has a very wide meaning and can include *any* person or group of persons entitled to exercise power over or command others. But in view of the fact that in enumerating the "authorities" included in the expression "the State", the article first specifically mentions certain authorities and mentions "other authorities" immediately afterwards, the words "other authorities" should be taken in an analogous sense on the principle of *ejusdem generis*.[6] Hence, the words "other authorities" would refer to authorities of a like nature to the ones already mentioned.

So interpreted, the expression "other authorities" can only refer to *public* authorities and not private authorities. Thus, the management of a private institution like, for instance, a private school or a bank or a commercial concern, a factory and so on, will not constitute an "authority" for the purpose of this article and will not be covered by the expression "the State". Further, Fundamental Rights are only directed against *State* action and not *private* conduct.[7] (See Part III-General, NOTE 8.) Hence, the expression "other authorities" in this article will *not* include *private* authorities. An educational institution like a university receiving *State aid* but not *maintained* by the State is not included in the term "State" as defined in this article.[8]

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[5] *See* 1950 S C 163 (Pr 4) [AIR V 37 C 11] : 1950 S C R 566 (S C), *Rashid Ahmed* v. *Municipal Board, Kairana.* (Municipal bye-law held to be void under Art. 13 (1) read with Art. 19.)

[6] 1954 Mad 67 (68) (Pr 5) [AIR V 41 C 13], *University of Madras* v. *Shantha Bai.* (The words "local or other authority" must be construed *ejusdem generis* with Government or Legislature and so construed can only mean authorities exercising Governmental functions. They cannot include persons, natural or juristic, who can be regarded as instrumentalities of the Government. University of Madras has no Governmental functions. It is a *State aided* but not *State maintained* institution.)

[7] 1952 S C 59 (59) (Pr 3) [AIR V 39 C 14] : 1952 S C R 391 (S C), *P. D. Shamdasani* v. *Central Bank of India.* (Articles 19 (1) (f) and 31 do not provide protection against merely private conduct.)

(1947) 92 Law Ed 1161 (1180) : 334 U S 1, *Shelley* v. *Kraemer.* (The equal protection clause of the 14th Amendment, U. S. Constitution, is directed against State action only and does not reach private conduct.)

(1883) 27 Law Ed 836 (841) : 109 U S 3, *Civil Rights Cases.* (When civil rights are guaranteed against State action, there cannot be an infringement of such rights merely by an act of a private individual unless it is supported by State authority.)

But the duty to abide by the Constitution and maintain the rule of law is cast upon all branches of the *State*, namely, the legislative, executive and judiciary.[9]

According to American decisions, the term "State" in the context of Fundamental Rights includes every repository of State power[10] and the prohibitions in the Fourteenth Amendment (against the State depriving any person of life, liberty or property or denying to any person the equal protection of laws) extend to all actions of the State whether it is action by the legislature, executive or judicial authorities who are all agents of the State.[11]

The action of *administrative officers* acting on behalf of the State in executing the laws is clearly "State" action.[12]

In the United States of America, it has been held that the State Judiciary also may be held guilty of violating the "due process clause" in the Fourteenth Amendment.[13] It has also been held there that judicial action even for the enforcement of a private agreement is State action for the purpose of the equal protection clause of the Fourteenth Amendment.[14] Thus, the judicial enforcement by State Courts of covenants restricting the use or occupancy of real property to persons of the Caucasian race was held to violate the equal protection clause of the 14th Amendment.[15] But the mere fact that a State Court has rendered an erroneous decision on questions of State law or overruled principles or doctrines established by previous decisions on which a party relied, does not amount to violation of the "due process" clause by the Court.[16]

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[8] 1954 Mad 67 (69) (Pr 7) [AIR V 41 C 13] (DB), *University of Madras* v. *Shantha Bai*. (The Madras University is not covered by the words "the State" and its regulations are not subject to Art. 15 (1))

[9] 1952 Hyd 36 (37) (Pr 3) [AIR V 39 C 17] : I L R (1952) Hyd 180 : 1952 Cri L Jour 340 (DB), *Kistareddy* v. *Commr., City Police*. (AIR 1951 Hyd 89 (FB), Foll.)

[10] (1913) 227 U S 278 (286) : 57 Law Ed 510, *Home Teleph. & Teleg. Co.* v. *Los Angeles*.

[11] (1935) 79 Law Ed 791 (794) : 294 U S 103, *Mooney* v. *Holohan*.
(1930) 74 Law Ed 1107 (1113) : 281 U S 673, *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*.
(1913) 227 U. S. 278 (286) : 57 Law Ed. 510, *Home Teleph. & Teleg. Co.* v. *Los Angeles*.
(1880) 25 Law Ed 667 (669) : 100 U S 313, *Ex-parte Commonwealth of Virginia*.

[12] (1935) 79 Law Ed 791 (794) : 294 U S 103, *Mooney* v. *Holohan*. (Conviction obtained by State prosecuting officers by employment of perjured evidence. This is infringement of due process clause by State action.)

[13] (1935) 79 Law Ed 791 (794) : 294 U S 103, *Mooney* v. *Holohan*. (The act of a *Court* may also amount to State action in infringement of the due process clause. Conviction based on perjured testimony is infringement of due process clause by State action.)
(1930) 74 Law Ed 1107 (1113) : 281 U S 673, *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*.

[14] (1947) 92 Law Ed 1161 (1181) : 334 U S 1, *Shelley* v. *Kraemer*.

[15] (1947) 92 Law Ed 1161 (1185) : 334 U S 1, *Shelley* v. *Kraemer*. ((1940) 311 U S 32 : 85 Law Ed 22, *Hansberry* v. *Lee* and (1926) 271 U S 323 : 70 Law Ed 969, *Corrigan* v. *Buckley*, Distinguished.)

It is not clear how far the above view would be good law under this Constitution. It is clear that under this Constitution, the question will depend upon the interpretation of the definition of "State" in this article. The article does not expressly refer to the judiciary as included in the term "State". The question is whether the "judiciary" is covered by the expression "other authorities" in the article. If this expression is construed according to the principle of *ejusdem generis*, it seems to be questionable whether it would include the Judiciary. In the context in which the expression occurs it seems to refer to public authorities exercising legislative or executive power and not the Judiciary. This view seems to receive support from the following observations of Shah J., in *Ratilal* v. *State of Bombay*[17]:

> "The protection afforded by the Constitution to Fundamental Rights is against executive, or legislative interference. A decision of a regularly constituted Court cannot, however, be challenged as an interference with Fundamental Rights in the abstract. The Court in the very nature of things adjudicates upon conflicting claims and declares rights and does not by the operation of its own order seek to infringe any Fundamental Rights. What may appear to be an interference with a right by an adjudication of a Court is in substance a direction founded on the non-existence, in the circumstances of the particular case, of the right claimed. A provision in a statute, which authorises the Courts to adjudicate upon claims which may affect rights, therefore, cannot be challenged on the ground that it infringes Fundamental Rights."

The observations of S. R. Das J., of the Supreme Court in the *State of Punjab* v. *Ajaib Singh*[18] also support the view that the Fundamental Rights are intended as a protection against the *Executive* and the *Legislature* and not against the Judiciary.

In referring to the "local or other authorities", the article limits itself to authorities within the territory of India or under the control of the Government of India. This shows that the words, "the State" will also include an authority functioning outside the territory of India provided it is under the control of the Government of India. The reason for the adoption of this extended definition is that it was the desire of the Constituent Assembly that the benefit of the provisions of Part III relating to Fundamental Rights must also apply to mandated or trusteeship territory that may come under the Government of India under international arrangements.

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16. (1930) 74 Law Ed 1107 (1113) : 281 U S 673, *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill.*

17. 1953 Bom 242 (253) (Pr 26) [AIR V 40 C 78].

18. 1953 S C 10 (14, 15) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (SC).

Laws inconsistent with or in derogation of the Fundamental Rights

13. *(1)* All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

COGNATE PROVISIONS

"The State" — Meaning of — See ART. 12.

"Commencement of this Constitution" — Meaning of — The expression refers to 26-1-1950 — See ART. 394.

"Laws in force" — Compare the explanation of the same term in ART. 372, Explanation I.

Synopsis

1. Scope of the article.
2. Meaning of expressions "law", "laws in force"—Clause (3).
2a. Bye-laws.
2b. "Notification."
2c. Statutory Rules.
3. Retrospective effect of cl. (1).
4. "The State shall not make any law" — Clause (2).
5. Part of law void — Effect.
6. Effect of Court declaring Act to be void.
7. "Void" — Meaning of.
8. Laws affected by this article.
9. General principles as to judicial review of legislation.

1. Scope of the article. — The effect of this article is to declare as void all laws which are inconsistent with or in derogation of the Fundamental Rights guaranteed by this Part. There is an

Article 13
Note 1

essential point of difference between the powers of the Parliament in England and those of the Indian Parliament and State Legislatures in India. The English Parliament is supreme and it can pass any law however unreasonable it may seem and to whatever extent it may curtail the liberty of the subject. Courts in England have no power to declare the law passed by the Parliament void. But in the Republic of India there is a written constitution in which certain Fundamental Rights are guaranteed to the people. These are mentioned in this Part of the Constitution. If the Parliament or any State Legislature makes any law taking away these Fundamental Rights except in the manner and to the extent provided in Part III, then that law is void to the extent of such inconsistency. Thus, the Parliament and the State Legislatures in India are not supreme like the Parliament in England. The Legislatures in this country have only those powers of legislation which are bestowed upon them by the Constitution. If they pass an Act in excess of those powers then that Act becomes void to that extent. Under the Constitution the power to decide whether a piece of legislation is void or not is given to the Courts and to nobody else. The power of the Judiciary is supreme in this respect.[1]

The inclusion of ART. 13 (1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid.[2]

But if the principle underlying the legislation and its object is constitutional, then it is not for the Courts to question the *policy* of the legislation.[3] While the Court must always be vigilant to prevent any encroachment by the Legislature upon the Fundamental Rights

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Article 13 — Note 1

1. 1950 Cal 274 (Prs 3, 4) [A I R V 37 C 97] : 51 Cri L Jour 1110 (S B), *Sunil Kumar* v. *West Bengal Government.*
[*See also* 1951 S C 270 (Pr 22) [AIR V 38 C 45] : 52 Cri L Jour 904 : 1951 S C R 451 (SC), *Ram Singh* v. *State of Delhi.* (Per *Bose* J.—The Fundamental Rights conferred by the Constitution are not absolute — They are limited — In some cases the limitations are imposed by the Constitution itself— In others, Parilament has been given the power to impose further restrictions and in doing so to confer authority on the Executive to carry its purpose into effect— But in every case it is the rights which are fundamental, not the limitations ; and it is the duty of the Supreme Court and of all Courts in the land to guard and defend these rights jealously — It is the duty and privilege of the Supreme Court to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms ; and in the case of the Executive, to see further that it does not travel beyond the powers conferred by Parliament.)
1950 S C 27 (Pr 6) [A I R V 37 C 6] : 51 Cri L Jour 1383 : 1950 S C R 88 (SC), *Gopalan* v. *State of Madras.*]
2. 1950 S C 27 (34) (Pr 6) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per Kania, C. J.)
3. 1951 Bom 440 (Pr 17) [A I R V 38 C 100] : I L R (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.*

which have been guaranteed by the Constitution, it must also remember that it is not a third chamber sitting in judgment on the policy laid down by the Legislature and embodied in the legislation which the Court is considering. However repugnant any legislation may be to the conception which the Court has of what is right and wrong and however drastic the provisions of such legislation may be, if it is not, in fact, contravening any of the articles of the Constitution which lay down Fundamental Rights, then it would be the duty of the Court to uphold such legislation,[4] provided the subject of enactment falls within the legislative jurisdiction of the particular Legislature.

In order to determine whether a particular law is repugnant to or inconsistent with the Fundamental Rights it is the *provisions* of the Act that must be looked at and not the manner in which the power under the provision is actually *exercised*. Inconsistency or repugnancy does not depend upon the *exercise* of the power by virtue of the provisions in the Act but on the nature of the provisions themselves.[5] See also NOTE 9.

Meaning of "inconsistency" or "contravention"

An Act is said to be inconsistent with another when the two cannot stand together, that is, when to obey one enactment is to disobey the other.[6] The question has been raised whether in order to characterise a certain law as being *inconsistent* with a provision in this Part, it is necessary that the provision in question must be to the effect expressly that a *law* of the kind shall not be made. The point involved in the question may be illustrated like this. Article 22 (4) runs asfollows : "No law . . . . shall authorise . . . . . .". This provision clearly says that a *law* shall not be to a certain effect. If there is a law which is to the effect mentioned, such a law will be void under ART. 13 read with ART. 22 (4). But compare with ART. 22 (4) the wording of ART. 22 (1) and similar other provisions. In ART. 22 (1), for instance, it is said that no *person* who is arrested shall be detained in custody without *being* informed of the grounds for such arrest, etc. Here it will be noticed that the clause only speaks of a *person* and not of a *law* and does *not* say that a particular kind of *law* shall not be passed. So, if a *law* is passed making it legal for an arrested person not being informed the grounds of his arrest, can it be said that it is *inconsistent* with

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[4] 1951 Bom 210 (Pr 18) [AIR V 38 C 42] : I L R (1951) Bom 17 · 52 Cri L Jour 80 (FB), *Fram Nusserwanji* v. *State of Bombay.*

[5] 1951 Mad 1015 (Pr 60) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*

1950 Orissa 157 (Pr 4) [A I R V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.* (It cannot be seriously contended that if there is any State law which is inconsistent with any of the provisions of the articles that law will not be invalid so long as there is no abridgement of the rights of an individual while administering the laws.)

[6] 1952 Pat 309 (321) (Prs 46, 47) [A I R V 39] : I L R 31 Pat 405 (FB), *In re Babul Chandra.* (Sections 4 and 7 of Abducted Persons (Recovery and Restoration) Act, 1949, are inconsistent with cls. (1) and (2) of Art. 22.)

Article 13
Notes 1–2

ART. 22 (1)? Such a question was raised before the Orissa High Court in *Prahalad Jena* v. *State.*[7]

It was contended that inconsistency or repugnancy of a law with a provision of the Constitution can arise only when the provision in the Constitution says that that kind of *law* cannot be made, and not when the provision does not speak of any *law* at all but merely says that a *person* shall be entitled to certain rights, etc. This contention was repelled by the Full Bench.

This article and Article 372

Under ART. 372 (1) all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed in due course. But this provision is expressly made subject to the other provisions of the Constitution, which include necessarily ART. 13. Hence if any law existing immediately before 26-1-1950 is inconsistent with the provisions of Part III of the Constitution, it will be void notwithstanding ART. 372 (1).[8]

This article and Article 254

The ground on which the validity of laws is affected under this article is the law being inconsistent with the Fundamental Rights guaranteed in this Part. Another kind of infirmity which may affect a law is that it is *ultra vires* the legislative jurisdiction of the authority which has made it. A third kind of infirmity is referred to in ART. 254. This infirmity consists of repugnancy between a State law and a Union law. In cases coming under ART. 254, in case of such repugnancy, the State law shall be void to the extent of the repugnancy.[9]

Directive Principles of State Policy

The Directive Principles of State Policy laid down in Part IV of the Constitution have been expressly declared under ART. 37 to be not enforceable in any court of law. Hence, where any law or order conflicts with a Fundamental Right, it will be void although it may be in conformity with a Directive Principle in Part IV.[10]

2. Meaning of expressions "law", "laws in force." — Clause (3). — This article in effect provides that all laws, whether already in existence at the commencement of the Constitution or passed subsequently, shall be void if and to the extent that they are inconsistent with the Fundamental Rights guaranteed by the Constitution in this Part.

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[7] 1950 Orissa 157 (Pr 4) [AIR V 37 C 26] : I L R (1950) Cut 222 : 51 Cri L Jour 1189 (FB).

[8] 1953 Mad 729 (Pr 12) [A I R V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.*

1951 Punj 27 (Pr 14) [AIR V 38 C 7] : 52 Cri L Jour 449 : I L R (1951) Punj 193 (DB), *Tara Singh Gopi Chand* v. *The State.*

1950 Pat 265 (Prs 24, 62) [AIR V 37 C 67]: 51 Cri L Jour 1081 : I L R 29 Pat 335 (DB), *Brahmeshwar Prasad* v. *State of Bihar.*

[9] 1950 Pat 265 (Pr 58) [AIR V 37 C 67] : 51 Cri L Jour 1081 : I L R 29 Pat 335 (DB), *Brahmeshwar Prasad* v. *State of Bihar.*

[10] 1951 S C 226 (228) (Pr 8) [A I R V 38 C 40] : 1951 S C R 525 (S C), *State of Madras* v. *Sm. Champakam Dorairajan.*

For this purpose cl. (3) of the article defines the expressions "law" and "laws in force." The Constitution contains definitions about law elsewhere also. For instance, ART. 366 (10), which is the interpretation clause in the Constitution, defines "existing law" as follows :

> "'Existing law' means any law, ordinance, order, bye-law, rule or regulation, passed or made, before the commencement of this Constitution by any Legislature, authority or person having power to make such law, ordinance, order, bye-law, rule or regulation."

Again, ART. 372, Expl. I provides as follows:

> "The expression 'law in force' in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas."

The definitions quoted above may be compared with the definitions of "law" and "laws in force" in sub-cls. (a) and (b) respectively of cl. (3) of this article.

For the purpose of this article the definitions in cl. (3) will have to be followed. It must also be noted that the definitions in cl. (3) are expressly limited to this article.

"Law" (clause 3 (a)).

Taking the above-mentioned definitions one by one, sub-cl. (a) of cl. (3) defines the word "law". The sub-clause uses the word "includes" showing that the definition is not intended to be exhaustive, so that any kind of law though not covered by any of the categories specified in sub-cl. (a) is not excluded from the meaning of "law" for the purposes of the article. Thus, it is obvious that an Act of the Legislature is clearly law for the purpose of the article although it is not expressly specified in sub-cl. (a). It should be noted that the term 'law' in sub-cl. (a) includes also custom or usage having in the territory of India the force of law.

The question arises as to whether the words "having in the territory of India the force of law" govern only the words "custom or usage" or whether they govern also the previous words. It has been held by a Division Bench of the Punjab High Court that *rules* made by the Government for regulating admission to a Government College, cannot be classified as "law" as defined in sub-cl. (a).[1] This ruling is only

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Article 13 — Note 2

[1] 1951 Punj 93 (Pr 11) [A I R V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab*.

[Compare 1951 S C 226 (Prs 8, 11) [AIR V 38 C 40] : 1951 S C R 525 (SC), *State of Madras* v. *Sm. Champakam Dorairajan*. (Case relating to validity of Madras Communal G. O. reserving seats in some State educational institutions for different communities in fixed proportions—*Held* that the G. O. contravened Art. 29 (2) of the Constitution and was therefore void.)]

consistent with the view that the words "having the force of law" apply also to the previous words in that clause and not merely to "custom or usage."

The question also arises whether the definition in sub-cl. (a) is applicable to the meaning of "law" for the purpose of the expression "laws in force" which has been separately defined in sub-cl. (b). The expression "laws in force" occurs in the beginning of cl. (1) of this article and the question, therefore, arises whether that expression should be confined to the laws that would be covered by sub-cl. (b) of cl. (3) which defines the expression. For instance, the question arises whether custom or usage having the force of law is included in the expression "laws in force" in cl. (1) of this article. It seems to be clear that custom or usage having the force of law is covered by cl. (1). In fact, cl. (2) only refers to *State-made* law and hence the definition of "law" in cl. 3 (a) as including custom or usage having the force of law would be meaningless if it is taken to refer only to the term "law" used in cl. (2). Hence, it is clear that the definition of 'law' in sub-cl. (a) is also applicable for the purpose of understanding what is meant by 'law' in the expression "laws in force",[2] notwithstanding that the latter expression has been separately defined in sub-cl. (b). It may be noted in this connection that the definition in sub-cl. (b) also uses the word "includes" showing that the definition is not exhaustive.

"Laws in force" (clause 3 (b)) and "existing law" (Art. 366 (10))

The effect of the definition of "laws in force" in sub-cl. (b) has already been discussed above to some extent in connection with the definition of "law" in sub-cl. (a). The definition in sub-cl. (b) seems to be intended to explain the meaning of the words "in force" rather than to explain what is meant by "law" or "laws". The sub-clause says that a law passed by or made by the Legislature or other competent authority in the territory of India before the commencement of the Constitution and not previously repealed, shall be regarded as a law in force, although it or any part of it may not be actually in operation either throughout India or in any particular area or areas thereof. Thus, the definition does not limit the meaning of *law* in connection with the expression "laws in force."

It will be noted that the definition in sub-cl. (b), of the expression "laws in force" is substantially the same as "law in force" in ART. 372, Expl. I. The remarks about the definition in sub-cl. (b) may, therefore, be taken as applicable to Explanation I of ART. 372.

The definition of "existing law" in ART. 366 (10) has already been quoted above. It will be seen that the definition as given in

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[2] 1953 Raj 158 (Pr 7) [AIR V 40 C 56] : I L R (1952) 2 Raj 511 (DB), *Bahadur Singh* v. *Jaswant Raj.* (An Ordinance is included within the term "law" and hence Ordinances, passed prior to the Constitution, which are continued in force under Art. 372 but which are inconsistent with any of the Fundamental Rights, will be void to the extent of their inconsistency.)

1952 Bom 84 (88) (Pr 12) [A I R V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *State of Bombay* v. *Narasu Appa.*

ART. 366 (10) is *exhaustive* as the word used is "means." It will also be seen from the discussion above that the meaning of "existing law" as defined in ART 366 (10) is not identical with the expression "laws in force" for the purpose of this article. Thus, for the purpose of this article, the expression "laws in force" is wide enough to include notifications and customs and usages having in the territory of India the force of law. But these categories are excluded from the definition of "existing law" in ART. 366 (10).

Clause (1) of this article contains the expression "laws in force" and cl. (2) contains the expression "law". This may create the impression that the definition of "law" in sub-cl. (a) relates to the expression "law" in cl. (2) and that the definition of "laws in force" in sub-cl. (b) relates to the expression "laws in force" in cl. (1). From this it may be further thought that the expression "laws in force" in cl. (1) does not include any law that would be covered by sub-cl. (a) and that the sub-clause only relates to the meaning of 'law' in cl. (2). This line of reasoning would be absolutely fallacious. For instance, as already pointed out, sub-cl. (a) includes in the definition of "law," custom or usage having the force of law. If sub-cl. (a) is treated as limited in its application to cl. (2), an absurdity would result because cl. (2) prohibits the State from *making* any law which takes away or abridges the Fundamental Rights conferred by this Part and it would be absurd to speak of the State *making* a custom or usage.[3] This clearly shows that the meaning of the word 'law' given in sub-cl. (a) is intended to be generally applicable to the conception of law for the whole purpose of the article and, therefore, applies also to the conception of law in the expression "laws in force."

In *Venkataraman* v. *Commissioner of Police, Madras*,[4] Govinda Menon, J., after referring to the definitions of 'law' and 'laws in force' in this article and of 'existing law' in ART. 366 (10), observed as follows :

> "Bearing in mind these three terms, one finds that the expression 'law' is intended to connote prospective laws made subsequent to the coming into operation of the Constitution, whereas the term 'laws in force' is intended to include laws passed by the Legislature or other competent authority before the commencement of the Constitution and not previously repealed notwithstanding that any such law or any part thereof may not be in operation, either wholly or in part at the commencement of the Constitution either throughout the whole of the territory of India or in particular areas. The term 'existing law' is much wider in scope and import because it includes such things as Ordinances, Orders, bye-laws, rules or regulations, made not only by a competent legislative authority but by other bodies and persons empowered or authorised to make or promulgate such things. It is, therefore, seen that the 'law in force'

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[3] 1952 Bom 84 (88) (Pr 12) [A I R V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.

[4] 1951 Mad 1015 (Pr 6) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB).

must have been a law passed, or made, by a Legislature or other competent authority, whereas an 'existing law' includes even an Order or a bye-law made by a person having power to make such an Ordinance or Order. Both the expressions 'existing law' and 'law in force' refer to positive legal Acts which were in existence at the time of the Constitution, whereas the word 'law' in cl. 3 (a) to ART. 13 denotes those that have to be passed hereafter."

With the utmost respect to his Lordship it is submitted that in view of the above exposition of the relevant provisions, his Lordship's observations call for criticism in many respects. For instance, to limit the word 'law' in cl. 3 (a) to laws to be passed after the commencement of the Constitution, leads to the obviously untenable position that under cl. (2) the State is contemplated as making or passing a custom or usage having the force of law. Similarly, the observation that the expression "existing law" is much wider in scope than 'law in force', is, for reasons already explained, not correct. It may also be pointed out that his Lordship's limiting the expression "law in force" (like "existing law") to positive legal Acts, does not seem to be justified, for reasons already explained. With respect, his Lordship seems to have overlooked that while the expression "laws in force" is not subject to a limiting and exhaustive definition and in the context of the meaning of 'law' given in cl. (3) (a), is wide enough to embrace all forms of law, the expression "existing law" is the subject of an exhaustive definition in ART. 366 (10), which definition limits it to positive law of the statutory variety.

The definition of "existing law" in ART. 366 (10), does not contain words to show that although an Act may not have actually come into operation, it will be covered by the definition. In this respect, the definition differs from the definition of "laws in force" in cl. (3) (b) of this article and in ART. 372, Explanation 1. But this does not mean that the expression "existing law" does *not* include an Act or other law which has been passed but has not yet been brought into actual operation. Thus, the two expressions have the same meaning in this respect notwithstanding the difference in the definition.[5] Suppose a certain Act passed before the Constitution was a temporary Act due to expire after the coming into force of the Constitution but it contained the provision that it might be extended by the State Government by notification for a further specified period. The duration of the Act was extended by another Act passed after the Constitution instead of by Government Notification. The latter Act does not constitute a new Act but is part and parcel of the *original* Act, and is, therefore, covered by the expression "laws in force" as defined in cl. 3 (b), as being a law which before the Constitution was yet to come into force.[6] Hence. such an Act falls within the scope of cl. (1) and not cl. (2).[7]

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[5] 1952 Bom 16 (25) (Pr 19) [A I R V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.* (Their Lordships observed that it was not clear why two different expressions "laws in force" and "existing law" were used in the Constitution—The explanation, it is submitted, lies in the fact, that although both expressions include laws potentially in force and hence have the same connotation in one respect, the expression "laws in force" is wide enough to include non-statutory law while "existing law" as defined in Art. 366 (10) excludes such law.)

The words "all laws in force in the territory of India immediately before the commencement of this Constitution" in cl. (1) clearly refer to the laws which are continued in force after the commencement of the Constitution under ART. 372, for there is no point in saying that such laws shall become void to the extent of their inconsistency with Fundamental Rights if on the coming into force of the Constitution they *ipso facto* cease to be operative at all.

In construing the term "all laws in force in the territory of India", S. 18 (3) of the Indian Independence Act, 1947, is relevant and under that section the laws passed by the British Parliament, and which were applicable to India continued in force till 26-1-1950, e.g., the Fugitive Offenders Act, 1881.[8]

A *private grant* of rights by the Ruler of a native State subsequently merged in the Indian Union is not a *law* in force to which ART. 13 (1) will apply.[9]

Article 372 (2) empowers the President to adapt any law in force to accord with the provisions of the Constitution. The Acts of the British Parliament which were applicable to India (e. g. Fugitive Offenders Act, 1881) were not adapted by the President.[10] The fact that an Act has not been adapted by the President does not affect the question whether it continued in force after the commencement of the Constitution.[11]

The adaptation of a pre-existing law by President's Order under ART. 372 (2) does not ensure the validity of the Act if it offends any of the articles of the Constitution.[12]

Constitutional provisions

The term "law" by itself and apart from the limitations imposed by the context is wide enough to include *constitutional* law. But there is a clear demarcation between ordinary law which is made in exercise of *legislative* power and constitutional law which is made in

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[6] 1952 Bom 16 (22) [A I R V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.*

[7] 1952 Bom 16 (23) [A I R V 39 C 2] (DB), *State of Bombay* v. *Heman Santal.* (If the validity of an Act falling within cl. (1) is saved by any provision in the Constitution as for instance under cls. (2) to (6) of Art. 19 or Art. 31 (5) (a) which save the validity of "existing laws" notwithstanding inconsistency with Fundamental Rights, then the above Act will be saved.)

[8] 1953 Mad 729 (Pr 10) [A I R V 40 C 281] : 1952 Cri L Jour 1364 (DB), *In re C. G. Menon.*

[9] 1952 Him Pra & B 41 (42) (Pr 5) [AIR V 39], *Sihnu* v. *Lachman Dass.* (AIR 1952 S C 59, Ref.)

[10] *See* 1953 Mad 729 (Pr 11) [A I R V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.*

[11] 1953 Mad 729 (Pr 11) [A I R V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.*

[12] 1953 Mad 729 (Pr 11) [A I R V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.*

Article 13
Note 2

exercise of *constituent* power. The constitutional law is mainly concerned with the creation of the three great organs of the State, the Executive, the Legislature and the Judiciary, the distribution of governmental power among them and the definition of their mutual relations. The question has arisen whether the power of amending the Constitution given to Parliament under ART. 368 includes the power to amend the provisions as to Fundamental Rights in this Part and whether such amendment would not be hit by the provisions of cl. (2) of this article. This question has been settled by the decision of the Supreme Court in *Shankari Prasad* v. *Union of India.*[13] It was held by the Supreme Court that the provisions of this article and those of ART. 368 conflict with each other but that harmonious construction requires that one of the articles should be read as controlled and qualified by the other. It was held by the Supreme Court that in the context of ART. 13, law must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power, with the result that cl. (2) of this article does not affect amendments made under ART. 368. On the basis of the above view their Lordships upheld the validity of the Constitution (First Amendment) Act, 1951.

It follows that the provisions of the *Constitution* itself, apart from any subsequent amendment, cannot be attacked on the ground of their repugnance to the provisions of the Part on Fundamental Rights.[14] Apart from the fact that "law" in ART. 13, cl. (2) does not refer to the Constitution or constitutional law, the clause does not relate to the other parts of the Constitution at all, its object being to limit the law-making power of the State *after* the Constitution has come into force. This conclusion also accords with the principle of harmonious construction already referred to. Hence, the operation of Part XII of the Constitution conferring the powers of taxation on the State, is not in any way affected by the provisions of this Part relating to Fundamental Rights.[15]

Personal law

In *The State of Bombay* v. *Narasu Appa*[16] it has been held by the Bombay High Court that the expression "laws in force" in cl. (1)

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[13] 1951 S C 458 (Pr 13) [A I R V 38 C 60] : I L R 30 Pat 1176 : 1952 S C R 89 (S C).

[14] 1952 Punj 143 (Pr 6) [A I R V 39 C 52] : I L R (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.* (An article in the Constitution cannot be held to be *ultra vires* on the ground of its being inconsistent with the Fundamental Right inasmuch as all the articles in the Constitution have to be read together. Article 15 (4) and Article 341 are exceptions to the general rule laid down in Art. 15 (1) —Hence the President's Constitution (Scheduled Castes) Order, 1950, is not *ultra vires* on the ground of discrimination on the grounds of caste alone.)

[15] 1952 Mad 395 (Pr 41) [A I R V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.* (In this case it was held that the levy of stamp duty for enrolment as an advocate, was not open to challenge as interfering with the Fundamental Rights of freedom to practise a profession under Art, 19 (1) (g).)

[16] 1952 Bom 84 (Pr 13) [A I R V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB).

of this article does not include *personal law*. Their Lordships' reasoning is based partly upon the fact that in cl. (3) (a) the definition of law, while mentioning "custom or usage" having the force of law, does not mention *personal law*. But it is submitted with respect that this argument is not helpful, because, as pointed out already, cl. (3)(a) does not mention even an *Act*, but this does not mean that an Act is not included within the meaning of 'law' for the purpose of the article. But their Lordships also consider the *general scheme* of the Constitution and come to the conclusion that "the scheme of the Constitution seems to be to leave the personal law unaffected except where specific provision is made with regard to it and leave it to the Legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform code."

It is questionable whether it is permissible to found an exception to the express words of the Constitution on such a ground.[17] The above decision of the Bombay High Court is also contrary to the view expressed by the Federal Court[18] that the words "all the law in force" in S. 292 of the Government of India Act, 1935 (corresponding to ART. 372 (1) of the Constitution), covered not only statutory laws but also non-statutory laws including personal laws. This, of course, does not exclude the possibility of saving the validity of *personal law* on the ground that it is not touched by a particular provision in this Part. Thus, it has been held that the rule of Hindu Law preventing a Hindu widow from transferring her husband's estate except for legal necessity, etc., does not contravene the provisions of ART. 19 (1) (f), inasmuch as the rule of Hindu Law does not prevent the transfer of what can be called *her* property, namely, her life interest in the husband's estate.[19]

Bills

The term "law" in cl. (2) does not include a *proposed* enactment. The expression "shall not make any law" in cl. (2) does not confer any jurisdiction upon the High Court to interfere with the progress of any piece of legislation.[20]

2a. Bye-laws.—The definition of "law" in cl. (3) (a) expressly includes a bye-law. Hence, a municipal bye-law, which is contrary to the Fundamental Rights can be declared void under this article.[1] Thus, a municipal bye-law, which places unreasonable restrictions on a person's right of carrying on business (see ART. 19 (1) (g)) in a municipality, is void.[2] Where a municipal bye-law, passed before the coming into force of the Constitution, has the effect of precluding a person from carrying on business within the municipal area, the bye-law will become void on the coming into force of the Constitution. It cannot be contended in such a case that the person's right, having already been put an end to before the Constitution, it cannot be revived on the coming into force of the Constitution.[3] The reason is that the right to carry on business is a continuing right and the principle that anything that happened already before the coming into force of the Constitution under the law then in force cannot be nullified on the coming into force of the Constitution as the Constitution is not retrospective, cannot apply in such a case.

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[17] 1952 Mad 193 (Pr 3) [A I R V 39 C 95] : I L R (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal*. (In this case the question was not gone into.)

[*See* 1950 S C 27 (Pr 26) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (In this case Kania, C. J., observed that an Act cannot be declared void merely because it is opposed to the *spirit* of the Constitution supposed to pervade the Constitution unless the Act is repugnant to any *express* provision of the Constitution.)]

[18] 1941 F C 16 (31) [A I R V 28] (FC), *United Provinces* v. *Atiqa Begum*.

[19] 1952 Him Pra & B 42 (43) (Pr 7) [A I R V 39], *Harish Chandra* v. *Lieut. Governor*.

[20] 1951 All 228 (Prs 5, 27, 29, 32) [A I R V 38 C 25] : I L R (1451) 2 All 505 (DB), *Chotey Lal* v. *State of Uttar Pradesh*.

As seen in Preamble, NOTE 6, there is a presumption in favour of constitutionality of legislation. The same presumption will apply to bye-laws also. In fact, the bye-laws of a local body like a municipality, must be benevolently interpreted, and credit must be given to those who have to administer them that they will be reasonably administered.[4] Courts should not look at the bye-laws of local authorities from the same point of view as they are in the habit of looking at the bye-laws of railway companies and other like bodies and a larger discretion is to be given to public representative bodies like local authorities than to private bodies.[5] Hence, when a municipal bye-law is questioned in a Court of law, the Court must be slow to declare it void.[6]

2b. "Notification." — Section 139 of the Bombay Prohibition Act (25 of 1949) authorises the State Government by general or special order to exempt any intoxicants or class of intoxicants from all or any of the provisions of the Act. An order made by the State Government in exercise of the power conferred by the section owes its legal efficacy to this section and, therefore, in the eye of the law the notification has the force of the law, as if made by the Legislature itself.[1]

Article 13 — Note 2a

[1] 1950 S C 163 (165) (Pr 4) [AIR V 37 C 11] : 1950 S C R 566 (SC), *Rashid Ahmed* v. *Municipal Board, Kairana.*

[2] 1950 S C 163 (165) (Pr 4) [AIR V 37 C 11] : 1950 S C R 566 (SC), *Rashid Ahmed* v. *Municipal Board, Kairana.*

[3] 1950 S C 163 (165) (Pr 5) [AIR V 37 C 11] : 1950 S C R 566 (S C), *Rashid Ahmed* v. *Municipal Board, Kairana.*

[4] 1953 All 681 (Pr 8) [AIR V 40 C 331] (DB), *Matwal Chand* v. *Dist. Magistrate.* ((1898) 2 Q B 91 : 67 L J Q B 782, *Kruse* v. *Johnson*, Foll.)

[5] (1898) 2 Q B 91 (99) : 67 L J Q B 782, *Kruse* v. *Johnson.*
(1899) 2 Q B 34 (37) : 68 L J Q B 702, *White* v. *Morley.* ((1898) 2 Q B 91 : 67 L J Q B 782, *Kruse* v. *Johnson*, Foll.)

[6] 1953 All 681 (Pr 8) [AIR V 40 C 331] (DB), *Matwal Chand* v. *Dist. Magistrate.*

Article 13 — Note 2b

[1] 1951 S C 318 (328) (Pr 25) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jou 1361 (SC), *State of Bombay* v. *F. N. Balsara.*

Article 13
Notes 2c–3

2c. Statutory rules.—The effect of a statutory rule, if validly made is precisely the same as that of a statutory enactment and every person must conform himself to its provisions. But while in the case of a rule it may be questioned whether it was within the statutory authority of those who made it, the provisions of an Act of Parliament cannot be canvassed in that way.[1]

3. Retrospective effect of cl. (1). — The question has arisen whether the provision in cl. (1) that all laws in force immediately before the commencement of the Constitution shall be void to the extent to which they are inconsistent with the Fundamental Rights declared by this Part, is retrospective so as to make the laws, which are so inconsistent, void *ab initio.* On this question it has been decided and settled as a result of a series of decisions including that of the Supreme Court that cl. (1) is not retrospective, and that its effect is not to make the "inconsistent" provision void *ab initio.*[1]

In *Keshavan* v. *State of Bombay,*[2] Das, J., delivering the majority judgment of the Supreme Court laid down the law in the following words :

> "It is, therefore, clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot

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Article 13 — Note 2c

[1] (1894) 1894 App Cas 347 (360), *Institute of Patent Agents* v. *Lockwood.*

Article 13 — Note 3

[1] 1951 S C 128 (Pr 7) [AIR V 38 C 20] : 1951 S C R 228 : ILR (1951) Hyd 294 : 52 Cri L Jour 860 (SC), *Keshavan* v. *State of Bombay.*

1952 S C 235 (238) (Pr 5) [AIR V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay.* (There can be no question of infringement of a Fundamental Right (example, under Art. 14) before the coming into force of the Constitution as the provisions of the Constitution relating to Fundamental Rights have no retrospective operation : AIR 1951 S C 128, Foll.)

1951 Bom 188 (Pr 8) [AIR V 38 C 38] : I L R (1950) Bom 529 : 52 Cri L Jour 30 (FB), *In re Keshav.*

1951 Mys 72 (Prs 43, 63. 67, 77) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (Per *Venkata Ramaiya and Balakrishnaiya, JJ.* — Principle of S. 6, General Clauses Act, dealing with consequences of repeal of an Act applied—Per *Mallappa J.*—Such principle did not apply. Distinction between 'void' and 'inoperative' etc., explained.)

1951 Pat 75 (Prs 29, 30) [AIR V 38 C 10] : 52 Cri L Jour 799 (SB), *Chanderdeo Sharma* v. *State of Bihar.*

1952 Mad 193 (Pr 1) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.* (AIR 1951 S C 128, Foll.)

1951 Kutch 73 (Pr 9) [AIR V 38 C 47], *Rabari Khengar* v. *Govt. of Kutch.*

1951 Mad 974 (Pr 6) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.*

1951 Mys 26 (Pr 7) [AIR V 38 C 14] : I L R (1951) Mys 192 : 52 Cri L Jour 251 (DB), *Amritlal* v. *Govt. of Mysore.*

[2] 1951 S C 128 (Prs. 5, 6, 7) [AIR V 38 C 20] : 1951 S C R 228 : I L R (1951) Hyd 294 : 52 Cri L Jour 860 (SC).

be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the Court should construe the language of ART. 13 (1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution."

After quoting cl. (1) of this article, his Lordship proceeded :

"It will be noticed that all that this clause declares is that all existing laws, *in so far as they are inconsistent* with the provisions of Part III shall, *to the extent of such inconsistency*, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting our Constitution. We find nothing in the language of ART. 13 (1) which may be read as indicating an intention to give it retrospective operation. On the contrary, the language clearly points the other way. The provisions of Part III guarantee what are called Fundamental Rights. Indeed, the heading of Part III is "Fundamental Rights." These rights are given, for the first time, by and under our Constitution. Before the Constitution came into force there was no such thing as Fundamental Right. What ART. 13 (1) provides is that all existing laws which clash with the exercise of the Fundamental Rights (which are for the first time created by the Constitution) shall to that extent be void. As the Fundamental Rights became operative only on and from the date of the Constitution, the question of the inconsistency of the existing laws with those rights must necessarily arise on and from the date those rights came into being. It must follow, therefore, that ART. 13 (1) can have no retrospective effect but is wholly prospective in its operation."

Hence, cl. (1) has not the effect of nullifying anything that has already occurred as a result of a particular law having been in force immediately before the commencement of the Constitution.[3] Thus, if

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[3] 1953 S C 355 (356) [AIR V 40 C 79] : 1953 Cri L Jour 1439 (SC), *Abdul Khader* v. *State of Mysore.*

1953 S C 287 (289) (Pr 4) [AIR V 40 C 67] : I L R (1953) Hyd 345 : 1953 Cri L Jour 1158 (SC), *Habeeb Mohamed* v. *State of Hyderabad.* (When a pre-Constitution Regulation is impeached as being in contravention of the Fundamental Rights (example, the equality clause in Art. 14), the invalidity of the law will not affect past transactions and rights and liabilities accrued before the coming into force of the Constitution.)

1952 S C 339 (342) (Pr 16) [AIR V 39] : 1952 S C R 744 : I L R (1953) Mys 142 (SC), *D. K. Nabhirajiah* v. *State of Mysore.* (Before the coming into force of the Constitution the Fundamental Rights had no application and therefore any order passed or any transaction completed before the coming into force of the Constitution cannot be impeached as being in contravention of Fundamental Rights : AIR 1951 S C 128, Foll.)

Article 13
Note 3

an act is done before the commencement of the Constitution which act, according to the law then in force, constitutes an offence, it shall not cease to be an offence after the commencement of the Constitution.[4]

1951 Pat 75 (Prs 29, 30) [AIR V 38 C 10] : 52 Cri L Jour 799 (SB), *Chanderdeo Sharma* v. *State of Bihar*. (Where the order under S. 19, Press (Emergency Powers) Act, was notified in the Bihar Gazette before the Constitution of India came into force the validity of the order cannot be called into question with reference to a higher right granted to a citizen of the Indian Union by the Constitution : AIR 1951 S C 128, Followed.)

1953 All 705 (Pr 6) [AIR V 40 C 343] (DB), *Mahmood Hasan Khan* v. *Bhikhari Lal*. (Right of pre-emption accrued before coming into force of Constitution not affected by Art. 19 (1) (f), even assuming that the right is inconsistent with that clause.)

1953 Cal 508 (509) [AIR V 40 C 192] (DB), *Narayan Chandra* v. *Ananda Bisni*.

1953 Punj 30 (34) (Pr 30) [AIR V 40 C 9], *Harmahendra Singh* v. *Punjab State*. (The High Court cannot interfere with a valid order passed by Government under S. 5 (2) (d) of the Punjab Court of Wards Act merely on the ground that by subsequent enactment or by the Constitution some rights have been conferred on the petitioner which, according to him, have made the Act *ultra vires*. Case law discussed.)

1953 Sau 58 (62) (Pr 9) [AIR V 40 C 25] (DB), *Desai Nagardas* v. *Jagsi Bhikha*. (Bhavnagar Khedut Sanrakshan Dhara — Act is void after Constitution, being inconsistent with Art. 14 — Transaction entered into before Constitution, is not affected.)

1952 Punj 417 (418) (Pr 2) [AIR V 39], *Ram Saran* v. *Sundar Singh*. (Where before the Constitution had come into effect the execution of a decree had become barred under the Punjab Debtors' Protection Act because of the judgment-debtor being an agriculturist as defined in the Punjab Alienation of Land Act, the period of limitation will not be extended and the execution will not become one within time under S. 48, C. P. Code, after the Punjab Alienation of Land Act has been declared to be void under Art. 13 (1) of the Constitution.)

1951 Kutch 73 (Pr 9) [AIR V 38 C 47], *Rabari Khengar* v. *Govt. of Kutch*. (Article 13 of the Constitution is not retrospective in operation and an order passed under some law in force prior to the commencement of the Constitution cannot be questioned on the ground that the law was inconsistent with the provisions of Part III of the Constitution. The order itself may be erroneous in the sense that if some other authority were to consider the law and the facts placed before it, it might arrive at a different conclusion. But the error itself does not vitiate the order nor does the order cease to be one without jurisdiction on account of such error.)

[*See* 1950 S C 163 (165) [AIR V 37 C 11]: 1950 S C R 566 (SC), *Rashid Ahmed* v. *Municipal Board, Kairana*. (Pre-Constitution municipal bye-law in effect preventing a person from carrying on business in the municipality—Bye-law becomes void on the coming into force of the Constitution — It cannot be contended that the right having been already affected under the then existing law cannot be revived.)]

[4] 1952 Trav-Co 217 (222) (Pr 9) [AIR V 39] : I L R (1952) Trav-Co 1 : 1952 Cri L Jour 1066 (FB), *G. Chadayammury* v. *State*. (If the charge under S. 4 of Cochin Criminal Law Amendment Act included in its scope a count regarding membership of the Cochin Communist Party (declared unlawful) prior to 26-1-1950 a prosecution can be proceeded with even if it is assumed that S. 3 of the Cochin Criminal Law Amendment Act is rendered void by Art. 13 (1) of the Constitution : AIR 1951 S C 128, Ref.)

1951 Bom 188 (Pr 8) [AIR V 38 C 38] : I L R (1950) Bom 529 : 52 Cri L Jour 30 (FB), *In re Keshav*.

1952 Mad 193 (Pr 1) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal*. (There is no Fundamental Right

Article 13
Note 3

Similarly, the validity of proceedings, which have already been commenced under a pre-Constitution law, is not affected by the law becoming void in consequence of the Constitution coming into force.[5]

But a person is entitled to Fundamental Rights both as to substantive law as well as procedural matters. From this two consequences follow : (i) So far as a person's substantive rights and liabilities are concerned, if he has incurred a certain liability under a pre-Constitution law, such liability is not wiped out by the pre-Constitution law becoming void on the coming into force of the Constitution as being inconsistent with the Fundamental Rights. (ii) As regards procedural matters, if proceedings have already been commenced against a person under a pre-Constitution law, the validity of the proceedings that have already taken place cannot be called in question

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that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force.)

1951 Mys 26 (Pr 7) [AIR V 38 C 14] : I L R (1951) Mys 192 : 52 Cri L Jour 251 (DB), *Amritlal* v. *Govt. of Mysore.*

5. 1953 S C 156 (Pr 21) [AIR V 40 C 41]: ILR (1953) Hyd 211 : 1953 Cri L Jour 862 (SC), *Qasim Razvi* v. *State of Hyderabad.* (No exception could be taken to the Special Tribunal's taking cognizance of the case under an order of the Military Governor of Hyderabad when this happened long before the advent of the Constitution)

1951 S C 128 (Pr 7) [AIR V 38 C 20] : 1951 S C R 228 : ILR (1951) Hyd 294 : 52 Cri L Jour 860 (SC), *Keshavan* v. *State of Bombay.* (Hence proceedings under S. 18 (1), Press (Emergency Powers) Act, 1931, pending at the date of the Constitution are not affected.)

1951 Mys 72 (Pr 45) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992. (FB), *Abdul Khader* v. *State of Mysore.* (Per *Venkata Ramaiya & Balakrishnaiya, JJ.*; *Mallappa, J., dissenting* — Assuming that the Mysore Special Criminal Courts Act (24 of 1942) has become void after the commencement of the Constitution of India, it does not affect the pending proceedings launched earlier to the commencement of the Constitution. Having regard to S. 6 of the General Clauses Act it cannot be said that the Special Tribunal set up by the impugned Act and before which the proceedings were pending, ceased to exist or the proceedings have been rendered void.)

1953 Cal 263 (Pr 50) [AIR V 40 C 96] : 1953 Cri L Jour 673 (DB). *Edward Ezra* v. *The State.*

1951 Bom 188 (Pr 8) [AIR V 38 C 38] : ILR (1950) Bom 529 : 52 Cri L Jour 30 (FB), *In re Keshav.* (A prosecution started under S. 18 (1), Press (Emergency Powers) Act, 1931, prior to the commencement of the Constitution cannot be affected by the result of S 18 (1) of that Act being declared to be void under Art. 13 (1) of the Constitution.)

1951 Mad 974 (Pr 6) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.* (Proceedings validly commenced on a reference by the Government under the Industrial Disputes Act, before the Constitution, are not affected by the Constitution, and must be allowed to continue notwithstanding the coming into force of the Constitution. Nor is the award affected, for it is only the final determination of the proceedings initiated by the reference. AIR 1951 S C 128, Foll.)

1951 Mys 26 (Pr 7) [AIR V 38 C 14] : I L R (1951) Mys 192 : 52 Cri L Jour 251 (DB), *Amritlal* v. *Govt. of Mysore.* (Where the offence of contravening cl. (3) of the Mysore Food (Restrictions of Service of Meals by Catering Establishments and others) Order (1949), was committed and the prosecution launched before the Constitution came into force : *Held*, that the result of the prosecution was not affected by the declaration of rights under the Constitution.)

on the ground that the procedure followed was opposed to the Fundamental Rights declared by the Constitution, such as the equality clause under ART. 14.[6] But as regards the future stages of the proceeding, the person proceeded against is entitled to claim that a procedure inconsistent with his Fundamental Rights should not be followed.[7]

Where certain laws were applicable to certain States, and after integration of those and other States into a union, the laws previously applicable in the respective States continued to be operative in the corresponding areas with the result that there was inequality of laws in the union newly formed, such inequality would not make the laws invalid prior to the Constitution, but on the coming into force of the Constitution they would become void.[8]

4. "The State shall not make any law"—Clause (2).—These words do not mean that the Legislature can be *prevented* by any legal proceeding in Court from enacting any law. In *Choley Lal* v. *State of Uttar Pradesh*,[1] Sankar Saran, J., made the following observations :

> "It is necessary to understand exactly how and in what circumstances Courts declare laws invalid or unconstitutional. Until a Bill has become law, the legislative process not being complete,

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[6] 1953 S C 156 (Prs 18, 22, 38) [AIR V 40 C 41] : I L R (1953) Hyd 211 : 1953 Cri L Jour 862 (SC), *Qasim Razvi* v. *State of Hyderabad*. (A trial commenced under Hyderabad Special Tribunals Regulation, 5 of 1358 F, before coming into force of Constitution—Proceedings before commencement of Constitution cannot be challenged on ground of discrimination—Validity of subsequent proceedings depends on whether accused has been deprived of equal protection in matters of procedure.)

[7] 1953 S C 287 (289) (Pr 47) [AIR V 40 C 67] : I L R (1953) Hyd 345 : 1953 Cri L Jour 1158 (SC), *Habeeb Mohamed* v. *State of Hyderabad*. (Where proceedings are commenced against a person before the Constitution under a pre-Constitution law, which is inconsistent with the Fundamental Rights, the fact that such proceedings are continued after the coming into force of the Constitution under the same law does not invalidate the subsequent proceedings but only entitles the accused to claim that the remaining part of the trial must not deviate from the normal standard of procedure in material respects so as to infringe the equal protection clause in Art. 14. AIR 1953 S C 156, Rel. on.)

1952 S C 235 (243, 244) (Prs 25, 27) [AIR V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay*. (Bombay Public Security Measures Act (1947), S. 12 — Cases referred to Special Judge before Constitution —Validity of special procedure after Constitution. AIR 1927 P C 97, Disting.)

1953 Cal 263 (Pr 50) [AIR V 40 C 96] : 1953 Cri L Jour 673 (DB), *Edward Ezra* v. *The State*. (Proceedings under Criminal Law Amendment Ordinance (29 of 1943 as amended by Ordinance 6 of 1946 (Central)), S. 5 — Proceedings pending at commencement of Constitution—Continuance of proceedings after Constitution before special tribunal and by adopting a special procedure was infringement of equality clause in Art. 14 and void. AIR 1951 S C 128, Expl. and Disting.)

[8] 1953 Raj 22 (28) (Pr 20) [AIR V 40 C 8] : I L R (1951) 1 Raj 888 (DB), *Manohar Singh* v. *State of Rajasthan*.

Article 13 — Note 4

[1] 1951 All 228 (Prs 5, 27, 29, 32) [AIR V 38 C 25] : I L R (1951) 2 All 505 (DB).

> Courts do not come into the picture at all. It is not the function of any Court or Judge to declare void or directly annul a law the moment it has been promulgated. Courts are not a supervisory body over the Legislature. Their approval or disapproval is not needed for an Act passed by the Legislature to have the force of law. Their function is interpretative. In other words, upon any particular case coming before them in which the right of any party is involved they decide whether the Act or any part of it is to be disregarded on the ground of its incompatibility with the Constitution."

In the same case Agarwala, J., quoted with approval the observations of Stephen, J., in *Bradlaugh* v. *Gossett*[2] :

> "I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings..... It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned and that even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly."

As to whether an Act extending the duration of a pre-Constitution temporary Act will come under cl. (2), see NOTE 2.

5. Part of law void — Effect. — Clauses (1) and (2) provide that laws inconsistent with the Fundamental Rights shall be void *to the extent of such inconsistency*.[1] But the article by itself does not provide as to the consequence of a part of an Act or other law being void under its provisions.[2] In such cases the general principle will apply, namely, that where an Act is partly invalid, the validity of the whole Act will not be necessarily affected. If the valid portion is severable from the rest, the valid portion will be maintained, provided that it is sufficient to carry out the purpose of the Act.[3] But where

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[2] (1884) 12 Q B D 271 (278) : 53 L J Q B 209.

Article 13 — Note 5

[1] 1953 S C 287 (289) (Pr 4) [AIR V 40 C 67] : I L R (1953) Hyd 345 : 1953 Cri L Jour 1158 (S C), *Habeeb Mohamed* v. *State of Hyderabad.* (Article 13 (1) does not necessarily make a whole pre-Constitution law which is inconsistent with the Fundamental Rights invalid, but only invalidates those provisions which are inconsistent with Fundamental Rights.)

1952 S C 252 (277, 296) (Prs 62, 137) [AIR V 39] : 1952 S C R 889, 1020, 1056: I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

1951 S C 318 (331) (Pr 33) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC). *State of Bombay* v. *F. N. Balsara.*

1950 S C 27 (Pr 93) [A I R V 37 C 6] : 51 Cri L Jour 1383 : 1950 S C R 88 (S C), *Gopalan* v. *State of Madras.* (Preventive Detention Act, 1950, is *intra vires* with the exception of S. 14 which is illegal and *ultra vires.*)

[2] *See* 1951 Bom 210 (Pr 27) [AIR V 38 C 42] : I L R (1951) Bom 17 : 52 Cri L Jour 80 (FB), *Fram Nusserwanji Balsara* v. *State of Bombay.*

[3] 1950 S C 27 (Pr 40) [AIR V 37 C 6] : 51 Cri L Jour 1383 : 1950 S C R 88 (S C), *Gopalan* v. *State of Madras.* (Invalidity of S. 14 of Preventive Detention Act, 1950, does not affect the rest of the Act.)

1939 F C 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.*

Article 13
Note 5

the two portions are not severable, the whole Act or law will be invalid.[4]

As regards the test to see whether the invalid and valid portions are severable, Viscount Simon, delivering the judgment of the Judicial Committee of the Privy Council in *Attorney-General of Alberta* v. *Attorney-General of Canada*,[5] observed as follows :

(1947) 1947 L J R 1392 (1399) : 1947 App Cas 503 (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada.*

1951 Bom 210 (Pr 27) [AIR V 38 C 42] : I L R (1951) Bom 17 : 52 Cri L Jour 80 (FB), *Fram Nusserwanji Balsara* v. *State of Bombay.* (Bombay Prohibition Act, 25 of 1949 — It is impossible to say that the provisions with regard to prohibition are inextricably bound up with the provisions with regard to other matters that the Legislature has dealt with in the Act—The whole Act cannot, therefore, be declared to be void.)

1951 Nag 58 (Prs 178, 203) [AIR V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Government.* (Though R. 7 of the C. P. & Berar Foreign Liquor Rules, 1938, is invalid being discriminatory, it is no part of the C. P. & Berar Prohibition Act, 1938, and hence the Act remains unaffected.)

1952 Nag 111 (Pr 18) [AIR V 39 C 45 (8)]: I L R (1952) Nag 69 (DB), *New Motor Transport Co.* v. *R. T. Authority.*

1951 Cal 85 (Prs 32, 38, 54, 57, 58) [AIR V 38 C 25] (DB), *Subodh Gopal* v. *Behari Lal.*

(1924) 264 U S 286 (289) : 68 Law Ed 686 (689), *Dorchy* v. *Kansas.* (Statute bad in part is not necessarily void in its entirety. Provisions of a statute within the legislative power may stand if separable from portions of statute found to be unconstitutional.)

(1892) 143 U S 649 (695) : 36 Law Ed 294 (311), *Field* v. *Clark.*

[4] 1950 S C 124 (Pr 13) [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (S C), *Romesh Thappar* v. *State of Madras.* (Madras Maintenance of Public Order Act, 1949, was held to be *wholly* void.)

1949 P C 190 (Pr 21) [AIR V 36 C 56] (P C), *Attorney-General of Saskatchewan* v. *Attorney-General of Canada.* (Paragraph 3 of S. 6 (2) of Farm Security Act, (Saskatchewan) (1944) trenched upon the Dominion field—The trenching was not incidental to the valid power of the Provincial Legislature to legislate for a modification of principal debts—Even otherwise, para 3 was *ultra vires* for the reason that the Dominion had already occupied its exclusive field by enacting Interest Act—The invalidity of para. 3 involved the consequence that S. 6 was *ultra vires* as a whole, since paras 1 and 2 of sub-s. (2) of S. 6 were bound up with para 3—Sub-section (2) expressed a single scheme and sub-s. (2) in its turn was the main effective provision of S. 6: (1947) 1947 App Cas 503 : 1947 L J R 1392 (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada*, Rel. on.)

1952 Nag 111 (Pr 19) [AIR V 39 C 45 (8)] : I L R (1952) Nag 69 (DB), *New Motor Transport Co.* v. *R. T. Authority.* (Notification issued by District Magistrate, Drug, on 15th May 1945, under S. 74, Motor Vehicles Act, 1939, held invalid as its invalid portion was not severable.)

1950 Pat 265 (Pr 28) [AIR V 37 C 67] : ILR 29 Pat 335 : 51 Cri L J 1081 (DB), *Brahmeshwar Prasad* v. *State of Bihar.* (The provisions of the Bihar Maintenance of Public Order Act (3 of 1950), relating to duration of detention being inextricably mixed up with the provisions of safeguards laid down therein, the doctrine of severability cannot apply and therefore the entire Act becomes void.)

[5] (1947) 1947 L J R 1392 (1399) : 1947 App Cas 503 (P C).

[*See also* 1951 S C 318 (331) (Pr 32) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.* ((1947) 1947 App Cas 503: 1947 L J R 1392 (PC), *Attorney-General of Alberta* v. *Attorney-General of Canada*, Foll.)

1952 S C 252 (277, 296) (Prs. 62, 137) [AIR V 39]: 1952 S C R 889, 1020, 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Do.)]

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

See also the cases noted below,[6] which lay down or illustrate the same principle.

6. Effect of Court declaring Act to be void.—The effect of the judgment of the High Court declaring an impugned Act invalid is not that the impugned Act never existed or has ceased to exist, but only that so long as the judgment is not overruled the Courts in the State will decline to recognise the impugned Act. Therefore, there can be no objection to an amending Act or Ordinance on the ground that it validates something which could not be validated. And if the Act as amended is constitutional it will be enforced.[1] See also NOTE 7.

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[6] 1950 S C 27 (Pr 40) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (*Kania, C. J.* —"It next remains to be considered how far the invalidity of this section (S. 14 of the Preventive Detention Act (1950)) affects the rest of the impugned Act. The impugned Act minus this section can remain unaffected. The omission of this section will not change the nature or the structure or the object of the legislation. Therefore the decision that S. 14 is *ultra vires* does not affect the validity of the rest of the Act.")

1939 F C 74 (83) [AIR V 26] (FC), *Shyamakant* v. *Rambhajan.* (If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former, while *intra vires* in the latter. The test is said to be whether a statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remained from what it would be with the omitted portions forming part of it.)

1952 Nag 111 (Pr 13) [AIR V 39 C 45 (8)] : I L R (1952) Nag 69 (DB), *New Motor Transport Co.* v. *R. T. Authority.* (This test of severability may, however, not be adequate in all cases. A safer test would be to see whether the statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it. Notification issued by District Magistrate, Drug, on 15th May 1945, under S. 74, Motor Vehicles Act, 1939, held invalid as its invalid portion was not severable.)

(1923) 264 U S 286 (290) : 68 Law Ed 686 (690), *Dorchy* v. *Kansas.* (Provision of statute inherently unobjectionable cannot be deemed separable unless it appears both, that standing alone, legal effect can be given to it and that the Legislature intended the provision to stand in case others included in the Act and held bad should fall.)

(1886) 118 U S 90 (96) : 30 Law Ed 115 (117), *Spraigue* v. *Thompson.* (Where by rejecting as in conflict with the Constitution and Laws of the United States, certain exceptions in a statute, it is made to enact what confessedly the Legislature never meant, the entire statute must be held as annulled.)

(1885) 114 U S 270 (304, 305): 29 Law Ed 185 (197, 198), *Poindexter* v. *Greenhow.* (The parts must be such that each can stand alone—It must be the intention of the Legislature that the valid part should be enforceable though the other part should fall.)

Article 13 — Note 6

[1] 1952 Punj 55 (Pr 3) [A I R V 39 C 15] : I L R (1951) Punj 480 (DB), *Gurdial Kaur* v. *The State.* (Willis' 'Constitutional Law', 1936 Edn., page 90 and

7. "Void" — Meaning of. — The word "void" in relation to an Act means inoperative.[1] But the effect of cl. (1) of this article (under which it is provided that in so far as a pre-Constitution law is inconsistent with the Fundamental Rights it shall to the extent of its inconsistency be void), is quite different from the effect of the repeal of an Act or expiry of a temporary Act.[2] Where a pre-Constitution Act is amended retrospectively after the Constitution so as to be brought into conformity with the Constitution with effect from the commencement of the Constitution, it cannot be declared void under cl. (1) because prior to the amendment it was void as being inconsistent with Fundamental Rights.[3] (See also NOTE 6.)

8. Laws affected by this article. — For list of enactments which were challenged before Courts and either upheld or held invalid, see Appendix.

9. General principles as to judicial review of legislation. — This subject has been discussed already in the notes on Preamble and in the general notes in the beginning of Part III. As seen there,

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'Sutherland Statutory Construction', 3rd Edn., by Horack, pages 333, 335, Rel. on.)

Article 13 — Note 7

[1] (1886) 118 U S 425 (454) : 30 Law Ed 178 (186), *Norton* v. *Shelby County*. (An unconstitutional Act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed—Where an Act creating a Court is void, the acts of the Court cannot be held valid as the acts of a *de facto* Court.)

[*See also* 1951 Bom 188 (Pr 6) [AIR V 38 C 38] : I L R (1950) Bom 529 : 52 Cri L Jour 30 (FB), *In re Keshav*. ("In substance and in its effect there is no difference between an Act which is repealed and an Act which is declared void —In both cases the Act ceases to be operative. The law is annulled".)]

[2] 1951 S C 128 (130) (Pr 7) [AIR V 38 C 20] : 1951 S C R 228 : ILR (1951) Hyd 294 : 52 Cri L Jour 860 (SC), *Keshavan* v. *State of Bombay*. (Per *Das, J.* — Art. 13 (1) cannot be read as obliterating the entire operation of the inconsistent laws or to wipe them out altogether from the statute book for to do so will be to give them retrospective effect which they do not possess—Such laws exist for all past transactions.)

1953 Cal 263 (274) (Pr 51) [AIR V 40 C 96] : 1953 Cri L Jour 673, *Edward Ezra* v. *The State*. (General Clauses Act, S. 6, is not applicable in such cases — A I R 1951 Bom 188, Dissented from.)

1953 Mad 729 (Pr 8) [AIR V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G Menon*. (By reason of Art. 13 (1), a section offending the article is not struck out from the statute book, but no effect will be given to any of its provisions in regard to a person claiming that his Fundamental Rights are affected thereby—Exposition of Subba Rao J. in W. P. No. 568 of 1952 (Mad) of the principles laid down by the Supreme Court in AIR 1951 S C 128, adopted.)

1952 Bom 16 (28) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santal*.

1952 Punj 417 (418) (Pr 2) [AIR V 39], *Ram Saran* v. *Sundar Singh*.

[*See* ('70) 20 Law Ed 153 (155) : 11 Wall 88, *United States* v. *Tynen*. (Repeal of a law creating an offence precludes conviction for offence even if proceedings had already commenced before the *repeal*.—*Note*: Under cl. (1) of this article the effect is not the same as *repeal* of the pre-Constitution law—Hence, the liability already incurred is not wiped out by the coming into force of the Constitution. See Note 3.)]

[3] 1952 Bom 16 (29) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santal*.

unlike under the English Constitution, under which the validity of any Act passed by the Parliament cannot be questioned in a Court of law, Courts under the Indian Constitution have the power to pronounce upon the validity of legislation passed by the Legislatures of the country. In this respect, the Indian Constitution has adopted the principle of American Constitution although to a limited extent. (See Part III-(General), NOTE 7.) The Courts are not only empowered to decide about the validity of legislation. They are also placed under a duty to do so when the question is properly raised before them.[1] In *State of Madras* v. *V. G. Row*,[2] Patanjali Sastri, C. J., observed as follows on this point :

> "We think it right to point out, what is sometimes overlooked, that our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "Fundamental Rights," as to which this Court has been assigned the role of a sentinel on the *qui vive*. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the Courts in the new set up are out to seek clashes with the Legislatures in the country."

Under this article, it is expressly provided that laws inconsistent with the Fundamental Rights shall, to the extent of the inconsistency, be void. Courts necessarily, therefore, have, while administering justice, to determine whether the laws, which they are called upon to enforce, are valid. The provisions of Part III clearly impose limitation on the legislative powers of the various Legislatures in India.[3]

Article 13 — Note 9

[1] 1952 S C 196 (199) (Pr 13) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (S C), *State of Madras* v. *V. G. Row.*
[*See also* (1907) 92 Law Ed 1161 (1186) : 334 U S 1 (23), *Shelly* v. *Kraemer.* (Where the action of a State clearly violates the terms of Federal Constitution it is the duty of Supreme Court of United States so to declare.)]

[2] 1952 S C 196 (199) (Pr 13) [A I R V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (SC).

[3] 1951 S C 226 (228) (Pr 8) [A I R V 38 C 40] : 1951 S C R 525 (SC), *State of Madras* v. *Sm. Champakam Dorairajan.* (The chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order except to the extent provided in the appropriate article.)
1951 Hyd 1 (Pr 14) [A I R 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.* (English decisions are not likely to be of much use on question of *ultra vires* of Indian legislation.)

Apart from express limitations by way of Fundamental Rights on the legislative powers of a Legislature, as a matter of construction of statutes, it is a general principle that provisions, which curtail the liberties of a subject or impose burdens or obligations upon him, should be strictly construed.[4]

The tests for determining constitutionality of any statutory provision are (i) whether it is inconsistent with any of the Fundamental Rights and (ii) whether it travels beyond the legislative competence of the Legislature which has passed the statute.[4a]

Where the law purports to authorise the imposition of a restriction on a Fundamental Right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold such law even so far as it may be applied within the constitutional limits where it is not severable.[5] But where the matters, to which the impugned legislation applies, are severable the whole provision is not void.[6]

1952 Mad 565 (Prs 38, 39) [AIR V 39] : ILR (1952) Mad 957 (DB), *Balakrishnan* v. *State of Madras.*

[*See also* 1952 Punj 309 (319) (Pr 46) [AIR V 39] : ILR (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.* (Even extraordinary conditions do not create or enlarge constitutional powers and cannot justify the governmental action outside the sphere of constitutional authority. (1935) 79 Law Ed 1570 : 295 U S 495, *Schechter* v. *United States*, Foll.)]

[4] *See* 1946 Bom 216 (234) [AIR V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.* (Strict construction should be put upon those provisions of the Government of India Act, 1935, which go to curtail the liberties of the subject or impose burdens and obligations upon him. Hence, items in the lists of Sch. 7 should not be so construed as to deprive the subject of his liberties or to impose burdens or obligations upon him beyond those which are warranted by the words used therein.)

[4a] 1953 Bom 242 (253) (Pr 26) [AIR V 40 C 78] (DB), *Ratilal* v. *State of Bombay.* (Shah, J.)

[5] 1950 S C 124 (129) [A I R V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras.* (So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.)

1951 S C 118 (119) [AIR V 38 C 17] : 1950 S C R 759 : ILR (1951) Hyd 221 (SC), *Chintamanrao* v. *State of Madhya Pradesh.*

1952 Mad 565 (Prs 38, 39) [AIR V 39] : ILR (1952) Mad 957 (DB), *Balakrishnan* v. *State of Madras.* (Discretion of Textile Controller under Cl. 33 of Cotton Textiles (Control) Order, 1948, to grant permits for acquisition and installation of new looms is *absolutely* uncontrolled.)

[6] 1951 S C 318 (328) (Pr 25) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.* (Definition of 'liquor' in Bombay Prohibition Act includes several items which are distinctly separable from the last category, viz., all liquids consisting of or containing alcohol; though such a wide and sweeping inclusion of all liquids containing alcohol within the definition of liquor, so as to make it subject to the restrictions and prohibitions imposed by the Prohibition Act, may be unreasonable within Art. 19 cl. (5), this will not affect the validity of the Act as regards the first mentioned items which are separable with reference to which the provisions of the Act could not be unreasonable.)

The presumption is always in favour of the constitutionality of an enactment.[7] Unless there is any express provision in the Constitution rendering an enactment void, it cannot be held to be void merely on the ground of its being contrary to the spirit of the Constitution.[8] In testing the validity of an Act, it is not proper to assume that those who are responsible for carrying out its provisions will act arbitrarily, capriciously and without regard for the feelings of the people and the public. On the contrary, the proper approach should be that the responsible officers act with responsibility and that the objects of the Act shall be carried out in the spirit in which they were conceived by the Legislature.[9]

Where statutory rules are made governing the discretion of an administrative officer in the exercise of the wide powers entrusted to him in regard to certain matters, the statutory provision entrusting vast powers, the exercise of which will affect private rights, may not be regarded as unreasonable so as to be questionable under ART. 14 or ART. 19.[10]

The provision in a statute which authorises *Courts* to adjudicate upon claims which may affect rights cannot be challenged on the ground that it infringes Fundamental Rights. The reason is that the protection afforded by the Constitution to Fundamental Rights is against executive or legislative interference and not against the adjudication of Courts. A decision of a regularly constituted Court cannot be challenged as an interference with the Fundamental Rights in the abstract. The Court in the very nature of things adjudicates upon conflicting claims and declares rights and does not by the operation of its order seek to infringe any Fundamental Right. What may appear to be an interference with the right by an adjudication of a Court is in substance a direction founded on the non-existence, in the particular circumstances of the case, of the right claimed.[11] So also, in judging about the reasonability of the provisions of an Act, (when such reasonability is a material factor as under ART. 14 or ART. 19) the fact that most of the important decisions that can be taken under the Act are not executive or administrative decisions but are judicial decisions, should be given due importance, inasmuch as Courts and Judges act on judicial principles and not on personal considerations or on personal prejudices or predilections.[12]

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[7] 1951 S C 318 (326) (Pr 19) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.*

1951 S C 41 (Pr 10) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

[8] 1950 S C 27 (Pr 26) [AIR V 37 C 6] : 1950 SCR 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[9] 1951 Mys 72 (85) (Pr 37) [A I R V 38 C 33] : I L R (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (An Act cannot be declared to be invalid merely because it may be feared that the Government may abuse it in future.)

1953 Bom 242 (Pr 20) [AIR V 40 C 78] (DB), *Ratilal* v. *State of Bombay.* (Bombay Public Trusts Act, 29 of 1950, held not to contravene any Fundamental Right—Under S. 65 (1) of the Act, in an enquiry relating to a public trust, which is for the benefit of members of particular religious denomination assessors chosen should as far as practicable belong to that religious denomination — It was contended that it was possible for non-Parsees to be appointed assessors in regard to a Parsee fire temple and in that capacity might have the power to visit such temples which was contrary to Parsee religious ideas and sentiments—It was held that this approach was not correct and that it should not be assumed that the Act would be administered in an irresponsible fashion.)

[10] 1952 Mad 565 (Prs 38, 39) [A I R V 39] : I L R (1952) Mad 957 (DB), *Balakrishnan* v. *State of Madras.*

In deciding on the constitutionality of a statute, the question has to be considered from the point of view of the provisions of the Constitution and not on the basis of convenience or sentiment.[13]

With the initial presumption being in favour of the validity of the statute, investigations of the validity of a given statute should be limited to the extent absolutely necessary for the disposal of the issue before the Court.[14]

As to who can raise question of constitutionality of a statute, see Part III (General), NOTE 7.

Reference may be made here to some provisions of procedural law relating to the subject under discussion, namely, the judicial determination of the question about the validity of a statute :

(i) Section 113 of the Code of Civil Procedure, as amended by the Codes of Civil and Criminal Procedure (Amendment) Act (24 of 1951), is as follows :

> "Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.
>
> "Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its

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11. 1953 Bom 242 (253) (Pr 26) [AIR V 40 C 78] (DB), *Ratilal* v. *State of Bombay.* (The protection afforded by the Constitution to Fundamental Rights is against *executive or legislative* interference.)

12. 1953 Bom 242 (Prs 19, 20) [AIR V 40 C 78] (DB), *Ratilal* v. *State of Bombay.*

13. 1953 Bom 242 (253) (Pr 26) [A I R V 40 C 78] (DB), *Ratilal* v. *State of Bombay.*

14. 1953 Mad 720 (Pr 7) [A I R V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.* (Case related to the liability of certain persons to be returned to Singapore as fugitive offenders. The Court remarked that it was only concerned in the case with the question whether they were liable to be returned under S. 14 of the Fugitive Offenders Act and with the validity of that section and not with the question of the validity of the whole Act or even of Part II of the Act in which S. 14 occurs.)

Article 13
Note 9

opinion and the reasons therefor, and refer the same for the opinion of the High Court.

"*Explanation.* — In this section, "Regulation" means any Regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897, or in the General Clauses Act of a State."

(ii) Order 27-A of the Code of Civil Procedure contains some special provisions relating to the Attorney-General, and the Advocate-General in suits in which the substantial question of law relating to the interpretation of the Constitution is involved. The Order also deals with the power of the Court to direct that the Government should be made a party in such cases.

(iii) Under ART. 228 of the Constitution, the High Court is required to withdraw to its file cases involving the substantial question of law relating to the interpretation of the Constitution.

See also NOTES 1 and 5 and notes on Preamble and Part III. (General).

Right to Equality.

Equality before law.

14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

COGNATE PROVISION

The State—Interpretation of—See ART. 12.
See also ARTS. 15, 16, 17, 18.

Synopsis

1. Scope and applicability of the article.
2. Mode of construing article.
3. Mode of construing an Act to test its constitutionality.
4. American decisions—Value of.
5. Retrospective effect of the article.
6. Presumption as to constitutionality.
7. Political rights.
8. Legislation affecting single person.
9. Personal and official privileges.
10. "The State."
11. Equality before the law as between State and subject.
12. "Any person."
13. Aliens.
14. Foreign corporations.
15. Territorial discriminations.
16. "Within the territory of India."
17. Taxation laws.
18. Racial laws.
19. Who can raise objection as to unconstitutionality.
20. Foreign States and Princes and their properties.
21. Personal law, inequality in matters relating to.
22. Hindu religious and charitable endowments.
23. Classification on religious basis.
24. Principle of equal protection of laws as affected by cost of litigation.
25. Special Courts and special procedure.
26. Power of State Government to order trial before Sessions Court to be by Jury.

27. Denial of right of suit or of other legal remedy.
28. Procedure of administrative tribunals.
29. Right to be represented by legal practitioner in litigation.
30. Estate abolition legislation.
31. Rent reduction in estates.
32. Prohibition laws.
33. Labour laws.
34. Refusal of admission into college to students.
35. Monopoly rights.
36. Discrimination as to sex.
37. Discrimination in favour of agriculturists and agricultural activities and produce.
38. Requiring of licences, etc.
39. Tenancy laws.
40. Rent control laws.
41. Fugitive offenders.
42. Illustrative examples—Miscellaneous.

The place of this article in the scheme of the Constitution

1. Scope and applicability of the article.—This article may be related to the Preamble to the Constitution directly. The Preamble declares as one of the objects of the Constitution the securing to all the citizens equality of status and of opportunity. This article is the first of a series which embodies the ideal of equality expressed in the Preamble.

This article expresses the general rule while the succeeding ARTS. 15, 16, 17 and 18 enact particular applications of the rule.[1] This article may be treated as the residuary provision on the subject. Article 15 is aimed at the abolition of disabilities and inequalities founded upon differences of religion, race, caste, sex and place of birth. The article must be taken with ART. 17 which formally abolishes untouchability and forbids its practice in any form. Article 16 guarantees equality of opportunity in matters of public employment. Article 18 is aimed against the coming into existence of a class of "title-holders."

Concept of equality — Analogous law

The article embodies a concept which is familiar to practically all modern systems of jurisprudence. But reference may be made here to the English conception of the rule of law and to the 14th Amendment of the Constitution of the United States of America as forming the main inspiration behind the article.

The "Rule of Law" (English law)

The principle of the Rule of Law or the supremacy of law is one which Dicey claimed as the speciality of the English law. For understanding the conception better it will be useful to refer to Dicey's analysis of the concept. According to him the supremacy or the rule of law which is a characteristic of the English Constitution generally includes under one expression at least three distinct, though kindred, conceptions.[2] These are :

(i) No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the *ordinary* legal manner before the ordinary courts of the land.

Article 14 — Note 1

[1] 1951 Mad 120 (Pr 36) [A I R V 38 C 14] : I L R (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.*

[2] Introduction to the Study of the Law of the Constitution by A. V. Dicey, 9th Ed., 1939, Ch IV, pages 202, 203.

In this sense the rule of law is contrasted with every system of Government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.

(ii) In England, not only no man is above the law, but (what is a different thing) every man, whatever be his rank and condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

(iii) The general principles of the Constitution (as for example, the right to personal liberty or the right of public meeting) are in England the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.

In Chapter XII of his book, LAW OF THE CONSTITUTION, Dicey compares the rule of law in England with the scheme of administrative law known as *droit administratif* in France. According to Dicey the *droit administratif* rests on ideas foreign to the fundamental assumptions of the English Common Law and especially to what he has termed the *rule of law*. This opposition, says Dicey, is specially apparent in the protection given in foreign countries to servants of the State, who, while acting in pursuance of official orders or in the *bona fide* attempt to discharge official duties, are guilty of acts which in themselves are wrongful or unlawful.

It will be seen from the above that Dicey's conception of the rule of law emphasizes the amenability of everyone in the land to the *ordinary law* and to the *ordinary courts*. The question arises whether the growth of *subordinate* legislation, such as rules, regulations, orders and so on, made by various governmental or statutory authorities under power conferred by statutes militates against the conception of the rule of law. Similarly, the question arises whether the system under which issues arising with reference to the application of various laws of a special character, such as rent control laws, industrial dispute laws and so on, are left to be decided not by the *ordinary* courts but by special tribunals, can be reconciled with the principle of rule of law.

It is no doubt debatable whether strictly according to Dicey's ideas as promulgated in his book, LAW OF THE CONSTITUTION, the development of subordinate legislation and special tribunals can be reconciled with the conception of the rule of law. But this question may be left aside as purely of academic importance now. It is too late in the day to limit the content of law to the "ordinary" law in the sense of Common Law and Acts passed by the Legislature. In this connection reference may be made to the definition of 'law' in ART. 13 (3) (a) as including any ordinance, order, bye-law, rule, regulation and notification. Although the definition is expressly made for the purpose of ART. 13, it may be taken as an interpretation of the word 'law', which has received the approval of the Constitution. Similarly, on a parity of reasoning, the extension of the authority to decide disputes and controversies so as to embrace various special tribunals and administrative bodies, does not militate against the concept of the rule of law, especially (as it would be noted below) because the conception of equality before the law does not take away the power of the State to make special arrangements with regard to special matters whenever it is reasonably necessary to do so. (See NOTE 25).

The Fourteenth Amendment of the Constitution of U. S. A.

Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, runs as follows :

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law *nor deny to any person within its jurisdiction the equal protection of the laws.*"

It will be seen that the above provision corresponds to a number of articles in our Constitution. But the last part of the section "nor deny to any person within its jurisdiction the equal protection of the laws" corresponds to this article. The other parts of the section correspond to ART. 5, ART. 13 (2), ART. 19, ART. 21 and ART. 31.

It will be seen that the Fourteenth Amendment of the Constitution of the United States only uses the words "equal protection of the laws" and does not contain the words "equality before the law", while ART. 14 of our Constitution contains both the expressions. But this does not seem to connote any substantial difference in the conception embodied, though, as shown below, some decisions have attempted to draw a distinction between the two expressions.

Equality before the law and equal protection of the laws— Principle of reasonable classification

Almost all constitutions which guarantee the right to equality contain the expression "equality before the law" or "equal before the law". The Constitution of the United States of America, however, as seen above, uses the expression "equal protection of the laws". The Constitution of India has incorporated both the expressions. There does not seem to be, however, any *substantial* difference, at least for practical purposes, between the two expressions. Some attempt has, however, been made to distinguish between these two expressions. In *Sheoshankar* v. *M. P. State Government*,[3] the Nagpur High Court observed as follows :

> "While both the expressions aim at establishing what may be regarded as equality of legal status for all, there is some difference between those expressions. The former expression is somewhat a negative concept implying the absence of any special privilege in

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[3] 1951 Nag 58 (Pr 185) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB).

[*See also* 1953 Nag 14 (15) (Pr 6) [AIR V 30 C 8] : I L R (1953) Nag 936 : 1953 Cri L Jour 251 (DB), *Shrikisan* v. *Dattu*. (To similar effect.)]

favour of an individual, while the latter is a more positive concept implying equality of treatment in equal circumstances."

So also, in *Suryapal Singh v. U. P. Government*,[4] the Allahabad High Court observed that equality before the law has not the same meaning as the equal protection of the laws, and that the former may be defined as the equal subjection of all persons to the ordinary law of the land and the latter as the protection of equal laws. See also *Raja Kulkarni v. State of Bombay*.[5]

But although the expressions may be capable of some difference in meaning, the dominant idea common to both the expressions is that of equal justice.[6]

The meaning of "equality before the law" or "equal protection of the laws" has been expounded in a number of decisions of the Supreme Court of U. S. A. and also in several decisions of the Supreme Court and High Courts of India. Although in actual application of principles to concrete disputes there is still considerable room for differences of views, certain principles may be regarded as settled in regard to the connotation of the conception of equality before the law. The conception does not involve the idea of absolute equality among human beings which is a physical impossibility.[7] Equality before the law means that among equals the law should be equal and should be equally administered and that the like should be treated alike.[8] Hence, equality

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4. 1951 All 674 (Pr 83) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB).

5. 1951 Bom 105 (Pr 40) [AIR V 38 C 22] : ILR (1951) Bom 318 : 52 Cri L Jour 779 (DB). ('Equality before the law,' does not mean an absolute equality of men but it postulates that there shall not be any special privilege by reason of birth or creed or the like in favour of an individual. "Equal protection" must mean that there will not be arbitrary discrimination made by the laws themselves in their administration.)

6. 1951 Nag 58 (Pr 185) [AIR V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.*

1953 Nag 14 (15) (Pr 6) [AIR V 40 C 8] : ILR (1953) Nag 936 : 1953 Cri L Jour 251 (DB), *Shrikisan* v. *Dattu.* (The concept is fundamentally the same, that is equal justice.)

[*See* ('49) 1949 Bur L R (SC) 170 (186) (SC), *Bo Thein Swe* v. *The Union of Burma.* (In this case the Supreme Court of Burma observed:—"In our Constitution the rule of law is enshrined. Everybody from the President downward is subject to the law.")]

7. 1951 Nag 58 (Pr 185) [AIR V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.*

8. 1953 S C 250 (252) [A I R V 40 C 61] (SC), *Satish Chandra* v. *The Union of India.*

1953 S C 215 (219) (Pr 16) [A I R V 40 C 52]: ILR 32 Pat 375 (SC), *Ram Prasad* v. *State of Bihar.*

1952 S C 235 (238) [A I R V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay.*

1952 Punj 309(331, 332) (Prs 142, 143) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

1951 Nag 58 (Pr 185) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Government.* (Quoting Jennings on the Law of the Constitution, p. 49)

1953 All 545 (545) [AIR V 40 C 266] : 1953 Cri L Jour 1269, *Har Murat* v. *State.*

before the law does not mean that things which are different shall be treated as though they were the same. What it does mean is the denial of any special privilege by reason of birth, creed or the like and also equal subjection of all individuals and classes to the ordinary law of the land.[9]

Thus, the principle of equality enacted in this article does not absolutely prevent the State from discriminating. The State has the power of what is known as "classification" on a basis of rational distinctions relevant to the particular subject dealt with.[10]

1953 Madh B 147 (148) (Pr 4) [AIR V 40 C 51] : 1953 Cri L Jour 964, *Girdhar Gopal* v. *State.*

1953 Nag 14 (15) (Pr 6) [AIR V 40 C 8] : I L R (1953) Nag 936 : 1953 Cri L Jour 251, *Shrikisan* v. *Dattu.* (Quoting Jennings' definition — Equality before the law means that among equals the law should be equal and it should be equally administered, that like should be treated alike : Jennings' Law of the Constitution, 3rd Edition, page 49.)

(1886) 118 U S 356 (369) : 30 Law Ed 220 (226), *Yick Wo* v. *Hopkins.*

[*See* (1938) 305 U S 337 (350).83 Law Ed 208 (213), *Missouri Ex Rel. Gaines* v. *Canada.* (The equal protection of the laws is a pledge of the protection of equal laws: (1886) 118 U S 356 (369): 30 Law Ed 220 (226), Yick Wo v. Hopkins, *Foll.*)]

[9] 1953 Hyd 100 (Prs. 23, 24) [AIR V 40 C 39]: ILR (1952) Hyd 953 (FB), *Abdul Fateh* v. *Govt. of Hyderabad.* (After inauguration of the Constitution which is republican, privilege enjoyed by persons because of association with a particular family is not reasonable.)

1951 Nag 58 (Pr 185) [AIR V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.*

1953 Nag 14 (15) (Pr 6) [AIR V 40 C 8] : I L R (1953) Nag 936 : 1953 Cri L Jour 251, *Shrikisan* v. *Dattu.*

Under the Burma Constitution, S. 13, the equality clause runs as follows: "All citizens irrespective of birth, religion, sex or race are equal before the law; that is to say, there shall not be any arbitrary discrimination between one class of citizens and another".

[10] 1953 S C 91 (94) (Pr 11) [AIR V 40 C 25] : 1953 S C R 464 : ILR (1953) Hyd 98 (SC), *Ameerunnissa* v. *Mahboob Begum.* (Mere differentiation or inequality of treatment does not *per se* amount to discrimination and it is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the Legislature has in view in order to invalidate an enactment under Art. 14.)

1953 S C 10 (16) (Pr 22) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*

1953 Bom 170 (173) (Pr 7) [AIR V 40 C 52] : I L R (1953) Bom 200, *Rampratap* v. *Dominion of India.* (Article 14 is intended to safeguard against arbitrary and unreasonable discrimination between subject and subject.)

1953 Cal 394 (395) (Pr 5) [AIR V 40 C 150] : 1953 Cri L Jour 899 (DB), *Badri Prasad* v. *The State.*

1953 Hyd 157 (Pr 3) [AIR V 40 C 68] : I L R (1953) Hyd 147 (DB), *Md. Habibuddin* v. *Govt. of Hyderabad.* (The test generally applied to ascertain whether any particular enactment is violative of Art. 14, is to see whether it is based on some rational classification. The rational classification denotes three things: (i) a reasonable differentia between the persons governed by the impugned Act and those not covered, (ii) a definite objective for enacting the law and (iii) a nexus between the two that should be just and reasonable: AIR 1952 S C 75, Rel. on; AIR 1952 S C 123 and AIR 1952 S C 235, Ref.)

1953 Madh-B 147 (148) (Pr 4) [AIR V 40 C 51] : 1953 Cri L Jour 964, *Girdhar Gopal* v. *State.*

Article 14
Note 1

Thus, in *Kedar Nath* v. *State of West Bengal,*[11] the Supreme Court of India observed as follows :

> "Now, it is well settled that the equal protection of the laws guaranteed by ART. 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the Legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation, cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose. Article 14 does not insist that legislative classification should be scientifically perfect or logically complete."

In *Lachmandas* v. *State of Bombay,*[12] the Supreme Court observed as follows :

> "It is now well established that while ART. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. To take an example:

1953 Mad 729 (736) [AIR V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.* (Two conditions are necessary:—(i) There must be a real difference in the facts and circumstances connected with each of the two groups of persons as between whom it is alleged discrimination is being made; (ii) the above difference must have a just and reasonable relation to the discrimination made; that is, the discrimination made must be a *just and reasonable* method for meeting the situation created by the difference in the circumstances.)

1953 Orissa 171 (177, 178) [AIR V 40 C 59] : I L R (1953) Cut 45 (DB), *Sashibhusan* v. *Mangala.*

1953 Punj 30 (Prs 36 to 45) [AIR V 40 C 9] (DB), *Harmahendra Singh* v. *Punjab State.* (It cannot be said that classification for the purposes of protection of land revenue or the protection of persons incapable of managing the estates, levying illegal exactions on the tenantry or land owners having habits of wasteful extravagance is not a reasonable classification.)

1952 Bom 476 (478, 479) (Prs 9, 10) [AIR V 39] (DB), *Bhanjee* v. *State of Bombay.* (Discrimination and classification may be supported if it is on a reasonable basis.)

[11] 1953 S C 404 (406, 408) (Prs 6, 8) [AIR V 40 C 89]: 1953 Cri L Jour 1621 (SC).

[12] 1952 S C 235 (Pr 26) [AIR V 39] : 1952 SCR 710 : 1952 Cri L Jour 1167 (SC).

Under S. 11 of the Contract Act persons who have not attained majority cannot enter into a contract. The two categories are adults and minors. The basis of classification is the age. That basis obviously has a relation to the capacity to enter into a contract. Therefore, the section satisfies both the requirements of a permissible classification."

In *Kathi Raning* v. *State of Saurashtra*,[13] Mukherjea, J. of the Supreme Court observed as follows :

> "It is well settled that a Legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons who are included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The Legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the regulation, that necessity of judicial interference arises."

In *Charanjit Lal* v. *Union of India*,[14] Mukherjea, J., observed as follows :

> "The Legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid. (See *Southern Railway Co.* v. *Greene.*)"[15]

In the same case, Mr. Justice Das observed :

> "The inhibition of the article that the State shall not deny to any person equality before the law or the equal protection of the laws was designed to protect all persons against legislative discrimination amongst equals and to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not, however, mean that every law must have universal application, for all persons are not, by nature, attainment or circumstances, in the same position. The varying needs of different classes of persons often require separate treatment and

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[13] 1952 S C 123 (Pr 32) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC).

[14] 1951 S C 41 (58, 65) [AIR V 38 C 9]:1950 SCR 869:ILR (1951) Hyd 461 (SC).

[15] (1910) 216 U S 400 (412) : 54 Law Ed 536.

it is, therefore, established by judicial decisions that the equal protection clause of the Fourteenth Amendment of the American Constitution does not take away from the State the power to classify persons for legislative purposes. This classification may be on different basis. It may be geographical or according to objects or occupations or the like. If law deals equally with all of a certain well-defined class it is not obnoxious and it is not open to the charge of a denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination amongst equals. It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality is not by itself enough. The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary'."

Patanjali Sastri, J., also observed as follows in the same case :

"A Legislature empowered to make laws on a wide range of subjects must of necessity have the power of making special laws to attain particular objects and must, for that purpose, possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification has a just and reasonable relation to the object which the Legislature has in view. While, for instance, a classification in a law regulating labour in mines or factories may be based on age or sex, it may not be based on the colour of one's skin. It is also true that the class of persons to whom a law is made applicable may be large or small, and the degree of harm which has prompted the enactment of a particular law is a matter within the discretion of the law-makers. It is not the province of the Court to canvass the legislative judgment in such matters."

In *State of West Bengal* v. *Anwar Ali*,[16] the Supreme Court observed as follows :

"If a legislation is discriminatory and discriminates one person or class of persons against other similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as 'hostile' in the sense that it affects injuriously the interests of that person or class. Of course, if one's interests are not at all affected by a particular piece of legislation, he may have no right to complain. But if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him, before he can claim relief on the basis of his Fundamental Rights, to assert and prove that in making the law, the Legislature was actuated by a hostile or inimical intention against a particular person or class."

The law on the subject was summarised by Fazl Ali, J., in the

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16. 1952 S C 75 (Pr 46) [AIR V 39 C 18]:1952 SCR 284;1952 Cri L Jour 510 (SC).

form of a series of propositions in the case of *the State of Bombay* v. *F. N. Balsara*[17]:

"1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

3. The principle of equality does not mean that every law must have universal application for all persons who are not, by nature, attainment or circumstances, in the same position, and the varying needs of different classes of persons often require separate treatment.

4. The principle does not take away from the State the power of classifying persons for legitimate purposes.

5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

6. If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

The law on the subject has been summed up by the Supreme Court of the United States as follows in *Louisville Gas and E. Co.* v. *Coleman*[18]:

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances,[19] and

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[17] 1951 S C 318 (326) (Pr 19) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC).

[18] (1928) 277 U S 32 (37) : 72 Law Ed 770 (773, 774).

[19] (1898) 170 U S 283 (293):42 Law Ed 1037, *Magoun* v. *Illinois Trust & Saving Bank*.

that it applies to the exercise of all the powers of the State which can affect the individual or his property, including the power of taxation.[20] It does not, however, forbid classification; and the power of the State to classify for purposes of taxation is of wide range and flexibility, provided always that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'[21] That is to say *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.'[22] Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[23]

In *Barbier* v. *Connolly*,[24] the Supreme Court of the United States of America observed as follows:

> "The 14th Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws', undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others

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(1885) 115 U S 321 (337) : 29 Law Ed 414, *Cincinnati, N. O. and T. P. R. R. Co.* v. *Kentucky.*

[20] (1886) 118 US 396:30 Law Ed 118, *Santa Clara County* v. *Southern P. R. Co.* 8 Sawy 238 : 13 Feal 722 (733). *Re Railroad Tax Cases.*

[21] (1925) 270 U S 230 (240) : 70 Law Ed 557, *Schlesinger* v. *Wisconsin.*
(1924) 266 U S 71 (85):69 Law Ed 169, *Air-Way Electric Appliance Corp.* v. *Day.*
(1920) 253 U S 412 (415) : 64 Law Ed 989, *Royster Guano Co.* v. *Virginia.*

[22] (1896) 165 U S 150 (155) : 41 Law Ed 666, *Gulf C. & S. F. R. Co.* v. *Ellis.*

[23] (1890) 134 U S 232 (237) : 33 Law Ed 892, *Bell's Gap Railroad Co.* v. *Commonwealth of Pennsylvania.*
[Compare (1907) 205 U S 135 (139) : 51 Law Ed 743, *Martin* v. *District of Columbia.*]

[24] (1885) 113 U S 27 (31, 32) : 28 Law Ed 923.
[*See also* (1803) 2 Law Ed 60 (69) : 1 Cranch 137, *Marbury* v. *Madison.* (Chief Justice Marshall:—The very essence of civil liberty certainly consists in the right of *every individual* to claim the protection of the laws whenever he receives the injury . . . . The Government of the U. S. has been emphatically termed as the Government of *laws and not of men.*)]

in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the Amendment, broad and comprehensive as it is, nor any other Amendment was designed to interfere with the power of the State, sometimes termed its "Police Power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favouring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

Reference may also be made to the following passage from CONSTITUTIONAL LAW by Professor Willis[25]:

Meaning and effect of guaranty.

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.' 'The inhibition of the Amendment . . . . . . was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation.' It does not take from the States the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis . . . . . . Many different classifications of persons have been upheld as constitutional. A law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it."

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[25] Constitutional Law by Willis (1936) Edition, pages 579, 580.

See also the cases noted below[26] in which the law is laid down in similar terms, and the power of the State to adopt classification on

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[26] 1952 S C 75 (Pr 37) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali.*

1951 All 746 (Prs 69, 70) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.* (The expression 'equality before the law' does not imply that the same laws should apply to all persons in the same State. It does not refuse to take note of differentiations in economic and social functions, nor of the need for special types of quasi judicial tribunals due to the growing tendency towards the enlargement of State intervention in the economic and social life of the country.)

1951 All 674 (Pr 86) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Government.*

1951 All 257 (Prs 70, 71, 75, 76, 115, 248 and 389) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government.* (Article does not prevent State from recognizing differences in capacity of persons.)

1951 Bom 210 (Pr 19) [AIR V 38 C 42] : ILR (1951) Bom 17 : 52 Cri L Jour 80 (FB), *Fram Nusserwanji Balsara* v. *State of Bombay.* (Class excluded from operation of law—There must be reasonable basis for this.)

1951 Hyd 11 (Pr 2) [AIR V 38 C 2] : ILR (1951) Hyd 1 : 52 Cri L Jour 1333 (FB), *Abdur Rahim* v. *J. A. Pinto.* (Equal treatment does not necessarily mean identical treatment. In fact, identical treatment in unequal circumstances amounts to inequality.)

1951 Mad 120 (Pr 33) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Champakam Dorairajan* v. *State of Madras.* (Per *Viswanatha Sastri, J.*—The power of the State to ensure public health, safety, morals, in short, the general welfare of the people is inherent in every State and it involves classification, differentiation and abridgment of individual freedom. So long as the power is exercised *bona fide* and in a reasonable manner for the end designed and subject to the express provisions of the Constitution, the exercise of that power is not hit at by Art. 14, though to some extent it might trench upon the freedom of the individual citizen.)

1951 Mys 72 (Pr 37) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (Equality before the law does not require mathematical equality of all persons in all circumstances. From the very nature of society, there should be different laws in different places and the Legislature controls the policy and enacts laws in the best interests of the safety and security of the State.)

1951 Nag 58 (Prs 188, 195) [AIR V 38 C 20]: ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.* (Reasonable classification by law is not a denial of equal protection. What the constitutional guarantee forbids is class legislation but not classification which rests upon reasonable grounds of distinction. The classification permissible by the State extends to all kinds of activities and the State has wide discretion in the matter. It is only where there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. Apart from the above, laws creating classifications have been upheld in several other cases on the ground that they were intended for the protection of individuals or a class or classes of persons or for the promotion of the public good. Where a law grants protection to a class which needs it, it has the effect of placing that class if not on a par with the rest of the community, at least as nearly so as is practicable. It would, therefore, be correct to say that the whole object of classification is to minimise and not to accentuate inequality. But it clearly follows that a classification which allows some to do what all are not, in the public interest, allowed to do, will not be upheld.)

1952 Pat 220 (Pr 10, 26) [AIR V 39 C 55 (22)] : ILR 31 Pat 203 : 1952 Cri L Jour 710 (SB), *Mohd. Anzar Husnain* v. *State of Bihar.* (The question is not whether the Court considers the classification reasonable to its satisfaction or whether in its opinion the Government could have devised a more equitable scheme. The question must be posed on the other hand — is the statute so clearly arbitrary that legislators acting reasonably could not have believed it to be necessary in the public interest? To put it in other words, the question is whether there was 'any' rational basis for legislative action.)

1951 Pat 91 (Prs 42, 53, 98) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (Per *Reuben and Dass JJ.*—The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction: it merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. Mathematical nicety and perfect equality are not required, and one who assails classification must carry the burden of showing that it does not rest upon any reasonable basis : AIR 1951 S C 41, Rel. on.)

1953 All 123 (129) (Pr 27) [AIR V 40 C 53] : 1953 Cri L Jour 356 (DB), *Dal Chand* v. *State.* (Notification under Criminal P. C., S. 269, directing trial in certain districts for certain offences to be by jury is not *ultra vires* as offending against this article.)

1953 Mad 326 (331) (Pr 11) [AIR V 40 C 110], *S. I. Bank* v. *Pichuthayappan.*

1953 Mad 105 (116) (Pr 35) [AIR V 40 C 35] : 1953 Cri L Jour 277 (DB), *V. M. Syed Mohamed & Co.* v. *State of Madras.*

1953 Orissa 171 (177, 178) [AIR V 40 C 59]: ILR (1953) Cut 45 (DB), *Sashibhusan* v. *Mangala.*

1953 Trav-Co 327 (328-332) (Prs 5-19) [AIR V 40 C 122]: ILR (1952) Trav-Co 670 (DB), *Soodalamadan* v. *Kulasekharaperumal.*

1952 Mad 33 (Pr 6) [AIR V 39 C 13], *Krishna Pillai* v. *Parukutty Ammal.* (Any discrimination the law allows cannot be illegal or unjust or inequitable. Nor will this come under the term "discrimination" discountenanced by the Constitution of India. There are certain classes and institutions like temples, trusts, charities, orphans, infants, lunatics and family members, which are given special privileges and protection under the law by enacting provisions for their benefit, as it is considered to be in the interests of the country to do so. Such provisions cannot be termed discriminatory or unjust or inequitable, and no Court has got the right to hold them to be void or unenforceable because they amount to giving some discrimination. Hence, it will not be illegal discrimination to enable a member of the family to buy the share purchased by a stranger at a valuation by the Court under S. 4, Partition Act (1893), and deny the same right to the stranger.)

1952 Orissa 42 (Pr 17) [AIR V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.* (Class legislation is forbidden but not reasonable classification.)

1952 Orissa 11 (Prs 12, 18, 35 and 37) [AIR V 39 C 2] (DB), *Bishnu Charan* v. *State of Orissa.* (Though there is no specific provision in Art. 14 as in Art. 19 (2) to (6) providing for reasonable restrictions on the right as such in public interest, the nature of the very right implies it.)

1952 Pat 166 (Pr 43) [AIR V 39 C 55 (12)] : ILR 30 Pat 1085 (DB), *Bankey Singh* v. *Jhingan Singh.* (Article 14 of the Constitution does not forbid the State to classify the citizens into groups and legislate for them. But the classification must not be unreasonable and arbitrary. (1885) 113 U S 27: 28 Law Ed 923, *Barbier* v. *Connolly*; (1897) 165 U S 150: 41 Law Ed 666, *Gulf C. & S. F. R. Co.* v. *Ellis and* AIR 1951 S C 41, Ref.)

1952 Raj 17 (Pr 10) [AIR V 39 C 11] : ILR (1951) 1 Raj 405 (DB), *Kewal Mal* v. *Heta Ram.*

1951 All 718 (Pr 27) [AIR V 38 C 192] : ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.* (The Legislature has full freedom to classify people according to circumstances and enact different laws for different classes; but it must treat equally all similarly circumstanced or falling in one class and the difference in treatment must have some intelligible or rational connection with the difference in circumstances and not be arbitrary. Discrimination among persons in one class or similarly circumstanced, whether apparent on the face of the statute or resulting in practice, is all that is prohibited under the clause. It is competent for the Legislature to leave it to the discretion of an authority to apply different laws to people in different circumstances but always provided that it lays down a rational standard to guide its discretion or such a standard can be presumed to exist; it cannot leave it to its arbitrary or naked discretion.)

1951 Bom 105 (Prs 18, 40) [AIR V 38 C 22] : ILR (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.* (Classification on rational grounds allowed.)

1951 Cal 539 (Prs 10, 28, 28a) [AIR V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.* (No legislation in any practical sense is possible without some kind of classification and some kind of discrimination. The very nature and purpose of every legislation depend on the choice of some subject or others, to the exclusion of the rest and some arena for its operation. This selective quality is inherent and implicit in every legislation. The fundamental guarantee of Art. 14 of the Constitution should not be construed in such a manner as to make legislation impossible for all practical purposes.)

1951 Punj 93 (Pr 12) [A I R V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Prakash* v. *State of Punjab.* (Equal protection of laws does not affect the power of State to classify either in the adoption of police laws or tax laws or eminent domain laws and nullifies what the State does only when it is without reasonable basis)

1951 Vind. Pra. 11 (Prs 9, 11) [AIR V 38 C 6], *Sikhar Chand* v. *Bank of Baghelkhand.* (Equality before the law or equal protection of the law does not exclude classification on the basis of difference in status. Corporations can be treated separately from individuals.)

(1942) 86 Law Ed. 1655 (1659):316 U. S. 535, *Skinner* v. *Oklahoma.* (A State need not, in order to meet the requirements of equal protection, provide for abstract symmetry in its legislation, but it may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience.)

(1938) 305 U S 337 (350) : 83 Law Ed 208 (213), *Missouri Ex Rel. Gaines* v. *Canada.* (The equal protection of the laws is a pledge of the protection of equal laws. (1886) 118 U S 356 (369) : 30 Law Ed 220 (226), *Yick Wo* v. *Hopkins,* Foll.)

(1836) 299 U.S 183 (197) : 81 Law Ed 109 (121), *Old Dearborn D. Co.* v. *Seagram-Distil. Corp.* (The equal protection clause of the 14th Amendment does not preclude the States from resorting to classification for the purposes of legislation, but only requires that the classification be reasonable, not arbitrary and rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.)

(1935) 294 U S 580 (583) : 79 Law Ed 1070 (1072), *Metropolitan Casualty Ins. Co.* v. *Brownell.* (The equal protection clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on the other.)

(1931) 283 U S 527 (537) : 75 Law Ed 1248 (1256), *State Board of Tax Commissioners* v. *Jackson.* (The fact that a statute discriminates in favour of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it.)

(1925) 268 U S 258 (262) : 69 Law Ed 944 (946), *Cockrill* v. *California*. (Absolute uniformity is not needed—State has wide discretion and can classify persons on bases that are reasonable and germane having regard to purpose of legislation.)

(1924) 264 U S 292 (296) : 68 Law Ed 690 (695), *Radice* v. *New York*. (Classification must not be arbitrary or capricious.)

(1923) 261 U S 379 (384) : 67 Law Ed 705 (710), *Arkansas Natural Gas Co.* v. *Arkansas Railroad Com.* (Equality clause not violated merely because the exercise of jurisdiction by the Legislature has produced inequality, every selection of subjects or persons for governmental regulation does that, but only where it has produced an inequality which is actually and palpably unreasonable and arbitrary.)

(1911) 55 Law Ed 229 (236) : 219 U S 307, *German Alliance Ins. Co.* v. *Hale*. (Statutes that apply equally to all of the same class and under like conditions cannot be held to deny the equal protection of the laws; for the equal protection of the laws is a pledge of the protection of equal laws to all under like circumstances : (1886) 118 U S 356 (367) : 30 Law Ed 220 (221), *Yick Wo* v. *Hopkins*; (1885) 113 U S 27 : 28 Law Ed 923, *Barbier* v. *Connolly*; and (1885) 113 U S 703 : 28 Law Ed 1145, *Hing* v. *Crowley*, Rel. on.)

(1910) 220 U S 61 (78) : 55 Law Ed 369 (377), *Lindsley* v. *Natural Carbonic Gas Co.* (The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary —A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.)

(1907) 52 Law Ed 236 (244) : 207 U S 338, *Heath & Milligan Mfg. Co.* v. *Worst*.

(1902) 184 U S 540 (559): 46 Law Ed 679 (689), *Connolly* v. *Union Sewer Pipe Co.*

(1900) 177 U S 164 (168) : 44 Law Ed 716 (719), *Petit* v. *Minnesota*. (Where a Statute prohibited labour on Sunday, excepting the works of necessity or charity (which included whatever was needful during the day for the good order, health or comfort of the community) with a proviso that keeping a barber shop open on sunday for the purpose of cutting hair and shaving beards should not be deemed a work of necessity or charity, the proviso does not make a purely arbitrary classification but is within the limits of the legislative police power.)

(1898) 170 U S 283 (293) : 42 Law Ed 1037 (1042), *Magoun* v. *Illinois Trust and Savings Bank*.

(1896) 165 U S 150 (165) : 41 Law Ed 666 (671), *Gulf C. & S. F. R. Co.* v. *Ellis*. (Mere fact of classification is not enough — It must be based on some reasonable ground, some difference which bears a just and proper relation to the attempted classification.)

(1894) 38 Law Ed 485 (487) : 152 U S 377, *Duncan* v. *State of Missouri*. (Due process of law and equal protection of the laws are secured if laws operate on all alike and do not subject the individual to an arbitrary exercise of the power of Government.)

(1890) 134 U S 232 (237) : 33 Law Ed 892 (895), *Bells Gap Railroad Co.* v. *Commonwealth of Pennsylvania*. (The provision in the 14th Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and

Article 14
Note 1

a reasonable basis is affirmed. Thus, a doctrinaire approach will not do in interpreting this article.[27] But at the same time, it must be remembered that the article provides one of the most important and valuable guarantees in the Constitution which should not be allowed to be whittled down.[28] See also NOTE 2.

It may be noted in this connection that the Constitution of Eire expressly recognizes the power of the State to classify having due regard to differences of capacity, physical and moral, and of social function.

Thus, although there is no specific provision in the article as in ART. 19 (2) to (6), enabling the State to impose reasonable restrictions on the right of a person in public interest, such a power is implied in the very nature of the right conferred by this article.[29]

In pointing out the distinction between this article and ARTICLES 15 and 16, Patanjali Sastri, C. J., in *Kathi Raning* v. *State of Saurashtra*[30] observed as follows :

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general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. The 14th Amendment was not intended to compel the States to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt.)

(1888) 128 U S 578 (582) : 32 Law Ed 544 (546), *Walston* v. *Nevin*. (Whenever the law operates upon all persons and property, similarly situated equal protection cannot be said to be denied : (1885) 114 U S 606 : 29 Law Ed 229, *Wurts* v. *Hoagland* ; (1878) 96 U S 521 : 24 Law Ed 734, *Richmond F. and P. R. R. Co.* v. *Richmond*, Rel. on.)

(1887) 30 Law Ed 578 (580) : 120 U S 68, *Hayes* v. *Missouri*. (The fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate — It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.)

[27] 1952 S C 235 (Pr 10) [A I R V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (S C), *Lachmandas* v. *State of Bombay*. (*Patanjali Sastri, C. J.* — In applying the dangerously wide and vague language of the equality clause to the concrete facts of life a doctrinaire approach should be avoided.)

[28] 1951 S C 41 (Pr 8) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

[29] 1952 Orissa 11 [Prs 12, 18, 35, 37) [A I R V 39 C 2] (DB), *Bishnu Charan* v. *State of Orissa*.

[30] 1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC). [Compare 1952 Mad 193 (195) [A I R V 39 C 95] : I L R (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal*. (Discrimination

"All legislative differentiation is not necessarily discriminatory. In fact, the word 'discrimination' does not occur in Art. 14. The expression 'discriminate against' is used in Article 15 (1) and Art. 16 (2), and it means according to the Oxford Dictionary, 'to make an adverse distinction with regard to; to distinguish unfavourably from others.' Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the Legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies."

Although it is an essential condition of the exercise of the power of classification by the State that the classification must be based upon a reasonable ground relevant to the subject-matter in question, this does not mean that the reason for classification or making a special provision with regard to a particular matter must appear on the *face* of the legislation.[31] The distinction will not be arbitrary if any state of facts can reasonably be conceived that would sustain it.[32] (See also Note 6).

Mere classification is not enough; it must be based on a reasonable ground which is relevant to the object of the legislation.[33] The classification need not be reasonable to the *satisfaction of the Court.*[34] The article does not require that the legislative classification should be scientifically or logically perfect.[35] The issue in such cases is not

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based only on birth, religion, etc., is bad under Art. 15 and it cannot be justified as being reasonable classification under Art. 14.)]

[31] (1923) 261 U S 379 (384) : 67 Law Ed 705 (710), *Arkansas Natural Gas Co.* v. *Arkanasas Railraod Com.* (Mere absence of such disclosure will not justify Court in assuming that appropriate reasons did not exist.)

[32] (1938) 303 U S 573 (578) : 82 Law Ed 1024 (1030), *New York Rapid Transit Corporation* v. *New York.*

(1935) 294 U S 580 (586): 79 Law Ed 1070 (1074), *Metropolitan Casulty Ins. Co.* v. *Brownell.*

[33] 1952 All 746 (748) (Pr 9) [AIR V 39] : I L R (1953) 1 All 29 (DB), *Cracknell* v. *State of Uttar Pradesh.*

[34] 1952 Pat 220 (230) (Pr 26) [AIR V 39 C 55 (22)]: ILR 31 Pat 203 : 1952 Cri L Jour 710 (S B), *Mohd. Anzar Husnain* v. *State of Bihar.* (The test is whether it is so utterly unreasonable that the legislators could not have believed it to be needed in public interest.)

1953 Cal 548 (559) [AIR V 40 C 205], *Atulya Kumar* v. *Director of Procurement & Supply.*

[35] 1953 S C 404 (Pr 7) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*

Article 14
Note 1

whether the impugned Act is well advised or not but whether it transgresses the Constitution.[36]

The principle that classification must be based on a just and reasonable relation between the distinction made and the object of the legislation does not mean that the object of the legislation must be *advanced or promoted* by the classification or differentiation *qua* the class exempted from the operation of the law.[37]

There are cases where the Legislature itself makes a complete classification of things and applies to them the law it enacts and others where the Legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with and in fulfilment of which the administrative authority is expected to select the persons or things to be brought under the operation of the law.[38]

A familiar example of this type of legislation is the Preventive Detention Act, 1950, which having indicated in what classes of cases and for what purposes preventive detention can be ordered vests in the executive authority a discretionary power to select particular persons to be brought under the law.[39] Another instance in point is furnished by those provisions of the Criminal Procedure Code which provide immunity from prosecution without sanction of the Government for offences by public servants in relation to their official acts the policy of the law being that public officials should not be unduly harassed by private prosecutions, unless in the opinion of the Govern-

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1951 Mys 72 (Pr 37) [AIR V 38 C 33] : I L R (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore*.

(1911) 220 U S 61 (67) : 55 Law Ed 369 (377), *Lindsley* v. *Natural Carbonic Gas Co.* (The classification having some reasonable basis does not offend the clause because it is not made with mathematical nicety or because in practice it results in some inequality.)

36. 1951 S C 41 (49) (Pr 28) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

37. 1953 Bom 170 (173) (Pr 8) [A I R V 40 C 52].: I L R (1953) Bom 200 (DB), *Rampratap* v. *Dominion of India*. (When the Army is exempted from the operation of the Prohibition Act, the object of the Prohibition Act is not advanced by such exemption — But at the same time such exemption and the differentiation between the Army and civil population on which it is based is founded on a rational consideration.)

38. 1953 S C 404 (407) (Pr 7) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (S C), *Kedar Nath* v. *State of West Bengal*.

1952 S C 123 (131) (Pr 34) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra*.

39. 1953 S C 404 (407) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal*.

ment there were reasonable grounds for prosecuting the public servant.[40] (See also NOTES 25 and 26).

The power to make a classification can be exercised not only by the Legislature but also by administrative bodies acting under an Act.[41]

One principle that emerges from the recognition of the power of classification, of the State, above referred to, is that a piece of legislation is not bad merely because it selects only one or a few evils for reform, while not dealing with other evils which may be considered as equally in need of attention by the State. The power to classify or particularize objects of legislation must be left to the Legislature. That other more desirable objects are left out of the operation of the legislation is a matter of legislative policy and beyond the pale of judicial interference.[42]

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40. 1953 S C 404 (407) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*

41. 1953 Mad 105 (Prs 22, 26) [AIR V 40 C 35]: 1953 Cri L Jour 277 (DB), *V. M. Syed Mohamed & Co.* v. *State of Madras.*

1952 Mad 715 (717, 718) [AIR V 39] (DB), *V. Menon* v. *Dev. Dept. Madras.* (All India Yarn Distribution Scheme — Preferential treatment to "consumer quota holders" is not unconstitutional. (1950) 94 Law Ed 381 : 338 U S 604, *Secretary of Agri* v. *Central Roig Ref. Co.,* Foll.)

42. 1951 All 674 (Pr 86) [A I R V 38 C 182] : ILR (1952) 2 All 46 (F B), *Suryapalsingh* v. *U. P. Govt.* (The equal protection of the laws does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate.)

1952 Bom 84 (87) (Pr 10) [A I R V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa.* (The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise—Bombay Prevention of Hindu Bigamous Marriages Act, 1946 is not void though *Muslims* are not precluded from marrying more than one wife.)

1952 Pat 194 (Pr 19) [A I R V 39 C 55 (15)], *Ram Prasad* v. *State of Bihar.* (Article 14 does not prohibit legislative classification — Nor does it prohibit the Legislature from enacting special laws to combat special evils—A classification that takes account of the different degrees in which an evil is present must be upheld as reasonable and valid - Even legislation relating to one individual would not violate the equal protection clause, if there is no discrimination— The Sathi Lands (Restoration) Act (34 of 1950) cannot be held to be invalid on the ground of its violating Art. 14: (1918) 249 U S 152: 63 Law Ed 527, *Middleton* v. *Texas Powers & L. Co.,* Rel. on.)

1951 Cal 539 (Pr 28a) [A I R V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.* (The power to classify or particularise objects of legislation must, in the nature of things, be left as wide as possible to the law-making authorities—But the line is drawn so as to ensure that, other things being equal, the same and similarly circumstanced persons who are subjects of the legislation should be equal before such law and there should be, as between them, equal protection of the laws — If not, it is only then that such law is discriminatory in the sense of being an infringement of the guarantee of Art. 14 of the Constitution — It is in this sense that the constitutional doctrine of 'equality before the law' or of 'equal protection of the laws' should be understood and it cannot be over-emphasised that in applying this doctrine no narrow dogmatic constitutional niceties should hamper the true exposition of the Constitution as a living practical instrument of government of men and affairs.)

This article does not prevent the State from exempting certain classes of persons from the application of a particular law.[43] Nor does it compel the State to extend the application of the particular law to all classes of subjects or to all territories coming within its jurisdiction.[44] (See NOTE 15).

The article does not prevent the Legislature from taking up one set of institutions, as for instance, Hindu religious and charitable institutions, for legislative consideration at one time and enacting laws in respect of them, reserving other types of institutions for consideration at a future date. The classification of institutions and endowments based on religion, as Hindu, Muhammadan or Christian, cannot be said to be either arbitrary or unreasonable having regard to the object sought to be attained, namely, the better administration and management of such institutions.[45]

The classification made by a State may be with reference to the *status* of a person. For instance, special legislation with regard to corporations may not be bad.[46] So also, the principle of equality is not violated by the existence of special laws providing for particular groups in the State like soldiers, doctors, lawyers, etc.[47] In the application of this article to the legislation passed or action taken by a particular State, the inequality that is produced between the citizens

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(1943) 87 Law Ed 1774 (1786) : 320 U S 81, *Hirabayashi* v. *United States*. (Congress may hit at a particular danger when it is seen, without providing for others who are not so evident or so urgent.)

(1919) 63 Law Ed 527 (531) : 249 U S 152, *Middleton* v. *Texas Power & L. Co.* (The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment — If one entertained the view that the Act might as well have been extended to other classes of employment, this would not amount to a constitutional objection.)

(1914) 234 U S 224 (227): 58 Law Ed 1288 (1290), *Keokee Consol Coke Co.* v. *Taylor*. (Statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the Court can see—That is for the Legislature to judge unless the case is very clear.)

43. Thus the exemption from the operation of Rent Control Laws of properties belonging to Government and local authorities has been held not to be unconstitutional—So also the power given to the Executive to exempt certain property from the application of such laws has been also recognised as valid. (See Note 33.)

44. 1953 Bom 170 (173) (Pr 7) [AIR V 40 C 52] : I L R (1953) Bom 200 (DB), *Rampratap* v. *Dominion of India*.

45. 1952 Mad 613 (632, 633) (Pr 29) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras*. (The Madras Hindu Religious and Charitable Endowments Act (19 of 1951), does not violate either Art. 14 or Art. 15 of the Constitution.)

46. 1951 Vind Pra 11 (Prs 9, 11) [AIR V 38 C 6], *Sikhar Chand* v. *Bank of Baghelkhand*. (Sections 3 and 4 of Ordinance 57 of 1949 are valid.)

47. 1951 S C 318 (Pr 21) [AIR V 38 C 55] : 52 Cri L Jour 1361 : 1951 S C R 682 (S C), *State of Bombay* v. *F. N. Balsara*. (Special treatment to members of Armed Forces not wrong—Section 37 of Bombay Prohibition Act, 1949, is not void in so far as it affects military and naval messes, canteens, warships, troopships.)

1951 Mad 147 (Pr 83) [AIR V 38 C 16] : 52 Cri L Jour 515 (FB), *V. G. Row* v. *State of Madras*.

of that State and those of other States is immaterial.[48] (See also NOTE 15). The class of persons to whom a law is made applicable may be large or small.[49] The equality contemplated by this article is equality both as to substantive law and procedural law.[50] (See NOTE 25).

Where the discrimination is not based on any rational ground bearing upon the subject dealt with, the law will offend the principle of equality and will be void.[51] The State's discretion as the sovereign should not amount to arbitrary invasion of substantial rights by oppressive executions and discriminations.[52]

When an Act itself is discriminatory, it is immaterial how it is actually worked out.[53]

The discrimination by the State which is forbidden under this article is not only discrimination *against* a person or a class but also discrimination *in favour* of a person or class.[54]

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48. 1953 Him Pra 41 (Prs 22, 23) [AIR V 40 C 19], *Hazari Lal* v. *State of Himachal Pradesh.*

1953 Pat 259 (264) [AIR V 40 C 92] : I L R 31 Pat 963 (DB), *Jugal Prasad* v. *Bhadai Das.* (Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 4—The possibility that an assignee to whom the handnotes were assigned outside the limits of the State might have instituted a suit outside those limits to recover the dues on the handnotes executed in favour of an unregistered money-lender is not a reason for holding that the money-lender who gave the loan has been discriminated against within the meaning of either Art. 14 or Art. 15. The bar under S. 4 applies to all money-lenders equally whoever they may be if they gave a loan within the limits of the State without being registered under the Money-lenders Act of 1938.)

49. 1951 S C 41 (49) (Pr 28) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India.*

50. 1952 S C 75 (Pr 45) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (S C), *State of West Bengal* v. *Anwar Ali.*

51. 1952 S C 75 (Pr 37) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (S C), *State of West Bengal* v. *Anwar Ali.*

(1919) 11 A L R 454 (457) : 123 N E 631, *Schiller Piano Co.* v. *Illinois Northern Utilities Co.* (An unreasonable invasion of private rights or impairment of rights of property guaranteed by the Constitution, under the guise of police power, will not be sustained.)

(1916) 240 U S 55 (59, 60) : 60 Law Ed 523 (526), *Gast Realty & I. Co.* v. *Schneider Granite Co.* (Ordinance levying tax upon property alleged to be benefited by local improvement—Provision creating taxing districts—If law is of such character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that properties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact: (1907) 51 Law Ed 743 (744): 205 U S 135 (139), *Martin* v. *District of Columbia*, Rel. on.)

52. 1951 Hyd 1 (Prs 13, 18, 19) [AIR V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.*

53. 1952 S C 75 (92) (Pr 50) [AIR V 39 C 18]: 1952 S C R 284 : 1952 Cri L Jour 510 (S C), *State of West Bengal* v. *Anwar Ali.*

54. 1951 Mad 147 (Pr 84) [AIR V 38 C 16] : 52 Cri L Jour 515 (FB), *V. G. Row* v. *State of Madras.* (Equal protection of the laws is a pledge of the protection of equal laws. It requires that persons subjected to a piece of legislation shall be treated alike under like circumstances and conditions both in the privilege conferred and in the liabilities imposed. It prevents any person or class of persons

Intention to discriminate.

Where a person is discriminated against as a result of legislation and denied equal privileges with others occupying the same position, it is not necessary for him to prove that in making the law the Legislature was actuated by the hostile or inimical intention against a particular person or class.[55] Where the *effect* of legislation is discriminatory, the fact that the dominant *purpose* of the legislature was not to discriminate is immaterial.[56] The Court is not concerned with the motives of the Legislature. It is only concerned with the actual effect of the law passed by the Legislature.[57]

In this connection the following observations of Mukherjea, J., in *State of West Bengal* v. *Anwar Ali*[58] may be quoted :

> "The expressions 'discriminatory' and 'hostile' are found to be used by American Judges often simultaneously and almost as synonymous expressions in connection with discussions on the equal protection clause.
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> "If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as 'hostile' in the sense that it affects injuriously the interests of that person or class. Of course, if one's interests are not at all affected by a particular piece of legislation, he may have no right to complain. But if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him, before he can claim relief on the basis of his Fundamental Rights, to assert and prove that in making the law, the Legislature was actuated by a hostile or inimical intention against a particular person or class."

But the question of intention would become material where an officer of the State charged with the execution of an Act is accused of

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from being singled out as a special subject for discriminating and hostile legislation.)

55. 1952 S C 75 (89) (Pr 46) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (S C), *State of West Bengal* v. *Anwar Ali.*

56. 1952 S C 75 (Pr 46) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (S C), *State of West Bengal* v. *Anwar Ali.*

1952 All 746 (749) (Pr 12) [AIR V 39] : I L R (1953) 1 All 29 (DB), *Cracknell* v. *State of Uttar Pradesh.* (U. P. Court of Wards Act, S. 8 (1) (b), discriminating against female proprietor is void though the intention of the Act may be beneficial.)

57. *See* (1910) 3 Law Ed 162 (176) : 6 Cranch 87 (131), *Fletcher* v. *Peck.* (Court cannot question motives of Legislature.)

58. 1952 S C 75 (89) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (S C).

[Compare 1952 S C 123 (125) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (S C), *Kathi Raning* v. *State of Saurashtra.* (In this case Patanjali Sastri, C. J., observed as follows:— "Discrimination involves an element of unfavourable bias and it is in that sense that the expression has to be understood in the context.")]

discriminatory conduct, as he would have a good defence if he could prove his *bona fides*.[59]

Equality in administration

Equality before the law and equal protection of the laws include the conception that the law being what it is, its application should be universal in every case which answers the description of the legislation.[60] This raises the question whether there is a violation of this article where an officer of State is guilty of discriminatory conduct in his official capacity when carrying out the provisions of an Act which are not themselves discriminatory. On this question it must be noted that the term "the State" as defined in ART. 12 includes the executive authority. Hence, discrimination practised by an executive or administrative body or officer in carrying out an Act would seem to be a violation of the injunction under this article (which prohibits "the State" from denying to any person equality before the law or the equal protection of the laws), as much as a legislative enactment which discriminates between different classes in an unconstitutional manner.[61] In *State of West Bengal* v. *Anwar Ali*,[62] Mukherjea, J., of the Supreme Court observed as follows :

> "It appears to be an accepted doctrine of American Courts that the purpose of the equal protection clause is to secure every person within the States against arbitrary discrimination, whether occasioned by the express terms of the statute or by their improper application through duly constituted agents. This was clearly laid down in *Sunday Lake Iron Co.* v. *Wakefield*.[63] In this case, the complaint was against a taxing officer, who was alleged to have assessed the plaintiff's properties at their full value, while all other persons in the county were assessed at not more than one-third of the worth of their properties. It was held that the equal protection clause could be availed of against the taxing officer, but if he was found to have acted *bona fide* and the discrimination was the result of a mere error of judgment on his part, the action would fail. The position, therefore, is that when the statute is not itself discriminatory and the charge of violation of equal protection is only against the official, who is entrusted with the duty of carrying it into operation, the equal protection clause could be availed of in such cases; but the officer would have a good defence if he could prove *bona fides*. But when

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[59] 1952 S C 75 (Pr 46) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali*.

[60] 1951 Cal 539 (Pr 28a) [AIR V 38 C 158], *S. B. Trading Co.* v. *Shyamlal*.

[61] 1952 S C 123 (131) (Pr 34) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra*.
[*See* 1952 S C 75 (92) (Pr 50) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali*.]
See also Note 9 and the cases in the foot-notes to that Note under the appropriate point in the body of the Note.

[62] 1952 S C 75 (92) (Pr 50) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC).

[63] (1918) 247 U S 350 : 62 Law Ed 1154.

the statute itself makes a discrimination without any proper or reasonable basis, the statute would be invalidated for being in conflict with the equal protection clause, and the question as to how it is actually worked out may not necessarily be a material fact for consideration."

In *Kathi Raning* v. *State of Saurashtra*,[64] the same learned Judge again observed as follows :

> "It is a doctrine of the American Courts, which seems to me to be well founded on principle, that the equal protection clause can be invoked not merely where discrimination appears on the express terms of the statute itself, but also when it is the result of improper or prejudiced execution of the law : *vide* Weaver on CONSTITUTIONAL LAW, page 404."

Similarly, in *Kedar Nath* v. *State of West Bengal*,[65] Patanjali Sastri, C. J., delivering the majority judgment observed :

> "If it be shown in any given case that the discretion (entrusted to the Executive) has been exercised in disregard of the standard or contrary to the declared policy and object of the legislation, such exercise could be challenged and annulled under ART. 14 which includes within its purview both executive and legislative acts."

Thus, according to the authorities, deliberate or systematic discrimination practised by an executive or administrative officer or body in carrying out the provisions of an Act, which are themselves fair, is within the prohibition of this article. But any discrimination which occurs, in practice, in the working of such an Act, owing to a *bona fide* error, and in the absence of any deliberate or systematic discrimination practised by the officers concerned, is not treated as a breach of the equal protection clause.[66]

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64. 1952 S C 123 (131) (Pr 34) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC).

65. 1953 S C 404 (409) (Pr 14) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC).

66. (1948) 332 U S 463 (465) : 92 Law Ed 76 (78), *Patton* v. *Mississippi.* (Systematic exclusion of Negroes from jury is bad whether it is done by statute or by administrative practices of state jury selection officials.)

(1945) 89 Law Ed 857 (864) : 324 U S 182 (190), *Charleston Fed. Sav. & L. Asso.* v. *Alderson.* (The equal protection clause of the Fourteenth Amendment does not prohibit inequality in taxation which results from mere mistake or error in the judgment of tax officials or which is not shown to be the result of intentional or systematic undervaluation of some, but not all, of the taxed property in a single class.)

(1943) 321 U S 1 (8) : 88 Law Ed 497 (502), *Snowden* v. *Hughes.* (The unlawful administration by state officers of a statute fair on its face resulting in its unequal application to those who are entitled to be treated alike, is not a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment unless there is shown to be present in it an element of *intentional* or purposeful discrimination.)

(1931) 284 U S 23 (28, 29) : 76 Law Ed 146 (150), *Cumberland Coal Co.* v. *Board of Revision.* (Intentional systematic undervaluation by state officials of taxable property of the same class belonging to other owners denies the equal protection of the laws to one taxed upon the full value of his property.)

But in some decisions, the discrimination practised by *individual officers*, unless it can be said to be part of the *policy of the State*, is held not to be hit by this article. Thus, in *Dhanraj Mills* v. *B. K. Kocher*,[67] the Bombay High Court observed as follows :

> "A clear distinction must be borne in mind between the law and the administration of the law. If the law itself permits discrimination, even though the law may appear to be fair and undiscriminatory, the Court may interfere and say, 'we are more concerned with how the law actually works rather than how it appears in black and white in the statute book'. One may even have a case where in exercising the discretion vested in officers under the statute the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally. We can imagine that even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the State, of discrimination. But to our mind the position is different when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of Art. 14. The officer in acting contrary to Art. 14 is really acting contrary to the law and not in conformity with or in consonance with the law. When the law invests an officer with a discretion, the law assumes that the officer will exercise the discretion *bona fide* and not dishonestly, arbitrarily or capriciously, and if he exercises the discretion dishonestly, arbitrarily or capriciously, he is really going contrary

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(1918) 247 U S 350 (352, 353) : 62 Law Ed 1154 (1156), *Sunday Lake Iron Co.* v. *Wakefield.* (Discrimination in tax assessment—Intentional violation of principle of practical uniformity is essential to support plea.)

(1894) 154 U S 362 (399) : 38 Law Ed 1014 (1024), *Reagan* v. *Farmers Loan & Trust Co.* (Where a railroad commission fixes and enforces unjust and unreasonable rates, it amounts to denial of the equal protection of the laws.)

(1886) 30 Law Ed 220 (227) : 118 U S 356, *Yick Wo* v. *Hopkins.* (Though a law be fair on its face and impartial in its appearance, yet if it is administered by public authority with an evil eye and an unequal hand so as practically to make illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution.)

(1880) 25 Law Ed 676 (679) : 100 U S 339, *Ex parte Commonwealth of Virginia.* (The 14th Amendment means that no agency of the State, nor of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction equal protection of the laws.)

[*See* (1914) 235 U S 151 (160) : 59 Law Ed 169 (174), *McCabe* v. *Atchison, T. & S. F. R. Co.* (Race discrimination — Separate accommodations — The doctrine that a State statute, although fair on its face, may be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself, is not applicable where it is the administration of the provisions of a separate coach law by *common carriers* which is claimed to produce the alleged discrimination.)]

[*See also* 1953 Mad 326 (Pr 11) [AIR V 40 C 110], *S. I. Bank* v. *Pichuthayappan.* (Law must be applied by public authority without arbitrariness or discrimination.)]

[67] 1951 Bom 132 (Pr 5) [AIR V 38 C 28] : ILR (1952) Bom 335 (DB).

to the law. In such a case the subject comes to Court not for protection under ART. 14, but for protection against the dishonest, arbitrary or capricious act of the officer. The Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under ART. 14 or under ART. 226. We are only concerned in this case with the question as to whether the petitioner has a right to maintain a petition against, what he chooses to call, a dishonest exercise of his discretion by an officer. There is no suggestion here that the State as a policy has laid down that licenses should be issued or quotas should be allotted not in a fair manner but in order to benefit a particular class of citizens."

Thus, their Lordships have visualised three possibilities[68]: *Firstly*, the law itself might permit discrimination, in which case even though the law may appear to be fair and indiscriminatory, the Court may interfere. *Secondly*, the law may vest discretion in certain authorities, and in exercising that discretion the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally. Even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the State, of discrimination. *Thirdly*, the challenge may only be against a specific act of an individual officer as being in contravention of ART. 14. In such a case, if the officer exercises his discretion dishonestly, arbitrarily or capriciously, he is really going contrary to law. The Court may not be powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under ART. 14 or under ART. 226 of the Constitution.

See also the undermentioned cases,[69] which take a similar view, namely, that the article does not apply to discrimination practised by an individual officer in carrrying out an Act.

It is submitted with respect that this view does not seem to be correct in view of the clear pronouncements contained in the judgments of the Supreme Court to the effect that this article includes within its purview both executive and legislative acts.[70]

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68. 1952 Mad 11 (Prs 10, 12) [AIR V 39 C 2] : I L R (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran.*

1952 Raj 74 (75, 76) [AIR V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr., Civil Supplies.*

69. 1953 Madh B 165 (Pr 13) [AIR V 40 C 62], *Dineshcharan* v. *State of M. B.*

1953 Sau 46 (48, 49) (Pr 5) [AIR V 40 C 21], *Kanti Cotton Mills* v. *State of Saurashtra.*

1952 Cal 16 (Pr 13) [AIR V 39 C 6], *Krishna* v. *Director of L. H. & D. E. Command.*

70. 1952 S C 123 (131) (Pr 34) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

1953 S C 404 (409) (Pr 14) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*

1952 S C 75 (92) (Pr 50) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali.*

But the unlawful administration of an Act (which Act itself is not violative of this article) does not affect the constitutional validity of the Act.[71]

It has sometimes been remarked that the principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by the State, but that it really comes into play in the sphere of the *enforcement* of law.[72] It is submitted with respect that this observation is not correct.[73]

Vesting of discretionary power in the Executive

An Act cannot be questioned as violating this article merely because it confers a certain amount of discretion on the Executive and such discretion lends itself, in practice, to abuse and to be exercised in a discriminatory manner.[74] The mere fact that there is a zone for the exercise of the discretion by an administrative officer will not make the Act unconstitutional where it has described the general standard.[75] As already seen above, where the Legislature itself has laid down the general classification, and within the class indicated or described, the Executive is given power to select the persons to whom or the things to which the Act should be applied, then the Act is not open to objection.[76] Some instances of this classification have already

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71. 1953 Sau 46 (48, 49) (Pr 5) [AIR V 40 C 21], *Kanti Cotton Mills* v. *State of Saurashtra*.

1952 Punj 389 (Pr 12) [AIR V 39] (DB), *Firm Sahib Dayal* v. *Asst. Custodian, E. P.*

72. 1951 Mad 147 (Pr 83) [AIR V 38 C 16] : 52 Cri L Jour 515 (FB), *V. G. Row* v. *State of Madras*.

73. 1951 Bom 132 (Pr 4) [AIR V 38 C 28] : ILR (1952) Bom 335 (DB), *Dhanraj Mills* v. *B. K. Kocher*. (There can be no doubt that if a law is so passed as to make discrimination or deny its application equally to all subjects such a law can be challenged under Art. 226 as offending Art. 14.)

74. 1951 Nag 58 (Prs 116, 191) [AIR V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.* ((1943) 321 U S 1 : 88 Law Ed 497, *Snowden* v. *Hughes*, Rel. on.)

1953 Mad 351 (353) [AIR V 40 C 120], *Dr. K. C. Nambiar* v. *State of Madras*. (Power reserved to State Government to exempt from operation of Rent Control Act is not violative of Art. 14.)

75. 1951 All 718 (Pr 27) [AIR V 38 C 192] : ILR (1951) 2 All 745 : 51 Cri L Jour 1251 (DB), *Deodat Rai* v. *State*. (Legislature may leave it to the *discretion of* an authority to apply different laws to people in different circumstances provided it lays down a rational standard to guide its discretion or such a standard can be presumed to exist. It cannot leave it to its arbitrary or naked power.)

(1943) 321 U S 503 (516) : 88 Law Ed 892 (904), *Bowles* v. *Willingham*.

76. 1953 S C 404 (407) [AIR V 40 C 89]: 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal*.

1952 S C 123 (131) (Pr 34) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra*.

[But see 1952 Cal 644 (Pr 17) [A I R V 39] : 1952 Cri L Jour 1447 (FB), *J. K. Gupta* v. *The State*. (Overruled by 1953 S C 404 [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal*.)

1952 Cal 639 (643, 644) [A I R V 39] : 1952 Cri L Jour 1441 (SB), *Ram Kissen* v. *State*. (W. B. Black Marketing Act (1948), S. 12 (1)—Absolute discretion given to Executive to prosecute an offender for the same act either under Black Marketing Act which prescribes heavier punishment or under Essential Supplies Act been referred to above. As another instance, it may be mentioned that the fact that an administrative tribunal is empowered to exercise its discretion and dispose of cases in different ways according to the circumstances of each case does not make the Act, under which the tribunal is constituted, open to challenge under this article.[77]

But where the Legislature does not lay down or indicate any standard for the guidance of the Executive but confers absolute, naked and arbitrary power on the Executive, the validity of such an Act will be open to challenge under this article.[78] A typical and oft-quoted example of such naked arbitrary power is that contained in *Yick Wo* v. *Hopkins*.[79] In that case, what was questioned was the validity of a

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1946, which prescribes a lighter sentence is violative of Art. 14. Must be deemed as overruled by 1953 S C 404 [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal*.)]

77. 1953 S C 10 (16) (Pr 22) [AIR V 40 C 4] : 1953 S C R 254 · 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh*. (Fact that Tribunal dealing with cases under Abducted Persons (Recovery and Restoration) Act (65 of 1949), is empowered to exercise their discretion and dispose of cases in different ways is not discrimination.)

78. (1886) 30 Law Ed 220 (226) : 118 U S 356, *Yick Wo* v. *Hopkins*.

1952 S C 75 (Pr 51) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali*. (Power given to State Government to order "any case" to be tried by special Court under special procedure — Statute is unconstitutional.)

1951 Nag 58 (Prs 116, 191) [A I R V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.* (Act conferring arbitrary power with the sole or dominant intention that it should be used for favouring or oppressing a particular class, community, race or other group.)

1953 Raj 158 (Pr 7) [A I R V 40 C 56] : I L R (1952) 2 Raj 511 (DB), *Bahadur Singh* v. *Jaswant Raj*. (Under S. 48 of the Matsya Customs Ordinance the Superintendent, Customs, has been given an unrestricted power to send any case he likes to a court of law and retain any case of the same type to be dealt with departmentally at his discretion by his own self. It is clearly hit by the provisions of Art. 14.)

1953 Trav-Co 146 (Pr 12) [AIR V 40 C 50] : ILR (1952) Trav-Co 960 (DB), *P. J. Joseph* v. *Asst. Excise Commr.* (Cochin Abkari Act (1 of 1077), S. 29 — Rules under, R. 7—The power given to the officer in R. 7 to fix the quantity is a "naked and arbitrary" power and has a potency of being exercised with unjust discrimination as there are no principles or standards prescribed guiding or regulating the exercise of the power.)

1952 Mad 565 (570) (Prs 15, 16, 17) [A I R V 39] : I L R (1952) Mad 957 (DB), *Balakrishnan* v. *State of Madras*. (Absolute and unfettered discretion conferred on Textile Commissioner to permit the acquisition and installation of new looms —*Held* unreasonable and repugnant to Arts. 14 and 19.)

1951 All 718 (Pr 27) [A I R V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State*.

[*See also* 1951 Mad 974(Pr 9)[AIR V 38 C 338](DB), *Sree Meenakshi Mills* v. *State of Madras*. (The entrustment of industrial disputes to administrative tribunals, without enunciating even the general principle on which the disputes should be decided, is fraught with the risk of grave injustice being done to either party. If the decision of the dispute were to depend entirely on the unfettered discretion of the tribunal there may be occasions when the very object of the legislation under which these tribunals function may not be achieved. It is for the Legislature to have regard to this aspect of the matter. But the Act cannot be held to be invalid because of this defect.)]

79. (1886) 30 Law Ed 220 (225) : 118 U S 356.

certain order of the city and county of San Francisco, providing that it should be unlawful for any person to engage in the laundry business within the corporate limits "without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone". The impugned order did not prescribe rules and conditions for the regulation of the use of laundry property, to which all similarly situated might conform. It was held by the Supreme Court of America that the order conferred a naked arbitrary power upon the Board to give or withhold consent and made all engaged in the business the tenants at will as to their means of living, under the Board of Supervisors.

Where the Act conferring power lays down expressly principles or rules for the guidance and control of the Executive in the exercise of the power conferred or there are statutory rules governing the matter, or otherwise there is sufficient indication of the policy and object of the legislation for the guidance of the Executive, the validity of the Act cannot be questioned under this article.[80] In several cases express rules for the guidance of the officers are not made by or under the enactment, but the matter is left to the discretion of the officer or administrative body concerned to be exercised in accordance with the policy of the Act. In such cases also, the entrustment of discretion to administrative body or officer with regard to a certain matter may not necessarily amount to infringement of this article or the principle underlying it.[81]. Thus, the discretion granted to an executive officer under rent control legislation to grant permission to a landlord to sue a tenant for ejectment has been upheld as validly conferred though it is not hedged in by statutory rules.[82] Similarly, the discretion to grant licences in different matters is not ordinarily made subject to rigid statutory rules.[83]

The true principle applicable in such cases is that it is not the entrustment of *discretion* to an executive officer or body that is objectionable but it is the conferment of "naked arbitrary power" on an administrative officer or body. In the former case, the "discretion" conferred must be such that it implies an obligation to exercise the power according to certain principles and in conformity with a certain policy of the Act, and not arbitrarily or capriciously. This distinction

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80. 1953 S C 404 (Pr 7) [AIR V 40 C 89]:1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*

1952 S C 123 (Pr 34) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

81. 1953 All 25 (29) (Prs 24, 25) [AIR V 40 C 7], *Jyoti Swarup* v. *Board of Rev., U. P.* (Absolute and unfettered discretion given to Board of Revenue to grant or refuse permission to assessee under S. 6 (1) Proviso, U. P. Agricultural Income-tax Act (3 of 1949), to make a change in the method of computation of income does not infringe this article : AIR 1952 All 699 and AIR 1952 All 859, Ref.)

82. 1952 All 699 (703) (Pr 10) [AIR V 39] (DB), *Karam Chand Thapar & Bros.* v. *Vijay Anand.*

83. 1952 All 699 (703) (Pr 10) [A I R V 39] (DB), *Karam Chand Thapar & Bros.* v. *Vijay Anand.*

has been brought out and explained by Mukherjea, J., in *Kathi Raning* v. *State of Saurashtra*,[84] where he observed as follows :

> "A statute will not necessarily be condemned as discriminatory, because it does not make the classification itself but, as an effective way of carrying out its policy, vests the authority to do it in certain officers or administrative bodies. Illustrations of one class of such cases are to be found in various regulations in the U. S. A., which are passed by States in exercise of Police Powers for the purpose of protecting public health or welfare or to regulate trades, business and occupations which may become unsafe or dangerous when unrestrained. Thus, there are regulations where discretion is lodged by law in public officers or boards to grant or withhold licence to keep taverns or sell spirituous liquors, *Crowley* v. *Christensen*,[85] or other commodities like milk, *New York ex rel. Lieberman* v. *Van De Carr*,[86] or cigarettes, *Gundling* v. *Chicago*.[87] Similarly, there are regulations relating to appointment of river pilots, *Kotch* v. *River Port Pilot Commrs.*,[88] and other trained men necessary for particularly difficult jobs and in such cases, ordinarily, conditions are laid down by the statute, on compliance with which a candidate is considered qualified. But even then the appointment board has got a discretion to exercise, and the fact of the candidate for a particular post is submitted to the judgment of the officer or the board as the case may be. It is true that these cases are of a somewhat different nature than the one we are dealing with; but it seems to me that the principle underlying all these cases is the same. The whole problem is one of choosing the method by which the legislative policy is to be effectuated. As has been observed by Frankfurter, J., in *Tinger* v. *Texas*,[89] 'laws are not abstract propositions—but are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by the use of specific remedies'. In my opinion, if the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. After all 'the law does all that is needed when it does all that it can, indicates a policy. . . . . and seeks to bring within the lines all similarly situated so far as its means allow': Vide *Buck* v. *Bell*.[90] In such cases, the power given to the executive body would import a duty on it to classify the subject-

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84. 1952 S C 123 (131, 132) (Pr 34) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC).

85. (1890) 137 U S 86 : 34 Law Ed 620.

86. (1905) 199 U S 552 : 50 Law Ed. 305.

87. (1900) 177 U S 183 : 44 Law Ed 725.

88. (1947) 330 U S 552 : 91 Law Ed 1093.

89. (1940) 310 U S 141 (147) : 84 Law Ed 1124.

90. (1927) 274 U S 200 (208) : 71 Law Ed 1000 matter of legislation in accordance with the objective indicated in the statute. The discretion that is conferred on official agencies in such circumstances is not an unguided discretion; it has to be exercised in conformity with the policy, to effectuate which the discretion is given and it is in relation to that objective that the propriety of the classification would have to be tested. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the Legislature, its action can certainly be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied. This, it seems to me, is the true principle underlying the decision of the Supreme Court of America in *Yick Wo* v. *Hopkins*[91]."

See also the observations of Patanjali Sastri, C. J., in *Kedar Nath* v. *State of West Bengal*.[92] The case of *Yick Wo* v. *Hopkins*[93] has already been referred to above. The following observations from that case in regard to the order impugned before the Court may also be usefully quoted here :

> "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint . . . . . .
>
> "As to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by

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91. (1886) 118 U S 356 : 30 Law Ed 220.

92. 1953 S C 404 (Pr 9) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC).

93. (1886) 30 Law Ed 220 (225, 226) : 118 U S 356.

> the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

The above principles are well illustrated in the cases relating to the constitutionality of entrusting the Executive with power to order cases to be tried by special courts and special procedure. This question has been discussed in NOTE 25.

The question whether in any given case the Act confers a naked arbitrary power and thus intrinsically contains the seeds of inequality or confers a discretionary authority on the Executive to carry out the policy of the Act must depend on the interpretation of each Act. In this connection the following observations of Patanjali Sastri, C. J., in *Kedar Nath* v. *State of West Bengal*[94] may be quoted :

> "Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of ART. 14 must be determined in each case as it arises, for, no general rule applicable to all cases can be safely laid down. A practical assessment of the operation of the law in the particular circumstances is necessary."

Although these observations were made with reference to a particular aspect of the question, namely, the entrustment of the power to the Executive to direct the application of a *special procedure* for the trial of certain offences, yet the observations may be taken to contain a general rule to be remembered in connection with the question how far the conferment of discretionary power on the Executive by an Act amounts to an infringement of this article.

The provision in the Income-tax Act (1922), S. 5, sub-s. (8), that all officers under the Act are bound to follow the directions of the Central Board of Revenue does not offend this article.[95]

Similarly, the fact that in S. 23 of the Income-tax Act, the Income-tax Officer is not bound to disclose the materials on which he finally makes the assessment does not constitute an infringement of this article.[96]

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94. 1953 S C 404 (408) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC).

95. 1953 Mad 716 (717) (Pr 3) [AIR V 40 C 275] (DB), *In re K. A. Meera Sahib Tharaganar & Bros.* (Contention that independence of officers is affected — To such a contention Art. 14 does not apply.)

96. 1953 Mad 716 (717) (Pr 3) [AIR V 40 C 275] (DB), *In re K. A. Meera Sahib Tharaganar & Bros.*

2. Mode of construing article. — The meaning of equality contemplated by this article has been explained in NOTE 1 and it has been seen there that the article does not fetter the discretion of the State to pass appropriate laws to meet different situations and solve different problems that arise in the affairs of a State dedicated to the ideal of promoting the common weal of the nation entrusted to its charge. Hence, although the article lays down an important Fundamental Right which should be closely and vigilantly guarded, in considering the article the Court should not adopt a doctrinaire approach which might choke all beneficial legislation.[1] In applying the doctrine of equality, therefore, no narrow, dogmatic constitutional niceties should hamper the true exposition of the Constitution as a living practical instrument of government of men and affairs.[2]

But at the same time it should be remembered that the article provides one of the most important and valuable guarantees in the Constitution which should not be allowed to be whittled down.[3]

3. Mode of construing an Act to test its constitutionality. —For a full discussion of this topic, see notes on Preamble, Part III (General) and ART. 13. As seen in Note 1, the test of the validity of an Act impugned as infringing this article is whether the classification is reasonable having regard to the object of the legislation. The object of the legislation may be gathered from the Preamble to the Act and from the provisions of the Act generally. The proceedings of the Legislature can also be looked at for this purpose.[1] See also NOTE 6.

4. American decisions—Value of. — As seen in NOTE 1, the express enactment in the form of a constitutional provision relating to

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Article 14 — Note 2

1. 1952 S C 235 (Pr 10) [AIR V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay.* (In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approach should be avoided.)

1951 S C 41 (Pr 18) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

1951 Hyd 1 (Prs 13, 18, 19) [AIR V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.* (Equal protection clause not intended to hamper State in discretionary exercise of appropriate sovereign powers.)

1951 Cal 539 (Pr 28) [AIR V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.*

2. 1951 Cal 539 (Pr 28a) [A I R V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.*

3. 1951 S C 41 (44) (Pr 8) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

Article 14 — Note 3

1. 1951 S C 41 (Pr 12) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.* (Legislative proceedings are relevant for the proper understanding of the circumstances under which an Act was passed and the reasons which necessitated it.)

1953 Bom 174 (175) (Pr 6) [AIR V 40 C 53] : I L R (1953) Bom 230. *A. S. Ruben* v. *Narayan.* (The statement of the Minister in charge of the Bill as to the necessity of the Bill in the Legislature may be taken into consideration, as for example, a Bill for adding an explanation in Rent Restriction Act for the purpose the Fundamental Right of equality owes its inspiration, at least partly, to the corresponding provision contained in the Fourteenth Amendment to the Constitution of the United States of America. Although there are fundamental differences between the approach of the American Constitution and that of the Indian Constitution in some respects to this question of Fundamental Rights, owing to the recognition by the American Constitution of a double citizenship, namely, the Federal and State citizenship, and although, therefore, American decisions are often influenced by the special considerations arising out of the peculiar provisions of the Constitution bearing upon the State and the Federal jurisdictions, still in so far as the conception of equality before the law is concerned, American decisions do afford a valuable guidance as to the place of individual liberty in the context of the responsibility of the State for a sound administration promoting the welfare of all citizens.[1]

5. Retrospective effect of the article. — Under ART. 13 (1) all laws in force in the territory of India immediately before the commencement of the Constitution, which are inconsistent with the provisions of Part III of the Constitution, shall, to the extent of such inconsistency, be void. Article 14 being one of the provisions of Part III, ART. 13 (1) applies to ART. 14 also, and hence even the laws which were passed prior to the Constitution, and which continue to be applicable by force of ART. 372, will be void if they are inconsistent with the doctrine of equality enunciated in this article. The illustrative examples which are noted under several headings in the commentary on this article will afford plenty of instances to show this.[1] But, as seen in the notes on ART. 13, the meaning of cl. (1) of that article is that the laws which are inconsistent with the provisions of Part III do not become void *ab initio* but only become void from the date of the coming into force of the Constitution. Hence, whatever action was already taken or whatever liability was incurred, before the coming into force of the Constitution, is not nullified after the Constitution, although the law under which such action was taken or liability incurred *prior* to the Constitution becomes void from the date of the coming into force of the Constitution.[2] But where proceedings were commenced before the inauguration of the Constitution under a special

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of preventing landlords purchasing houses after certain date from ejecting their tenants even if they require the houses for their own occupation.)

Article 14 — Note 4

[1] *See* 1951 Mad 120 (Pr 13) [AIR V 38 C 14) : I L R (1951) Mad 149 (FB), *Champakam Dorairajan* v. *State of Madras.* (American decisions are not directly applicable in construing Arts. 15 (1) and 29 (2) though they may have some bearing in construing Art. 14.)

Article 14 — Note 5

[1] *See* 1951 Mad 191 (Prs 10, 12) [A I R V 38 C 19] : 52 Cri L Jour 744 (DB), *C. P. Sarathy* v. *State of Madras.*

[2] 1953 S C 355 (Pr 12) [AIR V 40 C 79] : 1953 Cri L Jour 1439 (SC), *Abdul Khader* v. *State of Mysore.* (Mysore Special Criminal Courts Act (24 of 1942), S. 7—Conviction before coming into force of Constitution — Right of appeal, which had been expressly taken away by the special Act, is not revived on the coming into force of the Constitution.)

Act then in force and are pending at the time of such inauguration, if such Act is declared to have become void on the ground of infringement of this article on the coming into force of the Constitution, the subsequent stages in the proceedings must be conducted in such a manner as to conform to the principle of equality which applies to procedural law as well as substantive law.[3] (See also NOTE 25 and notes on ART. 13.)

6. Presumption as to constitutionality.—It has been already seen in the notes on ART. 13 that Courts are required to make every possible presumption in favour of the constitutionality of an Act or other law. The same principle is applicable to the determination of a question as to whether an Act is void as offending the principle of equal protection of laws enacted in this article. Hence, it is for the party who challenges the constitutionality of any enactment under this article to show how the enactment is unconstitutional, and how the State has violated the true principles of classified legislation and exceeded the limits of reasonable discrimination allowed to the State in passing the enactment.[1]

1952 S C 235 (Pr 5) [A I R V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay.*

1952 Raj 79 (Pr 10) [AIR V 39] : I L R (1951) 1 Raj 692 (DB), *Firm Udairaj* v. *Commr. Civil Supplies.* (Order freezing stock of applicant passed in March 1949 under Marwar Foodgrains Release Order (1946)—But order to sell freezed stock at certain rate per maund to certain person passed on 3-1-1951—Order for sale of the grain must be deemed to be an order under Cl. 25 of the Rajasthan Foodgrains Control Order, 1949—Arts. 14 and 19 (1) (f) of the Constitution held had no application, for the freezing took place before the Constitution came into force.)

3. 1952 S C 235 (244) (Pr 26) [AIR V 39] : 1952 S C R 710: 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay.* (Held by majority (Patanjali Sastri, C. J., *dissenting*)—Fact that a case had already been referred to the Special Judge to be tried according to special procedure which was prejudicial to accused, before Constitution, did not constitute a valid ground of classification for continuing same procedure after the Constitution.)

Article 14 — Note 6

1. 1951 S C 41 (Pr 10) [A I R V 38 C 9] : 1950 S C R 869 : I L L (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.* ((1919) 249 U S 152 : 63 Law Ed 527, *Middleton* v. *Texas Power & L. Co.*, Rel. on.)

1951 Pat 91 (Prs 42, 53, 98) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

1953 Mad 447 (449) (Pr 3) [A I R V 40 C 170], *Rangaswami* v. *Industrial Tribunal.*

1953 Mad 105 (114) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.* (The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. (1940) 309 U S 83 : 84 Law Ed 590 (593), *Maddan* v. *Kentucky*, Quoted and foll.)

1952 Mad 11 (Pr 24) [AIR V 39 C 2]: ILR (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran.* (Burden of showing that the classification rests upon arbitrary and not reasonable basis is upon the person who impeaches the provision in the statute.)

1951 Pat 570 (Pr 24) [AIR V 38 C 161] : ILR 30 Pat 735 (DB), *Gopeshwar Prasad* v. *State of Bihar.* (Do.)

It is for the party impugning a law as offending against the article to place sufficient materials before the Court to show that the discrimination is not justifiable on any rational basis. It will not be *presumed* by the Court that there is no such difference in the material facts concerning different things or persons or groups so as to justify a differentiation.[2] As observed by Prof. Willis in his CONSTITUTIONAL LAW,[3] "if any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis".

There is a strong presumption that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.[4] Thus, in *Charanjit Lal's case*,[5] where the impugned Act provided for taking over the

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(1945) 324 U S 182 (191) : 89 Law Ed 857 (864), *Charleston Fed. Sav. & L. Asso.* v. *Alderson.* (The burden is on a tax-payer claiming that, by reason of inequalities in assessment, he is deprived of the equal protection of the laws, to establish that differences in modes of assessment have produced inequalities in tax burden and that the inequality is intentional and not one resulting from mere mistake or error in judgment of the tax officials.)

(1918) 249 U S 152 (157) : 63 Law Ed 527, *Middleton* v. *Texas Power & L. Co.*

(1911) 220 U S 61 (78) : 55 Law Ed 369 (377), *Lindsley* v. *Natural Carbonic Gas Co.*

[*See* 1951 All 718 (Prs 22, 27) [A I R V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.* (But a statute enacted before the Constitution cannot be presumed to be constitutional under it.)

(1926) 271 U S 500 (518) : 70 Law Ed 1059 (1066), *Yu Cong Eng* v. *Trinidad.* (Court in considering validity of statute must give it such reasonable construction as can be reached to bring it within the fundamental law.)]

[2] 1953 Mad 105 (113) (Pr 24) [A I R V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.*

[3] Constitutional Law of the United States by H. E. Willis (1936), p. 579.

[4] (1919) 249 U S 152 (157, 158) : 63 Law Ed 527 (531), *Middleton* v. *Texas Power & L. Co.* (The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment. The burden being upon him who attacks a law for unconstitutionality, the Courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism.)

1953 S C 215 (220) (Pr 19) [A I R V 40 C 52] : ILR 32 Pat 375 (SC), *Ram Prasad* v. *State of Bihar.*

1951 All 746 (Prs 82, 84) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.* (While the Courts have the ultimate responsibility of deciding whether the classification can be reasonable or not or whether the category of the classification can be reasonable or not the Courts are bound to attach the greatest weight possible to the opinion of the Legislature : (1810) 6 Cranch 87, *Fletcher* v. *Peck* (*Yazoo Land Fraud Case*) and (1903) 47 Law Ed 323 : 187 U S 606, *Otis & Gassman* v. *Parker*, Rel. on. The High Court cannot be, in the very nature of things, a better judge than the Legislature itself in a matter of this kind.)

1953 Raj 53 (55, 56) (Prs 5, 7) [AIR V 40 C 18] : ILR (1951) 1 Raj 770, *Ghamandi* v. *Parshadi.*

[5] 1951 S C 41 (Pr 12) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.* (Majority view — Patanjali Sastri and

management of a textile mill on the ground of mismanagement affecting the production of an essential national commodity and causing a serious problem of unemployment, it was held by the Supreme Court that the burden was on the party impugning the Act to show that the Legislature had unjustly singled out a particular concern for its attention while there were other concerns about whom the same kind of complaints of mismanagement, etc., could be made.

But if on the face of an enactment there is no classification at all or none on the basis of any apparent difference peculiar to an individual or class and yet the law hits him or it only, the presumption in favour of the validity of legislation does not apply and therefore in such cases it is not for the person who attacks the validity of the law to prove that there are others who share his characteristics but are not hit by the law.[6]

It was on this principle that Patanjali Sastri and Das, JJ., who strongly dissented from the majority view in *Charanjit Lal's case*[7] based their decision. The same principle was applied by the Supreme Court in *Ramprasad Narayan* v. *State of Bihar*.[8] In that case the Legislature had passed an Act declaring as nullity a transaction of lease in favour of two individuals in respect of certain property belonging to Bettiah Estate in Bihar, without giving the persons concerned the opportunity of having their rights adjudicated upon by a Court of law in the normal course. The Supreme Court held that the Act was void as infringing this article. Mukherjea, J., quoted with approval the following observations of Brewer, J., in *Gulf C. & S. F. R. Co.* v. *Ellis*[9] :

> "To carry the presumption (of constitutionality) to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clauses of the 14th Amendment a mere rope of sand."

There is a difference between this article on the one hand and Arts. 15 and 16 on the other. If an unfavourable bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by

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Das, JJ., strongly dissented from this view and held that it threw an impossible onus on the party impugning the Act.)

[6] 1951 S C 41 (Pr 83) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

1953 Bom 174 (175) (Pr 4) [AIR V 40 C 53] : I L R (1953) Bom 230 (DB), *A. S. Ruben* v. *Narayan*. (When *prima facie* it appears that the classification is not justified it is for the State to satisfy the Court that there was some reasonable consideration which led the Legislature in exempting a particular class from the operation of a particular Act.)

[7] 1951 S C 41 [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*. (Sastri J. (Para 30); Das J. (Para 83.))

[8] 1953 S C 215 (220) (Pr 19) [AIR V 40 C 52] : ILR 32 Pat 375 (SC). (Bihar Sathi Lands (Restoration) Act (34 of 1950) is void—AIR 1952 Pat 194, Reversed.)

[9] (1897) 165 U S 150 (154) : 41 Law Ed 666.

Article 14
Notes 6–8

one or other of the provisos to those articles. But equal protection claims under this article are examined with the presumption that the State action is reasonable and justified.[10]

7. Political rights.—Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to *political* rights. But the necessity of showing purposeful discrimination is no less in a case involving political rights than in any other.[1]

8. Legislation affecting single person.—It is well established that if the Legislature has not been acting in an arbitrary fashion, even legislation passed with reference to a single individual or organisation might be sustained where such individual or organisation falls on account of peculiar circumstances associated with him or it, into a class by himself or itself. That only one person is affected is by itself no proof of arbitrary classification or discrimination on the part of the Legislature.[1]

As Professor Willis says in his CONSTITUTIONAL LAW,[2] a law applying only to one person or one class of persons or one body or institution is constitutional if there is sufficient basis or reason for it.[2a]

A prominent instance of an Act (falling under this category), the validity of which has been upheld by the Supreme Court, is furnished by *Charanjit Lal* v. *Union of India*.[3] In that case an Act was passed for taking over the management of an important textile mill on the ground of mismanagement affecting the production of an essential national commodity and causing unemployment among a considerable portion of the population. It was held by a majority of the Supreme Court that under the circumstances the company stood in a class by itself and the Act was not invalid under this article although it affected only the particular company. A parallel case is that of the *Jupiter General Insurance Co.* v. *Rajagopalan*[4] in which an Insurance Company was taken over by the Government on the ground of mismanagement under S. 52A of the Insurance Act and the action of the Government was upheld by the Punjab High Court.

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[10] 1952 S C 123 (125, 126) (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra*.

Article 14 — Note 7

[1] (1943) 321 U S 1 (11) : 88 Law Ed 497 (504), *Snowden* v. *Hughes*.
[*See also* 1953 S C 384 (385) (Pr 4) [A I R V 40 C 86] (SC), *Nain Sukh Das* v. *U. P. State*. (The constitutional mandate in Art. 15 (1) to the State not to discriminate against any citizen on the ground, *inter alia*, of religion clearly extends to political as well as to other rights and any election held after the Constitution in pursuance of a law providing for election on basis of communal electorates must be held void.)]

Article 14 — Note 8

[1] 1951 S C 41 (Pr 8) [A I R V 38 C 9] : 1950 S C R 869 : I L R 1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India*. (Sholapur Spinning and Weaving Company (Emergency Provisions) Act, empowering Government of India to take over control and management of company by appointing their own directors held valid.)

1952 Pat 194 (Pr 19) [AIR V 39 C 55 (15)] (DB), *Ram Prasad* v. *State of Bihar*. (Classification which takes account of different degrees in which an evil is present is not bad. The decision in this case has been reversed by the Supreme Court in AIR 1953 S C 215.)

1951 All 718 (Pr 22) [A I R V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State*.

[2] Constitutional Law of the United States by H. G. Willis, 1936, p. 580.

[2a] 1952 Cal 907 (912) (Pr 41) [A I R V 39], *Haran Chandra* v. *State of West Bengal*. (The 24 Parganas District Board (Dissolution) Ordinance (West Bengal Ordinance 3 of 1948), S. 1 and Act following it are not pieces of discriminatory legislation and do not contravene Art. 14 — There were special circumstances *peculiar* to this District Board which necessitated such an Act in its case.)

In *Charanjit Lal's case*,[5] however, Patanjali Sastri and Das, JJ., strongly dissented from the view of the majority and held that the Act in question was void as infringing this article. According to them, the Act made no classification at all and therefore there was no question of the Act being based on a reasonable classification by the Legislature made with reference to the object of the legislation. This point of view may be best expressed in the words of Patanjali Sastri, J., in the above case as follows :

> "It is obvious that the legislation is directed solely against a particular Company and shareholders and not against any class or category of companies and no question, therefore, of reasonable legislative classification arises. If a law is made applicable to a class of persons or things and the classification is based upon differentia having a rational relation to the object sought to be attained, it can be no objection to its constitutional validity that its application is found to affect only one person or thing. For instance, a law may be passed imposing certain restrictions and burdens on joint stock companies with a share capital of, say, Rs. 10 crores and upwards, and it may be found that there is only one such company for the time being to which the law could be applied. If other such companies are brought into existence in future, the law would apply to them also, and no discrimination would thus be involved. But the impugned Act, which selects this particular Company and imposes upon it and its shareholders burdens and disabilities on the ground of mismanagement and neglect of duty on the part of those charged with the conduct of its undertaking, is plainly discriminatory in character and is, in my judgment, within the constitutional inhibition of ART. 14. Legislation based upon mismanagement or other misconduct as the differentia and made applicable to a specified

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[3] 1951 S C 41 (46) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC). (See Fazal Ali, J.'s judgment at pp. 46, 47 of AIR 1951 S C for the circumstances which according to the majority placed the Sholapur Mills Company in a class by itself.)

[4] 1952 Punj 9 (Pr 45) [AIR V 39 C 2] : ILR (1952) Punj 11.

[5] 1951 S C 41 (49) (Pr 29) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

> individual or corporate body is not far removed from the notorious parliamentary procedure formerly employed in Britain of punishing individual delinquents by passing Bills of Attainder, and should not, I think, receive judicial encouragement."

As seen above, even the majority view in *Charanjit Lal's case*[5a] is based upon the fact that, in their view, the particular Company that was affected was, in the circumstances attendant on the legislation, in a *class* by itself. Where, however, there are no circumstances which would enable the Court to hold that a particular person or institution stood in a class by itself, legislation singling out a particular person or institution for discriminatory treatment will be void as offending this article. In this category will fall Acts providing for succession to the estate of a single person in a special way merely on the ground of such person having been a big nobleman or on similar grounds.[6] The claimants to the estate are deprived by such legislation of their ordinary rights under the law and are not allowed to have such rights determined by the ordinary Courts and according to the ordinary law. In this connection it has been pointed out by the Supreme Court that the analogy of private Acts of Parliament is not helpful as the British Parliament enjoys legislative omnipotence.[7] There were a few statutes passed by Provincial Legislatures in British days which regulated the succession to the estates of certain princely families. But these Acts were valid as there was no equality clause as a Fundamental Right in those days.[8]

So also, an Act of the Legislature declaring as a nullity the transaction of a lease granted in favour of certain individuals by the owners of certain estate or by persons who were competent to grant leases on behalf of their owners, without allowing an opportunity to the grantees to have their rights in regard to the lease adjudicated upon by an ordinary Court under the ordinary law in the ordinary course of events, is void under this article.[9] The reason is that to differentiate one individual from the rest of the community and pass a special Act to deal with his rights and liabilities, instead of allowing them to be governed by the general law of the land, is discriminatory and a violation of this article.[10] In this connection, the observations of Patanjali Sastri, C. J., in *Ram Prasad* v. *State of Bihar*[11] are worth quoting :

[5a] 1951 S C 41 (Pr 65) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India*.

[6] 1953 S C 91 (94) (Prs 13, 14) [AIR V 40 C 25] : 1953 S C R 404 : I L R (1953) Hyd 98 (SC), *Ameerunnissa* v. *Mahboob Begum*. (The Hyderabad Wali-ud-dowala Succession Act, 1950, is void under this article.)

1953 Hyd 105 (109) (Pr 7) [A I R V 40 C 40] : I L R (1953) Hyd 1 (FB), *Tahira Begum* v. *Hyderabad State*. (The proviso to Section 21 (2) of the Jagir (Abolition) Regulation, 1358-F, does not provide for the acquisition of any estate or any right therein or the extinguishment or modification of acquisition of any estate or right therein. The proviso safeguards only the existing law and the existing law of sanctioning succession proceeding is violative of the Constitution Act, *as it saves the royal prerogative of sanctioning succession* and denies the statutory right of appeal. The proviso is, therefore, discriminating and *ultra vires* the Constitution : Pronouncement of the majority in *Kamal Yar Jung's case*, AIR 1952 Hyd 163, held was *obiter dicta* and dissented from.)

1953 Hyd 100 (101) [AIR V 40 C 39] : I L R (1952) Hyd 953 (FB), *Abdul Fateh* v. *Government of Hyderabad*.

[7] 1953 S C 91 (94) [AIR V 40 C 25] : 1953 S C R 404 : I L R (1953) Hyd 98 (SC), *Ameerunnissa* v. *Mahboob Begum*.

[8] 1953 S C 91 (94) [AIR V 40 C 25] : 1953 S C R 404 : I L R (1953) Hyd 98 (SC), *Ameerunnissa* v. *Mahboob Begum*.

> "The appellants assert title to certain lands in Bettiah Estate under a settlement which they claim to have lawfully obtained from the Court of Wards, while it is now alleged on behalf of the Estate that the settlement was not for the benefit of the Estate and was contrary to law, as the Court of Wards did not then apply its mind to that question. This is purely a dispute between private parties and a matter for determination by duly constituted Courts to which is entrusted, in every free and civilised society, the important function of adjudicating on disputed legal rights, after observing the well-established procedural safeguards which include the right to be heard, the right to produce witnesses and so forth. This is the protection which the law guarantees equally to all persons, and our Constitution prohibits by ART. 14 every State from denying such protection to any one. The appellants before us have been denied this protection. A political organisation of the party in power decides, after making such enquiry as it thought fit, that the settlement in question was contrary to the provisions of law and public policy, and the State Legislature, basing itself on such decision, purports to declare the settlement null and void and directs the eviction of the appellants and the restoration of the lands to the Estate. The reasons given for this extraordinary procedure are indeed remarkable for their *disturbing implications*. It is said that there was agitation amongst the tenantry of the locality and opposition on the part of persons living in the locality against the appellants' possession of the lands which led to breach of the peace and institution of criminal cases. Whenever, then, a section of the people in a locality, in assertion of an adverse claim, disturb a person in the quiet enjoyment of his property, the Bihar Government would seem to think that it is not necessary for the police to step in to protect him in his enjoyment until he is evicted in due course of law, but the Legislature could intervene by making a 'law' to oust the person from his possession. *Legislation such as we have now before us is calculated to drain the vitality from the Rule of Law which our Constitution so unmistakably proclaims,*

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[9] **1953 S C 215 (220) (Pr 19) [A I R V 40 C 52] : I L R 32 Pat 375 (SC), *Ram Prasad* v. *State of Bihar*. (AIR 1952 Pat 194, Reversed.)**

[10] **1953 S C 215 (220) (Pr 19) [A I R V 40 C 52] : I L R 32 Pat 375 (SC), *Ram Prasad* v. *State of Bihar*.**

[11] **1953 S C 215 (217) (Pr 7) [AIR V 40 C 52] : I L R 32 Pat 375 (SC).**

and it is to be hoped that the democratic process in this country will not function along these lines." (Italics ours.)

See also NOTE 27.

9. Personal and official privileges.—We have seen in NOTE 1 that this article requires that no one should be entitled to any special privileges and should be subject to the same laws as everybody else in the State, unless he is entitled to any immunities and exemptions or privileges specially conferred on him by reason of special considerations based on some rational ground relevant to the matter in question. There are provisions in the Constitution itself which provide for certain special privileges. Under ART. 361 the President and the Governors and Rajpramukhs are entitled to certain important privileges, including that of exemption from any legal proceedings in regard to their official acts. So also, under ART. 362 the personal rights, privileges and dignities of the Rulers of Indian States which entered into the Union at the formation of the Republic are preserved, if the same have been guaranteed in their covenants of accession. So also, under ART. 363 disputes arising out of certain treaties, agreements, etc., are removed from the jurisdiction of Courts. Under ART. 291 also, there is provision for certain privileges in favour of Rulers of Indian States who joined the Indian Union, including exemption from income-tax for their privy purse.

It has been seen in the notes on ART. 13 that the word "law" as used in that article does not include the Constitution and hence special immunities, exemptions and privileges conferred by the Constitution itself may not be challenged in a Court of law on the ground of their being inconsistent with equal protection of laws clause.

But such special privileges conferred upon individuals or groups of individuals by any other law, as for instance, by the Civil Procedure Code, may be challenged on the score of their being inconsistent with the theory of equality before the law. But even here if the particular provision which is challenged is justifiable on the ground of reasonable classification with reference to the subject-matter which the State is always entitled to make, the privilege or exemption or immunity would be upheld. Thus, the exemption from personal appearance in Court which had been granted to the Rana of Kothi before the coming into force of the Constitution was, under the circumstances of the case, recognised as valid even after the Constitution.[1] So also, it has

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Article 14 — Note 9

[1] 1952 Punj 97 (Prs 2, 5, 6, 7) [AIR V 39 C 27] : I L R (1951) Punj 470 (DB), *Bashishst Chand Rai* v. *Radhika Devi.* (The Rana of Kothi, who by a notification of the Punjab Government made on 1-1-1909 under S. 133, Civil P. C., was exempted from personal appearance in Court, is still so exempted even after the coming into force of the Constitution, as S. 133 has not been repealed and the privilege has not been abrogated. The matter is not one of discretion having regard to the facts of a particular case before the Court. From a memorandum titled "Memorandum on the personal Privileges of the Rulers of the merged and integrated States," issued by the Government of India apparently in August 1949, it is clear that the exemption from appearance in Court granted under

been held that exemption from being sued in Courts given to Rulers under covenants of accession must be respected.[2] Under S. 132 of the Civil Procedure Code, women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. In cases arising before the Constitution it was held that the exemption from personal appearance granted by the section was a right which no Court had power to refuse. The validity of the section does not seem to have been questioned before the Courts in any case till now after coming into force of the Constitution. Perhaps the provision will be saved under ART. 15 (3). See also NOTES 8 and 20.

10. "The State."—It must be noted that the injunction against denying the equality before the law or equal protection of the laws is directed to "the State". The expression "the State" has been defined for purposes of this Part in ART. 12 and has to be taken in the sense there defined. The notes on ART. 12 may be referred to for the full discussion of the meaning of the words "the State". But it is worth noting here that "the State", as defined in ART. 12 and therefore as meant in this article, does not refer to the States in Parts A, B and C of the First Schedule which under ART. 1 constitute the members of the Indian Union. Exactly opposite is the meaning of the words "the State" in the Fourteenth Amendment of the Constitution of the United States of America. The injunction against not denying the equal protection of the laws to any person contained in the Fourteenth Amendment is directed to "any State" meaning, in the context, one of the States of the Federation. This fundamental difference in the meaning of the word "State" in the two provisions must be borne in mind for the proper appreciation of American decisions and their bearing upon the effect of this article.

It must also be remembered that the term "the State" in this article is the subject of a specific definition contained in ART. 12 and whatever may be the limits that follow from that definition will have

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S. 133, Civil P. C., was regarded as a substantial privilege coming under the guarantee of Article 4 of the Instrument of Accession. Though the immunity from appearance in Court granted to any person or class of persons appears to offend against the provisions of Art. 14, yet if the classification or discrimination is based upon reasonable distinction it would be valid: A I R 1951 S C 41, Rel. on. The preamble to the memorandum shows that the continuance of privileges to Rulers was made in recognition of the great contribution which the Rulers had made towards the unification and democratization of India, and there can be no doubt that the guarantee of continuance of privileges was an important factor in securing the voluntary surrender of sovereignty by the Rulers. Sufficient reason, therefore, exists for the continuance of the privilege granted under S. 133, Civil P. C. Moreover Art. 362 of the Constitution in terms provides that due regard shall be had to the guarantee or assurance given under any such agreement or covenant as is referred to in Art. 291 (1).)

[2] ('50) 3 Sau L R 95 (96) (DB), *Dadia Ottamchand Motichand* v. *Shahbuddin Jamal Thanani.* (Immunity from being sued given to the Rulers of the covenanting States under Art. 14 of Saurashtra Covenant is not confined to official acts done as a ruler only but also covers acts done in personal capacity.)

to be accepted as inseparable from the meaning of the words as used in this article and other articles in Part III.

It has been held by the Supreme Court of the United States that the equal protection of the laws clause in the Fourteenth Amendment affects only action by the State and does not refer to the actions of *individuals*.[1] This view will hold good even with regard to this article. But under ART. 17 (abolishing untouchability and forbidding its practice in any form) the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. Hence, even private conduct may under our Constitution become subject to the principle of equality.

The expression "State" will include public officials acting on behalf of the State.[2] (See also NOTE 1, sub-heading 'Equality in Administration'.)

It has been held that even judicial action will amount to State action for purposes of the Fourteenth Amendment of the United States Constitution.[3] It is debatable, in view of the specific definition of "State" in ART. 12 and the considerations submitted in the notes thereon, whether this article applies also to *judicial* action. (See notes on ART. 12). (See also NOTE 18.) But a ministerial act of a Judge will amount to State action.[4]

A *state-aided* as distinguished from a *state-maintained* institu-

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Article 14 — Note 10

[1] (1950) 339 U S 637 (641) : 94 Law Ed 1149 (1154), *McLaurin* v. *Oklahoma S. Regents.* (As regards the application of the Fourteenth Amendment to discriminations against Negro students, there is a vast constitutional difference between restrictions imposed by *the State* which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the State presents no such bar.)

(1948) 334 U S 1 (13) : 92 Law Ed 1161 (1180), *Shelley* v. *Kraemer.* (Fourteenth Amendment is directed against State action only but does not reach private conduct.)

(1883) 27 Law Ed 836 (839) : 109 U S 3, *Civil Rights Cases.* (It is *State* action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the 14th Amendment.)

[2] (1938) 305 U S 337 (343) : 83 Law Ed 208 (210), *Missouri Ex Rel. Gaines* v. *Canada.* (The action of the curators of a State University who are the representatives of the state in its management, in refusing to admit a Negro to the law school of the university, must be regarded as state action in determining whether the equal protection clause of the Fourteenth Amendment has been infringed.)

(1880) 25 Law Ed 676 (679): 100 U S 339, *Ex parte, Commonwealth of Virginia.*

[3] (1948) 334 U S 1 (8) : 92 Law Ed 1161 (1178), *Shelley* v. *Kraemer.* (Conceding that 14th Amendment does not affect *private* action, judicial action even for the enforcement of *private agreements* is 'State' action and enforcement of restrictive covenants against certain races is none the less discriminatory because *Courts* will enforce them against *any* race against whom they are directed, including the White race.)

[4] (1880) 25 Law Ed 676 (680) : 100 U S 339, *Ex parte Commonwealth of Virginia.* (The ministerial act of a *Judge*, viz., selection of jurors to serve in Courts of the county—The Judge represents the State.)

tion (e. g., the Madras University) is not covered by the term the "State".[5]

11. Equality before the law as between State and subject. —The question has arisen whether the principle of equality before the law applies also as between a State and its subject when the State, for instance, carries on a commercial undertaking not as incidental to its ordinary functions. It has been held by a Full Bench of the Allahabad High Court that the principle of equality will apply in such cases also and that S. 42 (3) (a) of the Motor Vehicles Act, 1939, in so far as it purports to exempt the State transport buses from the application of sub-s. (1), places the State Government in a privileged position and to that extent, it is in conflict with this article and therefore void under ART. 13.[1] The question involved in this, it will be seen, is really whether the term "person" in this article would include the State, as obviously, equality before the law, which is assured under the article, is equality of all *persons*. The majority decision in the above Full Bench case is understandable on the theory that the State is a *juristic* person.[2] (See also ART. 19, NOTE 79.) But this would be the position only where the State acts in a private capacity, so to say, or in the capacity of a "private juristic person", as when it engages in trade or commerce or enters into a contract, etc. But when the State is acting in its "public capacity" and in the exercise of its ordinary governmental functions, it will not come within the description of "a person" under this article and hence a subject will not be entitled to claim equality with the State under such circumstances.[2a]

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[5] 1954 Mad 67 (69, 71) (Prs 5, 7, 12) [AIR V 41 C 13), *University of Madras* v. *Shanthabai*. (Regulations of University of Madras restricting admission of women in affiliated colleges—Not liable to challenge on ground of infringement of equality clause by State.)

Article 14 — Note 11

[1] 1951 All 257 (Prs 115, 248] [AIR V 38 C 51]: ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government*.

[2] 1951 All 257 (Prs 248, 390) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Govt*. (*Sapru and Agarwala, JJ.*—State is a juristic person for the purposes of Art. 14 read with Art. 19 (1) (g). (Notion of State under various constitutions reviewed by Sapru J.)—*Agarwala, J.*— State cannot discriminate against person in its own favour—It will be negation of equality guaranteed under Art. 14—*Malik, C. J.*—When Government carries on business as incidental to its ordinary functions, Art. 14 cannot be invoked to put the State on same footing *qua* that business as private citizen—Where, however, it carries on a commercial undertaking on competitive basis and the undertaking is not incidental to its ordinary functions, whether the State can claim differential treatment in matters of permit would depend upon whether State can or cannot be separately classified. Article 14 does not prevent State from recognising differences in capacity—Word "person" in Art. 14, if is interpreted to include a State, then Art. 14 would appear to be in conflict with Art. 289—It was not intended that in Art. 14 State should be put on same footing as private person—If "person" in Art. 14 were to include a State, then S. 42 (1) requiring private persons to take out permits would be void and they could claim that they be placed on same footing as the State.)

[2a] 1953 Nag 35 (36) (Pr 3) [AIR V 40 C 19] : ILR (1952) Nag 830 (DB), *Amraoti Electric Supply Co.* v. *N. H. Mujumdar*. (When a Provincial Government, acting under statutory powers under a Public Security Measures Act, for the acquisition or requisition of private property for public purposes, requisitions certain

Article 14
Notes 11–12

It is also an established principle that a suit will lie at the instance of a subject against the State and that such a suit will be determinable according to the ordinary law of the land. The principle is that as between a State and its own subjects no question of Act of State arises and so controversies between a State and its own subjects may be taken before the Courts of the land for decision.[3] But transactions of independent sovereign States or sovereign princes between each other are governed by other laws than those which municipal Courts administer and hence they come under the category of Acts of State which are beyond the jurisdiction of Courts to enquire into.[4] See also A. I. R. COMMENTARY on the Civil Procedure Code, S. 9, NOTE 57.

12 "Any person." — By virtue of ART. 367, the definitions given in the General Clauses Act are applicable to the interpretation of the Constitution also and hence the expression "any person" in this article will, under S. 3, cl. (42), include any company, or association, or body of individuals whether incorporated or not. Hence a corporation which is a juristic person will be also entitled to the benefit of this article[1] and also will be subject to its provisions. As to whether the State should be regarded as a juristic person for the purpose of this article, see NOTE 11.

The article applies to any *person* and is not limited, like some other articles in this chapter, to *citizens*.[2] Hence the rule of equality

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property, e. g., electric supply undertaking, and appoints an arbitrator for fixing of compensation, it is not acting in a *private* capacity as a '*quasi* private juristic person' but in a public capacity as a 'great juristic person' as it is exercising the function of maintaining the security of the State or public order and in such a case the provisions of the law cannot be attacked as being in infringement of Art. 14 in that the power of appointing an arbitrator is given exclusively to the State without the concurrence of the party whose property is requisitioned.)

[3] 1931 P C 248 (251, 252) [AIR V 18] (P C), *Eshugbayi* v. *Govt. of Nigeria.* (The term "Act of State" is applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, may give rise to no legal remedy; but as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act.)
('72) 18 Suth W R 349 (351) : Supp Vol Ind App 10 (PC), *Forester* v. *Secretary of State for India.* (Resumption of lands. *Held* not an act of State but an act done under legal title.)

[4] (1859) 7 Moo Ind App 476 (529) : 4 Suth W R (P C) 42 (P C), *Secy. of State* v. *Kamachee Boye Sahaba.* (Seizure of Tanjore Raj on the death of the last Raja was an Act of State.)

Article 14 — Note 12

[1] 1951 S C 41 (52) (Pr 42) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India.*
(1923) 262 U S 544 (550) : 67 Law Ed 1112 (1116), *Kentucky Finance Corp.* v. *Paramount Auto Exch. Corp.*
(1897) 165 U S 150 (154): 41 Law Ed 666 (668), *Gulf, C & S. F. R. Co.* v. *Ellis.*
(1886) 30 Law Ed 118 (118) : 118 U S 394, *Santa Clara County* v. *Southern Pacific R. R. Co.* (14th Amendment of U. S. Constitution applies to Corporations.)

[2] 1953 Mad 729 (732) (Pr 14) [AIR V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.*

before the law can be invoked by citizens as well as non-citizens including aliens, subject of course to the powers of classification on a reasonable basis which the State undoubtedly has, as seen in NOTE 1. (See NOTES 13 and 14.)

The constitutional right does not depend upon the *number of persons* who may be discriminated against. It is the *individual* who is entitled to the equal protection of the laws.[3]

13. Aliens.—As already seen in NOTE 12 the article is not confined in its applicability, to citizens, as some other articles in this Part, for example, ARTS. 15, 16, 19, etc., are, but applies to citizens as well as non-citizens, to natives as well as foreigners, and aliens can, therefore, equally with natives and citizens, invoke the principle of equality before the law enacted in this article.[1] But this does not take away the power of classification on a reasonable basis which the State always has and in exercise of this power the State can, whenever it is necessary to do so, place restrictions on aliens which are not applicable to citizens, such as, for instance, restrictions with regard to entry into the country, doing business, owning immovable property, etc.[2] But even here, although the State does have extensive powers,

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[3] (1914) 235 U S 151 (161, 162) : 59 Law Ed 169 (174), *McCabe* v. *Atchison T. & S. F. R. Co.* (The constitutional right does not depend upon the number of persons who may be discriminated against. It is the individual who is entitled to the equal protection of the laws and if he is denied by a common carrier acting under the authority of a State law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveller, he may properly complain that his constitutional privilege has been invaded.)

Article 14 — Note 13

[1] 1951 Mad 120 (Pr 32) [AIR V 38 C 14]: ILR (1951) Mad 149 (FB), *Champakam Dorairajan* v. *State of Madras.*

1951 Mad 930 (Prs 12, 13) [AIR V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.*

(1923) 263 U S 197 (216) : 68 Law Ed 255 (275), *Terrace* v. *Thompson.*

(1915) 239 U S 33 (43) : 60 Law Ed 131 (136), *Truax* v. *Raich.*

(1900) 178 U S 289 (299) : 44 Law Ed 1072 (1076), *Sully* v. *American National Bank.* (Distribution of assets of insolvent company —Non-resident creditors are entitled to share equally with resident creditors.)

(1886) 30 Law Ed 220 (226) : 118 U S 356, *Yick Wo* v. *Hopkins.* (Same is the case under the 14th Amendment of the American Constitution also.)

[2] 1951 Mad 930 (Prs 12, 13) [AIR V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.* (Article 14 applies to aliens also but there can be a certain amount of discrimination so far as aliens are concerned which would be justified under the Police Power of the State. Persons who migrate to Pakistan after 1.3.1947 and have to be treated as non-resident aliens cannot complain, if, in the interest of the State, provision is made for taking into custody the property which they have left in India and for its administration under the Administration of Evacuee Property Ordinance (1949). These provisions are also intended to safeguard the rights and interests of the evacuees in cases where they had left India particularly abandoning their properties. There is no infringement of Art. 14 in such a case. (1923) 263 U S 197 (217): 68 Law Ed 255, *Terrace* v. *Thompson,* Referred.)

(1925) 268 U S 258 (262) : 69 Law Ed 944 (946), *Cockrile* v. *California.* (A statute providing for escheat of land transferred to an alien ineligible to hold it, such powers must be exercised in a reasonable manner and any unjustifiable discrimination against aliens may be declared unconstitutional by the Courts.[3] Reference may be made in this connection to persons migrating to Pakistan and the special regulations, etc., that are made with regard to them. See also S. 83 of the Code of Civil Procedure expressly recognising the right of aliens to sue in the courts of the country.

Under SCH. VII, LIST 1, Entries 17 and 19, the Parliament has power of legislation with regard to "citizenship, naturalisation and aliens" and "admission into, and emigration and expulsion from, India; passports and visas".

14. **Foreign corporations.** — As has been seen in NOTE 12, this article applies to citizens as well as non-citizens, and natives as well as aliens, as it enjoins the State not to deny equality before the law or equal protection of the laws to *any person.* We have also seen in that note that the word "person" is wide enough to include juristic persons like corporations. Hence, a foreign corporation is also entitled under this article to the right of equality before the law and any arbitrary discrimination made against a foreign corporation as such will be questionable as violating the principle of equality before the law embodied in this article.[1] But it has also been seen in NOTE 1 that the doctrine of equality under this clause does not require that the same laws must apply to everybody in the State irrespective of any differences that may exist with reference to particular classes or individuals. It has further been seen in NOTE 13 that on this principle a considerable amount of discrimination against aliens necessitated by considerations of safety and promoting the welfare and the progress of the State has been regarded as justifiable. On the same principle, discrimination against foreign corporations on reasonable grounds relative to the subject-matter concerned has been upheld.[2] Thus, States may exclude

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which raises a presumption of an intent to evade the statute where land is taken in the name of a person eligible to hold it, and the consideration is paid by a person ineligible to do so, does not violate the equal protection clause of the Federal Constitution.)

(1923) 263 U S 197 (217) : 68 Law Ed 255 (275), *Terrace* v. *Thompson.* (Each State has, in absence of treaty provisions, to contrary, power to deny aliens right to own land within its borders.)

(1913) 232 U S 78 (88) : 58 Law Ed 515 (518), *Lapina* v. *Williams.* (The authority of Congress is plenary—It may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country.)

(1913) 232 U S 138 (145, 146) : 58 Law 539 (544), *Patsone* v. *Pennsylvania.* (Prohibiting of killing of wild animals by foreigners held legal.)

[3] (1915) 239 U S 33 (43) : 60 Law Ed 131 (136), *Truax* v. *Raich.* (Law discriminating against aliens by providing that more than 80 per cent. of persons employed in any establishment employing more than five persons must be natives held invalid.)

Article 14 — Note 14

[1] (1926) 272 U S 494 (515, 516): 71 Law Ed 372 (382), *Hanover Fire Insurance Co.* v. *Carr.*

(1909) 216 U S 400 (418) : 54 Law Ed 536 (542), *Southern R. Co.* v. *Greene.*

[2] (1934) 294 U S 580 (583) : 79 Law Ed 1070 (1072), *Metropolitan Casualty Ins. Co.* v. *Brownell.* (Discrimination between foreign and domestic corporations—Test

foreign corporations entirely from their territory. They may restrict the business of a foreign corporation or foreign corporations to particular localities. The State may also require such conditions, as it may choose to impose, for the admission within its limits of foreign corporations.[3] The inequality between a foreign corporation and a domestic corporation with respect to securing business within the State does not offend the rule of equality before the law.[4] For instance, a State constitutionally may impose on a foreign corporation for the privilege of doing business within its borders more onerous conditions than it imposes on domestic corporations and may exact from foreign corporations a tax or a rate of tax not imposed on domestic corporations.[5] But the State's power of making a distinction between foreign and domestic companies is subject to the overriding principle that the distinction must have a rational basis and must have a bearing upon the subject dealt with by the legislation.[6] Thus, it has been held that a law, which permits a foreign corporation to be sued in any district in the State, irrespective of the question whether it is actually doing business there or not or whether it has any representative in that district or not, while domestic corporations can only be sued in a district where they are formed, or do business, or have a representative, is a violation of the equal protection clause.[7]

15. Territorial discriminations. — The State is entitled to classify according to objects or *territories* when such classification is based upon a rational ground which is relevant to the matter in question.[1] Apart from this, it has been held by the Supreme Court

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of validity of legislation is whether there are any differences between them which are pertinent to the subject with respect to which the classification is made and if these differences have any rational relationship to the legislative command.)

(1868) 19 Law Ed 357 (360) : 8 Wall 168, *Paul* v. *Virginia*. (A law of a State requiring insurance companies of other States to file security before they can issue policies in the State is constitutional.)

3. (1883) 31 Law Ed 650 (654) : 125 U S 181, *Pembina Con. Silver Mining etc. Co.* v. *Pennsylvania*.

4. (1926) 272 U S 494 (511):71 Law Ed 372 (380), *Hanover Fire Ins. Co.* v. *Carr*.

5. (1945) 325 US 673 (677):89 Law Ed 1861 (1864), *Lincoln National Life Insurance Co.* v. *Read*.

6. (1927) 274 U S 490 (494) : 71 Law Ed 1165 (1168), *Power Manufacturing Co.* v. *Saunders*.

7. (1927) 274 U S 490 (494) : 71 Law Ed 1165 (1168), *Power Manufacturing Co.* v. *Saunders*.

Article 14 — Note 15

1. 1953 S C 10 (16) (Pr 22) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh*. (As classification can be made on geographical basis, the fact that Abducted Persons Recovery and Restoration Act (65 of 1949) was extended only to certain specified States does not make it invalid under Art. 14. The consent of the several States to the passing of the Act indicates that the Muslim abducted persons in those States form one class having similar interest to protect. Therefore, the inclusion of all of them in the definition of abducted persons cannot be called discriminatory.)

1953 Bom 170 (173) (Pr 7) [AIR V 40 C 52] : I L R (1953) Bom 200, *Rampratap* v. *Dominion of India*. (The State is not compelled to extend application of particular law to all territories within the jurisdiction of the State.)

of the United States that the equal protection clause contemplates persons and classes of persons, that it has no reference to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons *within* places or municipalities for which such regulations are made.[2] Hence, the equal protection clause does not prevent a State from arranging and parcelling out the jurisdiction of its several Courts at its discretion. The equal protection clause is not violated by any diversity in the jurisdictions of the several Courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes and to regulate their local justice. It may establish one system of Courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion.[3] Thus, it was held in one case that where a right of appeal to the Supreme Court of the State was provided in cases arising in certain districts, while in cases arising in certain other districts a right of appeal only to another Court was provided, the equal protection clause was not violated.[4]

The above principles are applicable in the construction of this article. The words "within the territory of India" at the end of the article do not mean that there must be one uniform rule throughout all the territories comprised within the Union. A law which applies only to one State and not to the others cannot be attacked under this article on that ground.[5] The mere fact tha a different procedural law has been laid down for a particular Court or for the Court in a particular town does not make the law void as infringing the equal protection clause.[6]

But even classification on a territorial basis must be reasonable having regard to the object of the legislation.

Where the difference in the law applicable to one part of a State is not due to anything in the law itself, but due to extraneous causes, the question arises whether there would be an infringement of this

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1953 Hyd 157 (Pr 7) [AIR V 40 C 68] : I L R (1953) Hyd 147 (DB), *Md. Habibuddin* v. *Govt. of Hyderabad.* (Administration of Evacuee Property Act (1950) is not bad—It is based on valid classification—Territorial classification also has been recognised as good ground of classification.)

[2] (1879) 25 Law Ed 989 (992) : 101 U S 22, *Bowman* v. *Lewis.*

[3] (1879) 25 Law Ed 989 (992) : 101 U S 22, *Bowman* v. *Lewis.*

[4] (1879) 25 Law Ed 989 (992) : 101 U S 22, *Bowman* v. *Lewis.*

[5] 1951 All 746 (Pr 78) [AIR V 38 C 194]: I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.* (The Administration of Evacuee Property Act cannot be held to infringe Art. 14 on the ground that it applies to certain States and not to others.)

1953 Pat 259 (264) (Pr 10) [AIR V 40 C 92] : ILR 31 Pat 963 (DB), *Jugal Prasad* v. *Bhadai Das.*

[6] (1914) 234 U S 91 (98, 99) : 58 Law Ed 1231 (1235), *Ocampo* v. *United States.* (Equal protection clause does not require territorial uniformity.)

(1879) 101 U S 22 (30) : 25 Law Ed 989 (992), *Bowman* v. *Lewis.*

article. In *Ramjilal* v. *Income-tax Officer*,[7] the question was about the applicability of different rates of income-tax to different parts of the Patiala and East Punjab States Union. The question arose in this way. There was no Income-tax Act in the Nabha State prior to its inclusion in the above Union. But there was such an Act in force in the Kapurthala State. At the formation of the Union (Pepsu), there was a provision made that assessees whose cases were *pending* at that date, should be assessed at the old rates that were applicable to them according to the Acts in force previously in their respective States. As a result of this provision, the people of Nabha became subject to a higher rate of income-tax under the Patiala Act which was applied to the whole of the Union, than was applicable to the assessees of Kapurthala whose cases were pending at the time of the Union. The question was raised whether there was an infringement of this article involved in this position. Their Lordships of the Supreme Court pointed out that the discrimination, if any, was not brought about by the law which exempted pending cases but by the circumstance that there was no Income-tax Act in Nabha previous to the formation of the Union and that, therefore, there was no pending case against any Nabha assessee at the date of the formation of the Union. But their Lordships held that in any case, the provision that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced, was a reasonable law founded upon a reasonable classification of the assessees, which is permissible under the equal protection clause.

The observations in the above case suggest that where different territorial units having different laws are combined in one State, but the laws previously applying in the respective component territories continue to apply in such territories, there is no infringement of the principle of equality. But the case has been distinguished in the undermentioned decisions[8] which proceed on the view that even in such a case there would be an infringement of the principle of equality.

16. "Within the territory of India." — For the meaning of "territory of India", see Art. 1 and notes thereon.

The words "within the territory of India" do not mean that there must be one uniform rule throughout all the territories comprised within the Union. See Note 15.

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[7] 1951 S C 97 (Pr 9) [AIR V 38 C 11] : 1951 S C R 127 (SC).

[8] 1953 Raj 22 (Prs 20, 40) [AIR V 40 C 8]: ILR (1951) 1 Raj 888 (DB), *Manohar Singh* v. *State of Rajasthan*. (Inequality prior to the coming into force of the Constitution will not affect the validity of the concerned law for the period before the Constitution but the law will cease to be valid on the coming into force of the Constitution : AIR 1951 S C 97, Disting.)

1953 Sau 58 (62) (Pr 6) [AIR V 40 C 25] (DB), *Desai Nagardas* v. *Jagsi*. (Bhavnagar Khedut Sanrakshan Dhara—Discrimination was not in the Act itself but it arose on the integration of the Bhavnagar State and other States into the State of Saurashtra in March 1948, because most of the other States did not have a similar law.)

Article 14
Note 17

17. Taxation laws. — The principle of equality before the law with its attendant limitations applies to taxation laws also.[1] This means that where there is no ground for a rational distinction between two individuals or companies, etc., the imposition of unequal taxes will not be justifiable. If there is such a ground of distinction, the imposition of unequal taxes will not offend the equal protection clause.[2] In taxation even more than in other fields Legislatures possess the greatest freedom in classification.[3]

In *Bell's Gap Railroad Co.* v. *Commonwealth of Pennsylvania*,[4] Mr. Justice Bradley of the Supreme Court of the United States, who delivered the opinion of the Court, observed as follows :

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection

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Article 14 — Note 17

[1] 1953 Mad 105 (Prs 22, 26) [AIR V 40 C 35]: 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.*

[2] 1953 Mad 105 (114) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.*

(1945) 326 U S 620 (623): 90 Law Ed 358 (363), *Hillsborough Township* v. *Cromwell.* (Equal protection clause protects individual from State action which selects him for discriminatory treatment by subjecting him to taxes not imposed on others.)

(1945) 324 U S 182 (190) : 89 Law Ed 857 (863), *Charleston Fed-Sav. & L. Asso.* v. *Alderson.* (The equal protection clause of the Fourteenth Amendment applies only to taxation which in fact bears unequally on persons and property of the *same class* and mere differences in methods of assessment do not deny equal protection unless they are shown to produce such inequality.)

(1940) 309 U S 157 (162) : 84 Law Ed 670 (675), *Illinois Central R. Co.* v. *Minnesota.* (Tax on Railroads of certain classes upheld.)

(1938) 303 U S 573 (581) : 82 Law Ed 1024 (1031), *New York Rapid Transit Corporation* v. *New York.* (Administrative convenience may justify a classification for purpose of taxation.)

(1930) 282 U S 19 (24): 75 Law Ed 140 (143), *Klein* v. *Board of Tax Supervisors.*

(1921) 256 U S 658 (660) : 65 Law Ed 1151 (1156), *Kansas City S. R. Co.* v. *Road Improvement Dist. No. 6.* (Reasonable classification for taxation purposes is valid —But where the taxation law produces an arbitrary discrimination it is invalid.)

(1920) 254 U S 122 (124, 125): 65 Law Ed 170 (175), *Watson* v. *State Comptroller.* (Imposition of additional transfer tax upon certain bonds and other obligations held by a resident at his death upon which neither the general property tax nor an optional stamp tax had been paid for a fixed period, held did not deny equal protection of laws.)

(1895) 159 U S 526 (539) : 40 Law Ed 247 (252), *Winona & St. Peter Land Co.* v. *Minnesota.* (The difference to the mode of assessment of property which has escaped taxation in prior years from the general mode of assessment of property under the Minnesota statutes, does not deprive the property owner of any constitutional right.)

(1890) 134 U S 232 (237) : 33 Law Ed 892 (895), *Bell's Gap Railroad Co.* v. *Commonwealth of Pennsylvania.*

[3] 1953 Mad 105 (Pr 26) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.* (With reference to taxing statute, Legislature has considerable latitude in making classifications. It can select persons or things as it chooses for purpose of taxation.)

(1940) 84 Law Ed 590 (593) : 309 U S 83, *Madden* v. *Kentucky.*

[4] (1890) 134 U S 232 (237) : 33 Law Ed 892 (895).

[*See also* (1940) 310 U S 362 (368, 369) : 84 Law Ed 1254 (1257, 1258), *Nashville, C. & St. L. Railway* v. *Browning.* (Law laid down in similar terms.)

Article 14
Note 17

of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products, it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes especially such as are of an unusual character, unknown to the practice of our Governments might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt."

It has also been seen in NOTE 14 that foreign corporations may be required to pay certain taxes which domestic corporations are not required to pay. Apart from the distinction between foreign and domestic corporations, it is well established that a very wide discretion must be conceded to the Legislature in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax.[5] So also, carriers or other utilities with the right of eminent domain, the use of public property, special franchises, or public contracts may constitutionally be treated as a separate class for purposes of taxation. The freedom from unlimited, direct and private competition is of itself a sufficient advantage over ordinary businesses to warrant the imposition

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(1931) 283 U S 527 (537) : 75 Law Ed 1248 (1256), ***State Board of Tax Commissioners* v. *Jackson.*** **(Law is laid down in similar terms.)]**

[5] **(1931) 283 U S 527 (537, 538) : 75 Law Ed 1248 (1256),** ***State Board of Tax Commissioners* v. *Jackson.*** **(Classification in imposing *occupation* taxes will be upheld if there are substantial differences between the occupations separately classified and such differences need not be great. Court will not consider propriety or justness of occupation tax or seek for motives or criticise the public policy which prompted its imposition.)**

of a heavier tax-burden.[6] Similarly, an occupation tax upon the operation of a mercantile establishment, graduated according to the number of stores owned, is not bad, although it may so happen that the actual turnover of a person, owning a single store, exceeds the turnover of another who owns several stores and therefore becomes liable for a greater amount than the person who makes more profit, although owning only a single store.[7] This also shows that an occupation tax is not bad merely because it is unrelated to total earnings.[8] Similarly it has been held that assessing certain classes of property at full value while undervaluing other property for purposes of taxation does not necessarily offend the equal protection clause.[9]

The principle of equality before the law was held not to have been violated in the undermentioned Indian case.[10] As instances where inequality of taxation was held to have violated the equal protection clause, see the undermentioned cases.[11]

As to imposition of license fee, see under NOTE 38.

Sales Tax

The fixing of a minimum taxable turnover for purpose of sales tax is a reasonable classification and is not open to question under this article. The reason is that each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worthwhile to impose the tax.[12]

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6. (1938) 303 U S 573 (579, 580) : 82 Law Ed 1024 (1030, 1031), *New York Rapid Transit Corporation* v. *New York.*

7. (1931) 283 U S 527 (535) : 75 Law Ed 1248 (1255), *State Board of Tax Commissioners* v. *Jackson.*

8. (1931) 283 U S 527 (536) : 75 Law Ed 1248 (1255), *State Board of Tax Commissioners* v. *Jackson.*

9. (1940) 310 U S 362 (366) : 84 Law Ed 1254 (1256), *Nashville, C. & St. L. Railway* v. *Browning.* (Assessing railroad property at full value while undervaluing other property does not offend equal protection clause.)

(1890) 134 U S 232 (237) : 33 Law Ed 892, *Bell's Gap Railroad Co.* v. *Commonwealth of Pennsylvania.* (Assessment of tax of three mills upon the nominal or face value of corporate securities instead of assessing upon the actual value is not a discrimination which the State is not competent to make where all corporate securities are subject to the same regulation.)

[*See also* (1918) 62 Law Ed 1154 (1156) : 247 U S 350, *Sunday Lake Iron Co.* v. *Wakefield.*]

10. 1952 Pat 359 (360) (Pr 16) [AIR V 39] : ILR 31 Pat 493 (SB), *Atma Ram* v. *State of Bihar.* (Tax of two annas in the rupee paid as fare or freight by all passengers by bus and provision that bus owners must collect the tax and pay held valid.)

11. (1931) 284 U S 23 (25) : 76 Law Ed 146 (148), *Cumberland Coal Co.* v. *Board of Revision.* (Taxes—Discrimination—Deliberate and systematic assessment for taxation of all the coal lands in a township at the same sum per acre, notwithstanding differences in actual or market-value due to distances from transportation facilities and other factors, violates equal protection clause, although none of such lands are assessed for more than their fair market-value.)

(1907) 207 U S 20 (37) : 52 Law Ed 78 (88), *Raymond* v. *Chicago Union T. Co.* (Taxation — Assessing property of certain corporations at different rate and by different method from that employed for other corporations of the *same class* for same year, resulting in enormous disparity, was held to be bad.)

12. 1953 S C 252 (263) (Pr 29) [AIR V 40 C 62] (SC), *State of Bombay* v. *United Motors (India) Ltd.* (Reversing ('53) 55 Bom L R 246.)

If it is competent to the Legislature to select some commodities and impose a tax on them, such imposition is not open to attack on the ground that it is not imposed on all commodities.[13] A law imposing a tax only on the sale of hides and skins and making the purchaser liable therefor cannot be challenged under this article on the ground that purchasers of other commodities were not also taxed.[14]

Applying the principles relating to the proper scope and meaning of the equality clause in connection with taxing statutes, the Madras General Sales Tax Act (9 of 1939), and the Rules which impose sales-tax in some cases on the purchaser, while levying it on the seller in other cases, cannot be held to offend against this article.[15] The classification of merchants for the purpose of sales-tax under the Madras Turnover and Assessment Rules, 1939, into those who take out licenses and those who do not, has been held to be one resting on a rational basis and not to be repugnant to this article.[16]

Income-tax

There is no violation of the principle of equality before the law in treating more generously lower income groups for purpose of income-tax.[17] The Income-tax Officer is not bound to disclose materials on which he makes the final assessment, and the assessment proceedings cannot be attacked on the ground that the provision that the Income-tax Officer is not bound to disclose materials on which he makes assessment, is inconsistent with this article.[18] The contention that the independence of Income-tax Officers is affected by the provisions of S. 5 (8), Income-tax Act, 1922, under which Income-tax Officers are bound to follow the directions of the Central Board of Revenue does not raise any question under this article.[19] Where there is a change in the law of income-tax, the provision that pending assessment proceedings should be concluded according to the law applicable at the time when the rights and liabilities accrue and the proceedings commence, is a reasonable law founded upon reasonable classification of assessees which is permissible under the equal protection clause.[20] See also the undermentioned case.[21]✓

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[13] 1953 Mad 105 (114) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.*

[14] 1953 Mad 105 (114) (Pr 28) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.* (If among purchasers of hides and skins a differentiation was made without a rational basis therefor, different considerations would arise.)

[15] 1953 Mad 105 (Pr 29) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.*

[16] 1953 Mad 105 (Pr 35) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.*

[17] 1953 Cal 548 (559) [AIR V 40 C 205], *Atulya Kumar* v. *Director of Procurement & Supply.*

[18] 1953 Mad 716 (717) [AIR V 40 C 275] (DB), *In re K. A. Meera Sahib Tharaganar & Bros.*

[19] 1953 Mad 716 (717) (Pr 3) [AIR V 40 C 275] (DB), *In re K. A. Meera Sahib Tharaganar & Bros.* (There is nothing in S. 5 (8) of the Income-tax Act which is inconsistent with the rights guaranteed under Art. 14 of the Constitution. Section 5 (8) does not contemplate orders, instructions and directions from the Central Board of Revenue to the assessing officer in any particular case. What is contemplated is the issue of general orders, instructions and directions to guide the subordinate officers in the execution of the duties laid on them by the several provisions of the Act. The issue of directions by the Central Board of Revenue which is the chief income-tax authority under the Act is not in the nature of outside or executive pressure or interference.)

18. Racial laws. — In *Plessy* v. *Ferguson*[1] it was held by the Supreme Court of America that a law which required the separation of white and coloured races in public conveyances was a reasonable exercise of the Police Power of the State and that such a statute did not deprive a coloured person of any rights under the Fourteenth Amendment. But the trend of subsequent and recent decisions in the United States is definitely against encouragement of any discrimination by the State on grounds of race and colour. Thus, in *Shelley* v. *Kraemer*[2] it was held that a State statute or local ordinance, imposing restrictions based on colour or race on the right to acquire or occupy property, offends the equal protection clause of the Fourteenth Amendment. Discrimination imposed by State Courts in denying the equal protection of property rights to a designated class of citizens of a specified race and ancestry cannot be justified as proper exertion of State power.[3] Hence, the judicial enforcement by State Courts of covenants restricting the use or occupancy of real property to persons of Caucasian races was held to violate the equal protection clause.[4] Similarly, the systematic exclusion of Negroes as such from grand and petit juries, whether by statute or by administrative practice, is bad.[5] So also, it has been held that a State which excludes Negroes from a State-maintained law school open to white students, offends against the equal protection clause of the Fourteenth Amendment.[6]

In *Henderson* v. *United States*[7] it was held, in direct contradiction to *Plessy* v. *Ferguson* referred to above, that a railway regulation for provision of separate accommodation for Negroes and Whites in dining cars is a violation of the Inter-State Commerce Act. In *McLaurin* v. *Oklahoma S. Regents*[8] it was held that the equal protection clause of the Fourteenth Amendment is violated where a State, after admitting a Negro student to graduate instruction in its State University, affords him, solely because of his race, different treatment from other students, as by requiring him to occupy a seat in a row in the class-room specified for coloured students or at a designated table in the library or at a special table in the cafeteria. In *Sweatt* v. *Painter*[9] the facts were that a Negro was refused admission to the University of Texas Law School on the ground that substantially equivalent facilities were offered by a Texas Law School open only to Negroes. It was held by the Supreme Court without affirming or disaffirming the decision in *Plessy* v. *Ferguson*,[10] above referred to, that the Negro was entitled to admission as the other school did not afford equal facilities. In considering whether equal facilities were offered by the two schools, the Supreme Court included also prestige, facilities for contacts with professors, etc., as tests of the equality of facilities.

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[20] 1951 S C 97 (Pr 9) [AIR V 38 C 11] : 1951 S C R 127 (S C), *Ramjilal* v. *I. T. Officer*.

[21] 1951 Bom 438 (Pr 5) [AIR V 38 C 99] : I L R (1952) Bom 590 (DB), *Jamnadas* v. *I. T. Commr*. (The Income-tax (Amendment) Act (71 of 1951), does not offend the Constitution and is not void on that ground. It is no doubt true that a discrimination has been made under S. 3 of that Act in favour of a particular assessee who has obtained judgment from the Supreme Court before 7-10-1950, but it cannot be said that the exception made in favour of such assessee is not justified on a reasonable basis.)

Article 14 — Note 18

[1] (1896) 163 U S 537 (550) : 41 Law Edn 256 (260).

[2] (1948) 334 U S 1 (12) : 92 Law Ed 1161 (1180).

[3] (1948) 334 U S 1 (21) : 92 Law Ed 1161 (1185), *Shelley* v. *Kraemer*.

[4] (1948) 334 U S 1 (8) : 92 Law Ed 1161 (1178), *Shelley* v. *Kraemer*.

[5] (1948) 332 U S 463 (465) : 92 Law Ed 76 (78), *Patton* v. *Mississippi*.

[6] (1938) 305 U S 337 (342, 343) : 83 Law Ed 208 (209, 210), *Missouri Ex Rel. Gaines* v. *Canada*.

[7] (1950) 339 U S 816 (818) : 94 Law Ed 1302 (1307). (A Negro passenger on an inter-state train was denied dining service, although at least one seat at the tables reserved for Negroes was unoccupied, the other seats at these tables being taken by White passengers—After the incident the railroad modified its regula-

19. Who can raise objection as to unconstitutionality. — Articles 32 and 226 provide for remedies for the infringement of Fundamental Rights, including the right of equality before the law under this article. The question as to who can move for the remedies provided by the Constitution in case of unconstitutionality of any law is discussed under those articles. But it may be noted here that no one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law.[1]

This principle has been very clearly stated by Hughes, J., in *McCabe* v. *Atchison T. & S. F. R. Co.*[1a] in these words :

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tions—The new regulations provided for the reservation of ten tables, exclusively and unconditionally, for White passengers, and of one table in the same way for Negroes, and called for a curtain or partition between that table and the others —The Supreme Court unanimously, in an opinion given by Burton J., held that the Negro passenger had a standing to challenge the new regulations and that they violated S. 3 (1) of the Inter-State Commerce Act, which makes it unlawful for a railroad in inter-state commerce to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.)

[8] (1950) 339 U S 637 (642) : 94 Law Ed 1149 (1154).

[9] (1950) 339 U S 629 (636) : 94 Law Ed 1114 (1120).

[10] (1896) 163 U S 537 (550) : 41 Law Ed 256 (260).

Article 14 — Note 19

[1] 1953 S C 384 (385) [A I R V 40 C 86] (SC), *Nain Sukh Das* v. *U. P. State.*

1952 S C 75 (Pr 46) [A I R V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali.*

1951 S C 41 (Prs 7, 43, 63) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

[1a] (1914) 235 U S 151 (162) : 59 Law Ed 169 (174).

Article 14
Notes 19–20

> "It is an elementary principle that in order to justify the granting of this extraordinary relief, the complainant's need of it and the absence of an adequate remedy at law must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial interference."

In *Charanjitlal* v. *Union of India*,[2] the facts were that an Act was passed providing for the business and management of a company, (which was said to be mismanaged) being taken over by the Government through directors appointed by itself, and the validity of this Act was challenged before the Courts *inter alia* on the ground of its violating the equal protection clause in this article and the question was raised whether a shareholder of the company can take objection to the Act on the ground of its unconstitutionality. It was held that as in law a company and its shareholders are distinct entities, a shareholder was not entitled to raise the objection of unconstitutionality with regard to ART. 19 on the ground that property belonging to the *company* was taken possession of by the Government without compensation, but it was open to a shareholder of the company to take objection under this article on the ground of the violation of the principle of equality before the law, inasmuch as his complaint was that, apart from the discrimination made against the company, the impugned legislation had discriminated against him and the other shareholders of the company as a group vis-a-vis the shareholders of all other companies governed by the Indian Companies Act, who had not been treated in a similar way. The fact that there were other shareholders of the *same* company who had been similarly treated is immaterial and does not affect the right of an individual shareholder to agitate the question. Although a person whose interests are not affected cannot complain about the infringement of this article by a piece of legislation, yet, if his rights *are* affected, it is not necessary for him to show that the Legislature was actuated by hostile intention against a particular person or class.[3]

20. Foreign States and Princes and their properties. — The relations between one sovereign State and another sovereign State are not governed by municipal law but are regulated by international law and treaty arrangements. Hence, when this article speaks of the State not denying to any person equality before the law or the equal protection of the laws, it has not in contemplation the rights of foreign sovereigns who may be residing in the country or who may have properties in the country and also the rights of their diplomatic representatives. Hence, the special privileges and immunities enjoyed by foreign sovereigns do not offend the doctrine of equality before the law laid down in this article. The undermentioned[1] are some important decisions bearing upon the subject of foreign sovereigns and ambassadors and their special privileges and immunities.

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[2] 1951 S C 41 (Prs 7, 63) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC).

[3] 1952 S C 75 (Pr 46) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali*.

21. Personal law, inequality in matters relating to. — Legislation affecting the personal law of one community, such as the Hindus, alone, cannot be attacked as an infringement of this article on the ground that it leaves alone the personal law of another community. Thus, the Bombay Prevention of Hindu Bigamous Marriages

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Article 14 — Note 20

[1] (1894) 1 Q B D 149 (159, 160): 70 L T 64, *Mighell* v. *Sultan of Johore.* (Courts have no jurisdiction over an independent foreign sovereign, unless he submits to the jurisdiction — Such submission cannot take place until the jurisdiction is invoked — Therefore, the fact that a foreign sovereign has been residing in this country, and has entered into a contract here, under an assumed name, as if a private individual, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of such contract — A certificate from the Foreign or Colonial Office, as the case may be, is conclusive as to the status of such a sovereign.)

(1918) 1 Ch 176 (193) : 87 L J Ch 173, *In re Suarez.* (An ambassador or public minister can, with the consent of his Government, effectually waive his privilege.)

(1912) 1912 Prob 92 (96) : 105 Law Tim 991, *Statham* v. *Statham.* (A foreign ruling prince is not capable of being made a co-respondent in a suit for divorce in the High Court of justice in England.)

(1898) 1 Ch D 190 (195) : 77 Law Tim 555, *South African Republic* v. *La Compagnie Franco-Belge Du Chemin De Fer Du Nord.* (A foreign sovereign suing in the Courts of a country submits to the jurisdiction to the extent only that (1) he must give discovery ; (2) cross proceedings in mitigation of the relief claimed by him can be taken against him.)

(1880) 5 P D 197 (214, 215, 217) : 42 Law Tim 273, *The Parliament Belge.* (As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory — *Held*, therefore, that an unarmed packet belonging to the sovereign of a foreign State, and in the hands of officers commissioned by him, and employed in carrying mails is not liable to be seized in a suit *in rem* to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandize and passengers for hire.)

(1859) 2 El & El 94 (111) : 121 E R 37 (43) *Magdalena Steam Navigation Company* v. *Martin.* (The public minister of a foreign State, accredited to and received by the sovereign of England, having no real property in England and having done nothing to disentitle him to the general privileges of such public minister, cannot, while he remains such public minister, be sued against his will in England, in a civil action, although such action may arise out of commercial transactions by him here, and although neither his person nor his goods be touched by the suit.)

(1851) 17 Q B D 171 (207) : 117 E R 1246 (1259), *Wadsworth* v. *The Queen of Spain.* (Property in England belonging to a foreign sovereign prince in his public capacity cannot be seized under process in a suit instituted against him.)

Act (25 of 1946),[1] and the Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949),[2] are not void on the ground that they prohibit bigamy or polygamy among Hindus and thereby modify the personal law of the Hindus, while the Muslim law allowing Muslim men to marry four wives is left intact. The principle, as has been seen in NOTE 1, is that the State is not bound to make its legislation all embracive and social reform may be brought about by stages, and the stages may be territorial or according to the communities.[3]

In such cases there is also no discrimination against Hindus on ground *only of religion* so as to vitiate the legislation under ART. 15 or ART. 25.[4] The applicability of personal law to Muhammadans and Hindus is not based solely on *religion*.[4a]

The Bombay Act referred to above has also been held not open to attack under this article on the ground that it deals with Hindus, contracting a bigamous marriage, more severely than with members of other communities in whose case also bigamy may be prohibited by law. The more severe law adopted with reference to the Hindus in this matter by the Legislature is called for and justified by the special circumstances connected with Hindu manners and customs.[5]

The Bombay High Court has also held that the term "law" in ART. 13 (1) does not include personal laws of Hindus and Muhammadans and therefore the test of conformity with Fundamental Rights is not applicable to such law, and hence where the personal law is not altered by legislative enactment as, for instance, by the two Acts above referred to, it will continue to be operative after the coming into force of the Constitution in the same manner as before. Hence, the validity of Muslim law allowing Muslim men to marry four wives is not affected by ART. 15 (1) on the ground that Muslim women are not allowed to marry more than one husband and as such are discriminated against under the Muslim law on the ground of sex.[6]

Article 14 — Note 21

[1] 1952 Bom 84 (87) (Pr 10) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.

[2] 1952 Mad 193 (196) (Pr 5) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434, *Srinivasa Aiyar* v. *Saraswathi Ammal*.

[3] 1952 Bom 84 (87, 95) (Prs 10, 30) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.

[4] 1952 Bom 84 (89) (Pr 14) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.
1952 Mad 193 (195) (Pr 3) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434, *Srinivasa Aiyar* v. *Saraswathi Ammal*.

[4a] 1952 Bom 84 (89) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.
1952 Mad 193 (195) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434, *Srinivasa Aiyar* v. *Saraswathi Ammal*.

[5] 1952 Bom 84 (88) (Pr 11) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.

[6] 1952 Bom 84 (88) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.
[*See* 1952 Mad 193 (195, 196) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434, *Srinivasa Aiyar* v. *Saraswathi Ammal*. (The question whether

22. Hindu religious and charitable endowments. — The classification of institutions and endowments based on religion as Hindu, Muhammadan and Christian cannot be said to be either arbitrary or unreasonable having regard to the object sought to be attained by the Madras Hindu Religious and Charitable Endowments Act (19 of 1951), namely, the better administration and management of such institutions.[1] As seen in NOTE 1 and NOTE 21, the Legislature is not bound to include in the same piece of legislation passed for the purpose of social reform, the entire field that is in need of reform, but may select particular subjects for legislative attention.

23. Classification on religious basis. — See NOTES 21 and 22.

24. Principle of equal protection of laws as affected by cost of litigation. — It is obvious that the doctrine of equality before the law will be reduced to an empty farce if justice is not within the equal reach of all aggrieved persons and if, either on account of the costliness of judicial processes or of the complicated nature of legal procedure, the aid of the State in vindicating the justice of a cause is actually available only to a minority who are able to pay heavily for it. But, unfortunately, it is true that the cost of litigation is prohibitive to the vast majority of people and to that extent the ideal of equality before the law undoubtedly suffers a continuous blow. In modern countries there is a trend, however, for getting over the difficulties created by this state of affairs. For instance, in England there has been passed recently an Act known as Legal Aid and Advice Act, 1949, (12, 13 and 14 Geo. VI, Ch. 51). There is also a movement in India for similar steps being taken. In the meanwhile, it may be noted that there are provisions in the Criminal Procedure Code for giving free legal aid to poor accused who are charged with offences punishable with death. See also the provisions of the Civil Procedure Code as to suits and appeals in *forma pauperis* (O. 33 and O. 44).

General principles

25. Special Courts and special procedure. — Rules of procedure laid down by law come within ARTICLE 14 quite as much as substantive law and it is necessary that all litigants who are similarly situated are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.[1] In other words, the article condemns discrimination

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expression "all laws in force" in Art. 13 (1) includes personal law was left undecided — But the observations imply that as there were fundamental differences between Hindu Law and Mahomedan Law, there would be infringement of equality clause if personal law was held included. It is submitted that this may not be necessary. The application of the personal law of different communities may be treated as "reasonable classification" for the purpose of this article.)]

Article 14 — Note 22

[1] 1952 Mad 613 (622, 633) (Pr 29) [AIR V 39], *Lakshmindra Theertha Swamiar v. Commr., H. R. E., Madras.*

Article 14 — Note 25

[1] 1952 S C 123 (126) (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning v. State of Saurashtra.*

not only by substantive law but also by the law of procedure, and provisions introducing departures from the ordinary law of procedure to the prejudice of the accused constitute discrimination against the persons tried.[2] But at the same time, the principle of classification is equally applicable to procedural law as well as to substantive law, and it is competent to the State to make different provisions as to procedure and tribunals to suit different types of cases.[3] In *Kathi Raning* v. *State of Saurashtra*,[4] Patanjali Sastri, C. J., observed as follows:

> "The power of the State to regulate criminal trials by constituting different courts with different procedures according to the needs of different parts of its territory is an essential part of its Police Power (cf. *Bowman* v. *Lewis*)[4a]. Though the differing procedures might involve disparity in the treatment of the persons tried under them, such disparity is not by itself sufficient, in my opinion, to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands as, for instance, when it amounts to a denial of a fair and impartial trial. It is, therefore, not correct to say that ARTICLE 14 provides no further constitutional protection to personal liberty than what is afforded by ART. 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification, ARTICLE 14 remains an important bulwark against discriminatory procedural laws."

Hence, the establishment of special courts or the laying down of

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1952 S C 75 (Pr 45) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali.*

1953 Hyd 105 (108) (Pr 6) [AIR V 40 C 40] : I L R (1953) Hyd 1 (FB), *Tahira Begum* v. *Hyderabad State.*

1953 Hyd 33 (52) (Pr 56) [AIR V 40 C 20] : I L R (1952) Hyd 877 : 1953 Cri L Jour 454 (FB), *Mohd. Hydar* v. *Hyderabad State.*

[2] 1952 S C 235 (242) [AIR V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay.*

[3] 1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

1952 S C 221 (Pr 8) [AIR V 39] : 1952 S C R 737 : 1952 Cri L Jour 1147 (SC), *Gurbachan Singh* v. *State of Bombay.* (City of Bombay Police Act, S. 27 (1)—Difference of procedure from that under ordinary law is based on reasonable classification.)

1951 Mys 72 (Pr 35) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (Equal protection of law affords no guarantee as to a particular form of procedure, or the usual form of evidence, or the right of appeal so long as there is equal protection in the treatment of all persons equally circumstanced)

('51) 4 Sau L R 234 (236, 237) (DB), *Rana Kanubha Sensabhai* v. *State.* (No person has a vested right in any particular procedure. It is for the State to legislate about the forum and procedure of seeking remedies for infringement of substantial rights and such forum and procedure are bound to vary.)

[4] 1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC)

[4a] (1880) 101 U S 22 : 25 Law Ed 989.

special procedure for dealing with special cases is not *per se* an infringement of this article.[5]

Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory or violative of this article must be determined in each case as it arises, and no general rule applicable to all cases can safely be laid down.[6] The test to see whether the provision that certain offences should be tried by a special Court and according to a special procedure is valid, is whether having regard to the purpose and policy of the Act as disclosed by its title, preamble and provisions, the classification of the offences for the trial of which the special Court is set up and the special procedure is laid down can be said to be arbitrary and unreasonable.[7] If, for example, an Act makes certain offences triable by special Courts not according to the nature of the offences but according to the race, creed, religion, etc., of the accused person, the Act would be an infringement of this article.[8] In this connection, reference may be made to the special provisions in the Code of Criminal Procedure as to the trial of European accused that were formerly in existence, but have, since the advent of independence, been repealed. Provisions like these would be an infringement of this article.

As pointed out by Patanjali Sastri, C. J., in the passage quoted above, any deviation in the normal procedure must not curtail essen-

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5. 1953 S C 287 (Pr 5) [AIR V 40 C 67] : I L R (1953) Hyd 345 : 1953 Cri L Jour 1158 (SC), *Habeeb Mohamed* v. *State of Hyderabad*. (It is not possible to say that the appointment of a special Judge was in itself an inequality in the eye of the law.)

1953 S C 156 (162) (Pr 21) [AIR V 40 C 41] : I L R (1953) Hyd 211 : 1953 Cri L Jour 862 (SC), *Qasim Razvi* v. *State of Hyderabad*.

1951 All 746 (Prs 69, 70) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram*. (Administration of Evacuee Property Act laying down a special procedure and constituting special court for declaring any property as evacuee property — Procedure of summary nature — This does not offend Art. 14.)

1953 Hyd 145 (Pr 14) [AIR V 40 C 64] : I L R (1951) Hyd 895 : 1953 Cri L Jour 785, *Abdul Munim Khan* v. *State of Hyderabad*.

1953 Nag 14 (16) (Pr 7) [AIR V 40 C 8] : ILR (1953) Nag 936 : 1953 Cri L Jour 251 (DB), *Shrikisan* v. *Dattu*. (Constitution of different classes of courts for trying different offences is not a violation of the equal protection clause—C. P. & Berar Panchayats Act (1 of 1947) is valid.)

[*See also* 1951 Mys 72 (Pr 40) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore*.]

6. 1953 S C 404 (Pr 10) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal*.

[*See* 1953 Mad 105 (115) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras*. (A reading of the judgments in *Anwar Ali's case* : AIR 1952 S C 75, (West Bengal Special Courts Act case) and *Kathi Raning's Case* : AIR 1952 S C 123 (Saurashtra State Public Safety Ordinance case) would show that the difference is not in regard to the *principles* applicable but to the *application* of the principles to the facts of the case)]

7. 1953 S C 404 (Pr 6) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal* (Section 4, West Bengal Criminal Law Amendment (Special Courts) Act, 21 of 1949, held valid.)

8. 1953 Nag 14 (16) (Pr 7) [AIR V 40 C 8] : I L R (1953) Nag 936 : 1953 Cri L Jour 251 (DB), *Shrikisan* v. *Dattu*.

tial safeguards, for a just trial of the accused.[9] Where in spite of deviation the accused has substantially the benefit of a normal trial, there will be no infringement of this article.[10]

Where a new law of procedure makes an exception in favour of pending proceedings, such a saving clause will not amount to an infringement of this article, as pending proceedings can very well be treated by the Legislature as a class by themselves having regard to the exigencies of the situation which such pendency calls for.[10a]

Allotment of cases for trial by special courts

In so far as an Act makes provision for the setting up of special courts and of special judges, and in so far as the Act itself selects classes of offences which can be tried by them, the Act will be valid where it is based on the principle of reasonable classification.[11] But where the Act confers on the Government or the Executive the power of allotting cases for trial by special courts, the question arises whether the entrustment of such a power to the Executive does not make the Act discriminatory on its face. On this question it is well settled that the entrustment of such power to the Executive does not *per se* make the Act discriminatory.[12] In such cases, the general principles as to reasonable classification having regard to the object of the legislation will apply as in all other cases where the legislation is impugned as discriminatory. As already observed above, whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of this article must be determined in each case as it arises and no general rule applicable to all cases can safely be laid down. The practical assessment of the operation of the law in particular circumstances is necessary.[13] Subject to this reservation, it may be stated that if the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation does not itself make a complete and precise classification of the persons or things to which it is to be applied, but leaves the selective application of the law to be made by the executive authority, in accordance with the standard indicated or the underlying policy or object disclosed, is not a sufficient ground for condemning it as arbitrary and therefore obnoxious to this article.[14] In the case of such a statute, it could make no difference in principle whether the discretion which is entrusted to the executive Government is to make a selection of individual cases or of offences, or whether it is to select classes of offences or classes of cases.[15] For, in either case, the discretion to make the selection is a guided and controlled discretion and not an absolute or unfettered one, and is equally liable to be abused. But if it be shown in any given case that the discretion has been exercised in disregard of the standard or contrary to the declared policy or object of legislation, such exercise could be challenged and annulled under this article.[16]

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[9] 1951 Hyd 11 (Pr 2) [AIR V 38 C 2] : I L R (1951) Hyd 1 : 52 Cri L Jour 1333 (FB), *Abdur Rahim* v. *J. A. Pinto.*

[10] 1953 S C 156 (163) (Pr 22) [AIR V 40 C 41] : ILR (1953) Hyd 211 : 1953 Cri L Jour 862 (SC), *Qasim Razvi* v. *State of Hyderabad.*
1953 Nag 14 (16) (Pr 9) [AIR V 40 C 8] : ILR (1953) Nag 936 : 1953 Cri L Jour 251 (DB), *Shrikisan* v. *Dattu.* (Although some offences are made triable by a new set of Courts i.e., the Village Panchayat Courts, and a different procedure is allowed to be followed by them, there is no infringement of the equality clause if the procedure of the Courts is not fundamentally inconsistent with the essential principles of judicial procedure.)

[10a] 1953 S C 394 (397) (Pr 6) [AIR V 40 C 88] : 1953 Cri L Jour 1480 (SC), *Shiv Bahadur Singh* v. *State of Vindhya Pradesh.* (There can arise no question as to such a saving provision infringing Art. 14 so long as no scope is left for any further discrimination *inter se* as between persons affected by such pending matters. Part C States (Laws) Act (30 of 1950), S. 4, Proviso 1 is valid.)

[11] 1953 S C 404 (410) (Pr 25) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*
1953 Nag 14 (16) (Pr 7) [AIR V 40 C 8] : I L R (1953) Nag 936 : 1953 Cri L Jour 251 (DB), *Shrikisan* v. *Dattu.* (Where an Act is passed making certain offences under the general law of the land triable by a new set of Courts as, for example, the C. P. and Berar Panchayats Act (1 of 1947), this does not *ipso facto* make the Act one in infringement of Art. 14, inasmuch as the discrimination is made with reference to the offences charged and the punishment prescribed therefor and not with reference to the birth, race, creed, religion etc., of the accused persons.)

[12] 1953 S C 404 (Pr 12) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*
1952 S C 123 (Pr 34) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

But where no standard is laid down and no principle or policy is disclosed in the impugned legislation to guide the exercise of the discretion by the Government or the Executive in selecting a case for reference to the special court for trial under the special procedure provided in the Act, the Act will be in contravention of this article.[17]

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[13] 1953 S C 404 (408) (Pr 10) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*

[14] 1953 S C 404 (409) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.* (Majority view.)
1952 S C 123 (Pr 34) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.* (The above is the interpretation of the majority view in this case, by Patanjali Sastri, C. J., in AIR 1953 S C 404.)
1953 Mad 105 (115) (Pr 29) [AIR V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras.*

[15] 1953 S C 404(409) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.* (AIR 1952 Cal 644, Overruled.)

[16] 1953 S C 404 (409) (Pr 14) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*

[17] 1952 S C 75 (Pr 50) [A I R V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali.*
1953 Raj 158 (Pr 7) [AIR V 40 C 56] : ILR (1952) 2 Raj 511, *Bahadur Singh* v. *Jaswant Raj.* (Unrestricted power of Superintendent of Customs to send any case he likes to be tried by a Court and to retain any case he likes to be dealt with by him departmentally—This is bad.)
[*See* 1952 Cal 639 (643, 644) [A I R V 39] : 1952 Cri L Jour 1441 (SB), *Ram Kissen* v. *State.* (West Bengal Black Marketing Act — Discretion given to executive to prosecute for same offence either under Black Marketing Act or Essential Supplies (Temporary Powers) Act, though the former Act prescribes more severe punishment, is violative of this article.)]

These principles are illustrated by three decisions of the Supreme Court:

(i) *State of West Bengal* v. *Anwar Ali.*[18]
(ii) *Kathi Raning* v. *State of Saurashtra.*[19]
(iii) *Kedarnath* v. *State of West Bengal.*[20]

These cases may be briefly considered here:

(i) *The State of West Bengal* v. *Anwar Ali.*[21]

In this case the validity of S. 5 (1) of the West Bengal Special Courts Act (10 of 1950) was in question. That section ran as follows:

> "A special Court shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order in writing, direct."

Acting under this section, the State Government by notification ordered that the case of certain specified accused persons should be tried by the Special Judge in accordance with the special procedure. It was held by a majority of the Supreme Court that in so far as the section empowered the State Government to refer for the trial of the Special Judge a *particular case* it was void under this article. The majority decision was based on the view that the impugned legislation did not lay down any principle or disclose any policy to guide the exercise of the discretion of the Government in selecting a "case" for reference to the special Court. All that was relied on as indicative of a guiding principle for selection was the object, as disclosed in the preamble of the Act, of providing for the "speedier trial of certain offences". The majority of the learned Judges brushed that aside as too indefinite and vague to constitute a reasonable basis for classification.

> "Speedier trial of offences," observed Mahajan, J. (page 86 of the A. I. R.), "may be the reason and motive for the legislation. But it does not amount to a classification of offences or of cases. In my opinion it is no classification at all in the real sense of the term, as it is not based on any characteristics which are peculiar to persons or to cases which are to be subject to the special procedure prescribed by the Act."

(*ii*) *Kathi Raning* v. *State of Saurashtra.*[22]

In this case, the impugned Ordinance had been passed to provide for "public safety, maintenance of public order and preservation of peace and tranquillity in the State" and provided for the establishment of special courts of criminal jurisdiction in *certain areas* to try *certain classes of offences* in accordance with the simplified and shortened procedure. The section relating to the power of the Government to allot cases for trial by special Courts was practically in the same terms as S. 5 (1) of the West Bengal Act above quoted. Acting under the section, the State Government directed that certain specified offences (which included offences under Ss. 302, 307 and 392 read with S. 34, Indian Penal Code, with which the appellant in the case was charged) should be tried by the special court. It was held by a majority of the Supreme Court that the impugned legislation was not violative of this article.

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[18] 1952 S C 75 [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC).

[19] 1952 S C 123 [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC).

[20] 1953 S C 404 [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC).

[21] 1952 S C 75 (Prs 50, 51) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC).

[22] 1952 S C 123 (Pr 20) [AIR V 39] : 1952 S C R 435:1952 Cri L Jour 805 (SC).

The majority view proceeded on the basis that the clear recital in the enactment in question of a definite objective furnished a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the law, and for choosing only such offences or cases as affected public safety, maintenance of public order and the preservation of peace and tranquillity. The State Government was expected only to select such offences or class of offences or class of cases for being tried in a special court in accordance with the special procedure as were calculated to affect the public safety, maintenance of public order, etc.

It will be noted that in this case the impugned legislation had made a twofold classification of offences with reference to *type* as well as *territory*. Further, it was not a *particular* case which was referred for trial to the special court but certain specified offences which included the offences charged against the accused. But in the light of the decision in *Kedarnath's case*[23] (discussed below) this last mentioned characteristic cannot be regarded as the decisive factor. The real basis of the decision of the majority was that the impugned provision was based on a rational classification having regard to the object of the legislation. Patanjali Sastri, C. J., referred to the affidavit filed on behalf of the State giving facts and figures relating to the increasing number of incidents of looting, robbery, dacoity, nose cutting and murder by marauding gangs of dacoits in certain areas of the State and concluded as follows :

> "The impugned Ordinance having thus been passed to combat the increasing tempo of certain types of regional crime, the twofold classification on the lines of type and territory adopted in the impugned Ordinance, read with the notification issued thereunder, is in my view reasonable and valid and the degree of disparity of treatment involved is in no way in excess of what the situation demanded."

(iii) *Kedarnath* v. *State of West Bengal.*[24]

In this case, S. 4 of the West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), was impugned on the ground that it enabled the Government to single out a particular case for reference to the special court for trial by special procedure, which denied to persons tried under it certain material advantages enjoyed by those tried by the ordinary procedure. It was contended that such a provision was void under the Supreme Court ruling in *Anwar Ali Sarkar's case.*[25] The majority of the Supreme Court overruled this contention and held that the case came within the rule of the *Saurashtra Ordinance case.*[26] The majority judgment of the Supreme Court delivered by Patanjali Sastri, C. J., explained the two decisions and pointed out that there was no conflict in principle between them, and expounded the true principle applicable to such cases.

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[23] 1953 S C 404 [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal.*

[24] 1953 S C 404 (Prs 10, 11) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC).

In this case also, the impugned law had *classified* the offences triable by the special Court as to *territory* as well as the *type of offence.* The object of the enactment was given as being the need to provide for the more speedy trial and more effective punishment of certain offences, set out in the schedule annexed to the Act. Patanjali Sastri, C. J., who delivered the majority judgment, referred to the peculiar conditions with which the Act was intended to deal. He observed, "viewed against this background it will be seen that by and large the types of offences mentioned in the schedule to the Act are those that were common and widely prevalent during this period and it was evidently to prevent or to place an effective check upon the commission of such offences that the impugned legislation was considered necessary." He concluded : "Hence the system of special Courts to deal with the special types of offences under a shortened and simplified procedure was devised and it seems to us that the legislation in question is based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained."

As regards the objection that the impugned provision vested in the State Government an unfettered discretion to choose any *particular* case of a person alleged to have committed an offence falling under any of the specified categories for allotment to the special Court, the learned Chief Justice observed :

> "The argument overlooks the distinction between those cases where the Legislature itself makes a complete classification of persons or things and applies to them the law which it enacts and others where the Legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of the law ...... It is not, therefore, correct to say that S. 4 of the Act offends against ART. 14 of the Constitution

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[25] **1952 S C 75 [A I R V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC),** ***State of West Bengal* v. *Anwar Ali.***

[26] **1952 S C 123 [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC),** ***Kathi Raning* v. *State of Saurashtra.***

Article 14
Note 25

merely because the Government is not compellable to allot all cases of offences set out in the schedule to Special Judges but is vested with a discretion in the matter."

Thus, the mere fact that the Government or Executive is empowered to refer for trial by the special court *individual cases* will not vitiate an Act under this article, where the Act makes a reasonable classification of offences having regard to the object of the Act. The undermentioned cases,[27] in so far as they have adopted as a *conclusive* test of distinction, the question whether the State Government has been empowered to refer to the special court individual cases or whether it has been empowered to refer *classes* of offences or cases, should be treated as superseded by the decision of the Supreme Court in *Kedarnath* v. *State of West Bengal*.[28] But where the Executive is empowered to allot for trial by the special court under the special procedure any case whatsoever without any classification of offences out of which the Executive is to make its selection or without any clear indication of legislative policy or object for the guidance of the Executive, the provision will be invalid.[29] It must also be noted that even where the Legislature makes a *classification* and the Executive is empowered to allot cases out of the group or groups indicated by the Legislature, the classification made by the Legislature must be a reasonable one having regard to the object of the Legislature.[30] As to the power of the State Government to order offences to be tried by jury in Sessions Court, see NOTE 26.

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[27] 1952 S C 235(242) [AIR V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay*. (Section 12 of the Bombay Public Security Measures Act in so far as it authorises the Government to direct specific and particular 'cases' to be tried by the Special Judge is unconstitutional and void : AIR 1951 S C 75 and AIR 1952 S C 123, Rel. on.)

1953 Hyd 33 (35) (Pr 7) [AIR V 40 C 20] : ILR (1952) Hyd 877 : 1953 Cri L Jour 454 (FB), *Mohd. Hydar* v. *Hyderabad State*. (Hyderabad Special Tribunals Termination and Special Judges Appointment Regulation, 10 of 1359F, is hit by Art. 14 and is void : AIR 1951 Hyd 11, Overruled, A I R 1952 S C 75 and AIR 1952 S C 235, Rel. on.; AIR 1952 S C 123, Disting.)

1952 Cal 644 (Pr 17) [A I R V 39] : 1952 Cri L Jour 1447 (FB), *J. K. Gupta* v. *The State*. (West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4 (1), is invalid : Overruled by AIR 1953 S C 404.)

1953 Cal 394 (Pr 10) [AIR V 40 C 150] : 1953 Cri L Jour 899, *Badri Prasad* v. *The State*.

1953 Cal 263 (Prs 49, 51) [A I R V 40 C 96] : 1953 Cri L Jour 673 (DB), *Edward Ezra* v. *The State*.

1953 Mad 105 (115) (Pr 29) [A I R V 40 C 35] : 1953 Cri L Jour 277, *V. M. Syed Mohamed & Co.* v. *State of Madras*.

1952 Nag 118 (Prs 26, 27) [A I R V 39 C 45 (10)] : ILR (1952) Nag 14 : 1952 Cri L Jour 646 (DB), *Jagjivanrao* v. *The State*.

[28] 1953 S C 404 (Pr 14) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC).

[29] 1952 S C 235 (Pr 26) [A I R V 39] : 1952 S C R 710 : 1952 Cri L Jour 1167 (SC), *Lachmandas* v. *State of Bombay*.

1952 S C 75 (Pr 50) [A I R V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (SC), *State of West Bengal* v. *Anwar Ali*.

[30] 1953 S C 404 (Pr 7) [A I R V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal*.

1952 S C 123 (Prs 34, 47) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra*.

Retrospective Effect

The question has arisen as to the validity of proceedings before special Courts commenced before the coming into force of the Constitution and continued thereafter. For a discussion of this question, see notes on ART. 13; see also NOTE 42, sub-heading "Evacuee property law."

26. Power of State Government to order trial before Sessions Court to be by jury.—Under S. 268, Criminal Procedure Code, all trials before a Court of Session shall be either by jury or with the aid of assessors. Under S. 269 of the Code the State Government may, by order, direct that the trial of all offences or any particular class of offences before any Court of Session shall be by jury in any district and may revoke or alter such order. Thus, the State Government has been given the power of determining whether the trial of a certain offence in a Sessions Court is to be by jury or with the aid of assessors. The conferment of this discretion on the State Government does not amount to an infringement of the principle of equal protection of the laws and so does not invalidate S. 269 of the Criminal Procedure Code.[1]

27. Denial of right of suit or of other legal remedy.—The right of applying under the ordinary law to the Courts of the land in appropriate form for redress of grievances is a Fundamental Right and any action taken by the State which affects this right in the case of any particular person or class of persons, *prima facie* violates the principles of equality under this article. Thus, the denial to a person, by means of the law of a Legislature, of the right of civil suit is a denial of equal protection of the laws, unless there is a reasonable ground for the exclusion of such a right in any case. This article means that all persons should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts.[1] The right to institute a suit

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Article 14 — Note 26

[1] 1953 Cal 394 (Pr 10) [AIR V 40 C 150] : 1953 Cri L Jour 899, *Badri Prasad* v. *The State.* (Principle that the classification should be deducible from the Act itself applies only to special Acts, and not to the general law of procedure — S. 269, Criminal P. C., is not invalid, inasmuch as under that section, the State Government is not given power to allot individual cases, but only classes of offences.)

[*See also* 1953 All 123(128)(Pr 27) [AIR V 40 C 53]:1953 Cri L Jour 356(DB), *Dal Chand* v. *State.* (Notification under S. 269, Cr. P. C., by Government directing that the trial in certain districts of certain offences shall be by jury, held not discriminatory, as the classifications made were based on reasonable considerations.)
1953 Cal 602 (Pr 16) [A I R V 40 C 231] : 1953 Cri L Jour 1377 (DB), *Radha Nath* v. *State.* (Notification under S. 269 for trial by jury being in respect of classes of offence there is no contravention of Art. 14 : AIR 1953 Cal 394 and AIR 1953 All 123, Rel. on.)]

Article 14 — Note 27

[1] (1921) 257 U S 312 (339) : 66 Law Ed 254 (266), *Truax* v. *Corrigan.* (Prohibition against interference by injunction between employers and employees in cases

in a Court of law regarding one's claim is a civil right and if a person is to be deprived of his right to claim property under his personal law by his claim being dismissed under an enactment of the Legislature, it would *prima facie* amount to a denial of the equal protection of laws.[2] (See also NOTE 8.)

28. Procedure of administrative tribunals. — There is no contravention of this article in providing a procedure for administrative tribunals like the Industrial Courts which is different from that of the ordinary courts.[1] The discrimination made between a litigant in the

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growing out of disputes concerning terms or conditions of employment denies equal protection of laws when applied to defeat injunctive relief.)

[Compare 1953 Trav-Co 327 (332) (Pr 19) [AIR V 40 C 122] : ILR (1952) Trav-Co 670 (DB), *Vishnu* v. *Poulo.* ((Travancore-Cochin) Holding (Stay of Execution Proceedings) Act (8 of 1950)—Act does not offend Art. 14— Object of legislation is to afford temporary relief to particular class of persons, viz. tenants of holdings as defined in the Act.)]

[2] 1951 Hyd 1 (Prs 21, 22, 23) [AIR V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.* ((Hyderabad) Wali-ud-Daula Succession (Decision of Disputes) Act (16 of 1950) — Act infringes Art. 14 of the Constitution of India inasmuch as by S. 2 (1) it dismisses the claims of the persons mentioned therein. The Act takes away the property of those persons, viz., the decree obtained by them, in contravention of Art. 31 of the Constitution and also infringes the rights of those persons to hold property accruing to them under the decree as per Art. 19 (f) of the Constitution. The Act is, therefore, void under Art. 13 (2) in so far as it relates to the claims and rights of those persons. Section 2 (1), and S. 3 so far as it relates to S. 2 (1) are declared void.)

1952 Pat 166 (Prs 45, 46) [AIR V 39 C 55 (12)] : ILR 30 Pat 1085 (DB), *Bankey Singh Jhingan Singh.* (Applying this test, S. 3 of the Barahiya Tal Land (Declaration of Possession) Act (26 of 1950) is found to offend the provision of Art. 14. The Act makes differential treatment between the landlords and tenants for whose benefit it is intended. The landlords, including the plaintiffs, are forbidden to seek relief in Court but there is no such limitation imposed upon the tenants, including the defendants, or any other landlord of the locality. Thus there is a complete denial of equality before the law to the landlords governed by the Act which is, therefore, *ultra vires* the State Legislature.)

[*See also* 1934 P C 84 (86) [AIR V 21] (PC), *Ramayya* v. *Lakshminarayana.* (Where evidence is inconclusive as to whether the inam grant conveyed the kudivaram right or not, the burden of proof that the inam is an estate within the Act is on the defendant because the terms of S. 9, Civil P. C., lay down a general rule in favour of the jurisdiction of the civil Court, and the burden of proof is on the party who maintains an exception to the general rule : AIR 1915 Mad 738, Rel. on.)

('04) 28 Mad 42 (50) : 32 Ind App 45 (PC), *Maharaja of Jeypore* v. *Gunupuram Deenabandhu.* (*Held* (reversing the decision of the Governor of Madras in Council), that the legal right to bring a suit, and to have it determined by the proper Court could not be barred by considerations of political expediency.)

(1908) 209 U S 123 (147) : 52 Law Edn 714 (724), *Ex parte Young.* (A statute providing for the establishment of rates for railroad transportation without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the Courts to test the validity of the rates, is unconstitutional, as depriving the corporations of the equal protection of the laws.)]

Article 14 — Note 28

[1] 1953 Mad 447 (449) (Pr 3) [AIR V 40 C 170], *Rangaswami* v. *Industrial Tribunal.*

Article 14
Notes 28-30

ordinary court of law and before a tribunal, like the Industrial Tribunal, can easily be justified on the basis of reasonable classification. The classification is not arbitrary but is based upon the nature of the tribunal and the purpose for which it is constituted.[2] Hence, S. 36 (4) of the Industrial Disputes Act, 1947, under which a party is not entitled as of right to be represented by a legal practitioner but can only be so represented with the consent of the other parties to the proceedings and with the leave of the tribunal, is not repugnant to this article.[3] The justifiability of such a provision has been explained as follows[4]:

> "The object of the constitution of labour tribunals was to have an expeditious and just settlement of disputes between the employers and employees in the interests of industrial peace. It was also apparently intended as a convenient device to avoid costly and prolonged litigation in courts of law and to place the two categories of disputants, i. e., the employees and employers with obvious disparity in wealth and influence, as far as possible on an equal level. To achieve this object labour tribunals are constituted. The makers of the law might have thought that an unrestricted right to be represented by an advocate would defeat the aforesaid purpose. Such restrictions on the right of a party to be represented by an advocate before tribunals are not unknown in other parts of the world." ✓

29. Right to be represented by legal practitioner in litigation.—The denial of a right to be represented by a legal practitioner except by consent of the other parties and by permission of the Court under S. 36 (4), Industrial Disputes Act, 1947, is based on the principle of reasonable classification and does not constitute a violation of the equal protection clause.[1] ✓

30. Estate abolition legislation. — The validity of what may compendiously be termed, for the sake of convenience, as estate abolition legislation, has been questioned before the Courts. There was a difference of judicial opinion on the matter. The High Courts of Allahabad,[1]

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[2] 1953 Mad 447 (449) (Pr 3) [AIR V 40 C 170], *Rangaswami* v. *Industrial Tribunal.*

[3] 1953 Mad 447 (451) (Pr 6) [AIR V 40 C 170], *Rangaswami* v. *Industrial Tribunal.*

[*See also* 1951 Trav.Co 203 (Pr 22) [AIR V 38 C 81] : ILR (1951) Trav.Co 458, *Nagalinga Nadar Sons* v. *A. T. H. L. C. Workers' Union.* (In this case also it was held that S. 36 (4) of the Industrial Disputes Act, 1947, was not repugnant to this article. But the ground of attack was different. It was that the provision would lead to the result that the disputants in some cases will have legal aid but the disputants in other cases will not have such aid—The contention was rejected.)]

[4] 1953 Mad 447 (449-450) [AIR V 40 C 170], *Rangaswami* v. *Industrial Tribunal.*

Article 14 — Note 29

[1] 1953 Mad 447 (449) (Pr 3) [AIR V 40 C 170], *Rangaswami* v. *Industrial Tribunal.*

Article 14 — Note 30

[1] 1951 All 674 (Pr 88) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapalsing* v. *U. P. Govt.* (Section 4 (2), U. P. Abolition of Zamindari and Land Reforms Act, 1950 (1 of 1951) does not offend Art. 14 as it cannot be said that such classification as may result from S. 4 (2) does not rest on a reasonable basis.)

Nagpur[2] and Madhya Bharat[3] upheld such legislation, while the Patna High Court[4] regarded it as unconstitutional. The matter has now been settled by the decision of the Supreme Court[4a] that the legislation in the different States on the subject is valid. The constitutionality of the legislation was attacked on various grounds under this Part relating to Fundamental Rights. One of the grounds was that the legislation offended the principle of equality embodied in this article inasmuch as it made a distinction, which was said to be unwarranted, between the richer and the poorer landlords as regards the rate at which the compensation payable to them was to be calculated. In view of the recent decision of the Supreme Court, the question has become purely one of academical interest now. But the principle is established now that a distinction based on the economic condition of different classes or groups cannot be treated as unreasonable.[5] See also the undermentioned cases.[6] ✓

See also notes on ART. 31.

31. Rent reduction in estates. — Under the Madras Estates Land (Reduction of Rent) Act (30 of 1947), the rents payable by tenants in estates were reduced to the level of ryotwari assessment, but there was no provision for the enhancement of rent where it was below the ryotwari assessment level. It was held that it did not invalidate the Act under this article and that the Act was only an illustration of the constitutional practice of classification which was reasonable and permissible. There was no discrimination when the scope and intendment of the Act were taken into consideration. In the light of the Preamble of the Act, provision for enhancement of rent would be completely out of place in the enactment. There was no discrimination between one landholder and another and between one tenant and another.[1]

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[2] ('53) I L R (1953) Nag 1 (61) (FB), *Ganpatrao Pande* v. *The State.*

[3] 1952 Madh B 57 (Prs 43, 44) [A I R V 39 C 25] : I L R (1952) Madh B 178 (FB), *Ram Dubey* v.*Govt. of Madhya Bharat.* (Madhya Bharat Zamindari Abolition Act (13 of 1951) is not discriminatory. The provisions relating to the award of rehabilitation grants though discriminatory are not void. The distinction between the bigger and the smaller Zamindars cannot be said to be arbitrary or capricious. A distinction based on the economic condition of the different classes cannot be said to be unreasonable.)

[4] 1951 Pat 91 (Prs 16, 62, 106) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (Per *Special Bench*:—The Bihar Land Reforms Act, 1950, is unconstitutional and void as it contravenes the provisions of Art. 14 of the Constitution — Having regard to the scheme of operation of S. 3 it gives such an unrestrained power that it is bound to result in discrimination between members of the same class standing in like circumstances and conditions. Per *Reuben J.*—Object of Bihar Land Reforms Act, 1950—Giving of compensation — It is not reasonable classification which assesses value at 20 times the net income in the case of a poor man and three times in the case of a rich man — Principle of progressive taxation does not apply to compensation for land acquired.)

[4a] 1952 S C 252 (Pr 237) [AIR V 39] : 1952 S C R 889, 1020, 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (The argument that the zamindari abolition legislation violated Art. 14 of the Constitution is no longer tenable after the passing of the Constitution (First Amendment) Act, 1951, inserting Arts. 31A and 31B.)

[5] 1952 Madh B 57 (Prs 43, 44) [A I R V 39] : I L R (1952) Madh B 178 (FB), *Ram Dubey* v. *Government of Madhya Bharat.*

[6] 1953 Madh B 97 (Pr 8) [AIR V 40 C 46] (FB), *Malojirao* v. *State of Madhya Bharat.* (M. B. Abolition of Jagirs Act (28 of 1951), S. 4 (1) (g), is bad both for want of public purpose and for perpetrating a fraud on the Constitution. It is also void as it contravenes the provisions of Art. 14 of the Constitution.)
1953 All 92 (94) (Pr 9) [AIR V 40 C 37], *Mohammad Raza* v. *State of U. P.* (It cannot be said that merely because the provisions of a Zamindari Abolition Act

32. Prohibition laws. — There is nothing wrong *prima facie* in the Legislature according special treatment to persons of the armed forces who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions. Hence, S. 39 of the Bombay Prohibition Act, 1949, in so far as it affects the military and naval messes and canteens, warships and troop ships, cannot be held to be invalid on the ground that it contravenes ART. 14.[1] But the classification of persons who are used to drinks on the basis of wealth or social position, clearly amounts to invidious discrimination and any rule or law permitting or based on such classification will be void.[2]

Similarly, where liquor permits are granted to foreign nationals, the exclusion of citizens of French and Portuguese Settlements in India from the general category of foreign nationals and refusal to issue liquor permits to them, is an infringement of this article. Such settlements, although geographically situated in India must be treated as part of the territory of France or Portugal, as the case may be, and the citizens of such settlements cannot be treated as Indian citizens and not as foreign nationals for the issue of liquor permits. It is not open to the State Government to exclude citizens of French and Portuguese Settlements in India from the general category of

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relating to the payment of compensation are different from the principles laid down in the Land Acquisition Act, this article is contravened.)

Article 14 — Note 31

[1] 1952 Mad 203 (213, 224) (Prs 31 & 66) [AIR V 39 C 98], *Rajah of Bobbili* v. *State of Madras.*

Article 14 — Note 32

[1] 1951 S C 318 (Pr 21) [AIR V 38 C 55] : 52 Cri L Jour 1361 : 1951 S C R 682 (SC), *State of Bombay* v. *F. N. Balsara.* (AIR 1951 Bom 210, Reversed.)

[2] 1951 Nag 58 (Prs 115, 116, 202) [A I R V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.* (Rule 7 of the C. P. and Berar Foreign Liquor Rules, 1938, enables any person who satisfies the appropriate authority that 'his social and economic status and habits' warrant the granting to him of a permit, to obtain a permit for the consumption of intoxicating liquor, not as a medicine but for his enjoyment as a beverage. Rule 7 has, therefore, become void under Art. 13 (1) after the commencement of the Constitution. Per *Hidayatullah, J.* — The permit system envisaged by S. 29 (2) and Rr. 7 and 7A of the Central Provinces and Berar Foreign Liquor Rules, 1938, creats an inequality. By reason of this inequality, these rules and S. 29 (2), which enables the Provincial Government to enact such rules are void under the Constitution.)

foreign nationals on the ground that the grant of permits to them might lead to abuse.[3]

For a discussion of the validity of Prohibition Laws from the point of view of ART. 19, see notes on that article.

Industrial disputes legislation

33. Labour laws. — The provisions of the Industrial Disputes Act, 1947, do not contravene this article. Both the employer and employee are given similar right to invoke the application of the provisions of the Act. The Act does not make any discrimination between employers and employees or between employers or employees *inter se*. There is nothing in the Act which *ex necessitate* compels the Industrial Tribunal to make any discrimination, though perforce the Tribunal may have to make a classification in deciding a dispute.[1]

Sections 27A and 30 of the Bombay Industrial Relations Act (11 of 1947), are not inconsistent with this article. Though the provisions of the sections make a distinction between Union and Union, inasmuch as only a 'representative' Union is held to be entitled to represent labour before the Industrial Court, that cannot be said to be a provision which violates the principle of equality before the law. It is no breach of this article for the Legislature to make a classification on rational grounds.[2] A provision entitling a party to an industrial dispute to be represented by legal practitioner before an Industrial Tribunal with the consent of the other parties and with the leave of the Tribunal cannot be attacked as violating the principle of equality under this article on the ground that such a provision would lead to the result that the disputants in one case may get legal aid while the disputants in another may not.[3] The reason is that the test can only be whether the contending parties to a particular dispute have the equal protection of the law. But where in legislation relating to industrial disputes, an arbitrary distinction is made not having any rational bearing upon the subject in question, the relative provisions will be void under this article.[4]

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[3] 1952 Mad 734 (735) (Pr 6) [AIR V 39] (DB), *Luis Caetano Menzes* v. *State of Madras.*

Article 14 — Note 33

[1] 1951 Mad 974 (Pr 9) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.* (Award made in pursuance of reference under the Act, re-instating a dismissed employee and granting additional bonus to the workers, are not inconsistent with the Fundamental Rights conferred by Part III of the Constitution.) [*See also* 1953 Madh B 231 (Prs 14, 16) [AIR V 40 C 87] (DB), *Jivajirao Cotton Mills* v. *Chairman, Industrial Court.* (Bombay Industrial Relations Act (11 of 1947), S. 73-A (as adapted in M. B. State) — S. 73-A is not discriminatory within scope of Constitution of India, Art. 14. The fact that a registered Union of *Employees* is given the right of making a reference to the Industrial Court but in the case of an *employer*, he has no similar right, but only the *Government* can refer industrial dispute, does not invalidate the Act.)]

[2] 1951 Bom 105 (Prs 18, 40) [AIR V 38 C 22] : I L R (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.*

[3] 1953 Mad 447 (449) [AIR V 40 C 170], *Rangaswami* v. *Industrial Tribunal.* 1951 Trav-Co 203 (Pr 22) [AIR V 38 C 81] : ILR (1951) Trav-Co 458, *Nagalinga Nadar Sons* v. *A. T. H. L. C. Workers' Union.*

Regulation of hours of work for employees, etc.

The State has ample powers of regulating hours of work of employees in industrial and commercial establishments, etc., and in doing so the State has got the power also of classifying the employees in any reasonable and rational manner with reference to the circumstances connected with the nature of work and other factors. In making such laws or regulations the State does not violate the principle of equality before the law or the equal protection of the laws.[4a] Thus, it has been held that restrictions as to the hours of work of women employees of certain establishments like hotels, etc., at night time were quite within the power of the State and did not violate the equal protection clause.[5]

Shops and Establishments Act

The Madras Shops and Establishments Act (36 of 1947), S. 41, provides against arbitrary dismissal of employees by enacting that they must not be dismissed without reasonable cause and without at least one month's notice. The provision is not invalid under this article on the ground of discrimination between employer and employee, the alleged discrimination consisting in the fact that while the employee is entitled to resign with impunity at any time, restrictions are placed on the employer's right of dismissing him. The reason is that there are obvious differences between the two classes of persons which do not yield to common treatment.[6] So also, the Act is not bad on account of the fact that it applies only to certain classes of employers and not to all.[7] The provisions of the Act are not also invalid on the ground of its conferring arbitrary power on the Labour Commissioner, because his decision is appealable and the appellate authority has to act quasi judicially which means that it cannot act arbitrarily.[8] The exemption granted by a shops and establishments enactment in respect of certain formalities and requirements, to certain classes of persons such as those conducting restaurants, etc., with the members of their own family without employing outside labour, is not open to objection under this article.[9]

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[4] 1951 Mad 191 (Prs 10, 12) [A I R V 38 C 19] : 52 Cri L Jour 744 (DB), *C. P. Sarathy* v. *State of Madras.* (Sections 5 and 6 of the Industrial Disputes (Madras) Amendment Act, 1949, by validating awards which have not been quashed by Courts and by validating awards which though apparently are void but have not been so declared by Courts, has discriminated between persons to whom the same set of circumstances applied, and therefore, offended Art. 14 of the Constitution. Though the Legislature recognised that the awards are invalid, it has afforded protection to persons who have approached Courts and have secured declarations that awards based on the same footing as those which have been legislatively held valid are not current and valid.)

(1921) 257 U S 312 (339) : 66 Law Ed 254 (266), *Truax* v. *Corrigan.* (Prohibition against interference by injunction between employers and employees in cases growing out of dispute concerning terms or conditions of employment denies equal protection of laws when applied to defeat injunctive relief.)

[4a] (1908) 52 Law Ed 551 (556) : 208 U S 412, *Muller* v. *Oregon.* (Rights under 14th Amendment not infringed by limitation of hours of labour of women employees in laundries to 10 hours daily although like legislation affecting male employees may be invalid.)

[5] (1924) 264 U S 292 (296, 297) : 68 Law Ed 690 (695), *Radice* v. *New York.* (Act forbidding employment of women in restaurants between 10 P. M. and 6 A. M. not bad though it is not applicable to entertainers in such places, attendants in cloakrooms, etc.)

(1915) 236 U S 383 (395) : 59 Law Ed 632 (636), *Bosley* v. *McLaughlin.* (Statute forbidding employment of women in certain specified establishments for more than 8 hours in one day or 48 hours in one week—Exempting graduate nurses does not render statute unreasonably discriminatory although such prohibition applies to student nurses in hospital training school, etc.)

(1915) 236 U S 373 (383, 384) : 59 Law Ed 628 (631, 632), *Miller* v. *Wilson.* (Limiting hours of work of women employees in hotel establishments upheld. So also exempting women employees of certain establishments from the regulations as to working hours. Hours of work may be limited in hotels, though they are not limited in boarding houses, etc.)

34. Refusal of admission into College to students. — It has been held by the Punjab High Court that the article can have no application to a case where certain students are refused admission to a college under rules for admission.[1] The decision proceeds upon the basis that the article does not take away from the State the power to classify on a reasonable basis having regard to the peculiar circumstances and characteristics of each problem. It is obvious that any rule which the State may make as regards admission of students into colleges and other educational institutions will be void if it is not based on any reasonable ground of distinction and discriminates against any particular class or group of persons.[2] Regulations of

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[6] 1953 Mad 326 (Pr 12) [AIR V 40 C 110], *South India Bank* v. *Pichuthayappan.* (One is rich, the other poor; one is powerful, the other is weak; one can dispense with the service of another and reappoint another in his place without detriment to his interest, but the other, if discharged, may have to starve and go without any appointment — Purpose of the law is to protect this class of employees from the arbitrary action of the employers.)

[7] 1953 Mad 326 (Pr 13) [AIR V 40 C 110], *South India Bank* v. *Pichuthayappan.*

[8] 1953 Mad 326 (Pr 16) [AIR V 40 C 110], *South India Bank* v. *Pichuthayappan.*

[9] 1952 All 773 (775) (Pr 14) [AIR V 39] (DB), *Matrumal* v. *Chief Inspector of Shops etc., Kanapur.* (U. P. Shops and Commercial Establishments Act (22 of 1947), S. 4 is not invalid.)

[*See also* (1919) 63 Law Ed 527 (532) : 249 U S 152, *Middleton* v. *Texas Power & L. Co.* (The exclusion of railway employees, domestic servants, farm labourers, and employees generally where there are less than five under a single employer, from the operation of the Texas Workmen's Compensation Act of 16th April 1913, which substitutes, without regard to negligence, a stated compensation for disabling or fatal injuries, fixed with relation to the employee's average weekly wages, in lieu of the common-law liability confined to cases of negligence, is not such an arbitrary classification as to deny the equal protection of the laws to an employee not in the excepted classes.)

Article 14 — Note 34

[1] 1951 Punj 93 (Pr 12) [AIR V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab.*

[2] *See* 1951 S C 226 (Prs 8, 11) [AIR V 38 C 40] : 1951 S C R 525 (S C), *State of Madras* v. *Champakam Dorairajan.*
1951 Mad 120 (Prs 14, 15) [AIR V 38 C 14] : I L R (1951) Mad 149 (FB), *Champakam Dorairajan* v. *State of Madras.*
[*See also* 1954 Mad 67 (Pr 12) [AIR V 41 C 13] (DB), *University of Madras* v. *Shantha Bai.*]

University that colleges should provide certain facilities for women before they could be admitted are not discriminatory on the ground of sex.[3] Reference may be made in this connection to the racial discrimination cases considered in NOTE 18. See also notes on ARTS. 15 and 29.

35. **Monopoly rights.** — It has been held by the Orissa High Court that an Act under which a joint-stock company is formed and is granted a monopoly right for taking over the entire business of public transport in the State is not arbitrary but is reasonable in the interests of the general public and hence not void under this article.[1] (See also NOTE 11.) (See also ART. 19 (6) (ii).)

36. **Discrimination as to sex.** — Article 15 (1) provides that the State shall not discriminate against any citizen on grounds, *inter alia*, only of sex. Under ART. 15 (3) it is provided that the State may make special provision for women and children. Thus, the Constitution expressly authorises special provisions being made for the benefit of women and children, although the general rule laid down is that discrimination on the ground of sex *alone* will be unconstitutional. Article 15 expresses a particular application of the general principle of equality embodied in this article. Where a law comes within the prohibitory line of ART. 15, it cannot be validated by recourse to this article and by applying any principle of reasonable classification which is applicable only to this article and not ART. 15.[1] Where, however,

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[3] 1954 Mad 67 (Pr 12) [AIR V 41 C 13] (DB), *University of Madras* v. *Shantha Bai.* (NOTE.—In this case it was also held that the Madras University was not covered by the term "State" and its regulations cannot be called in question as an infringement of the equality clause by the State.)

Article 14 — Note 35

[1] 1952 Orissa 42 (Prs 17, 18) [AIR V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.* (The object of the Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carrier's Services) Act (36 of 1947), is to secure more efficient administration of transport services, through a monopolistic agency controlled by the State. The provisions of the Act tend towards the accomplishment of the object and do not go beyond the reasonable demands of the occasion. There are distinct advantages to the public that are inherent in the control of the undertaking by a monopolistic company. The private permit holders who are plying the motor vehicles for hire on public roads, however rich and influential they may be, will never be able to offer the same facilities to the public. Hence, the choice of a joint stock company, in which the State Government and the Union Government together would have controlling interests, for the grant of a monopoly rights with a view to take over the entire business of running stage carriage and public carrier's services in the State is not arbitrary, but is reasonable and in the interests of the general public. Hence the Act is not invalid under Art. 14 of the Constitution of India: AIR 1951 S C 41, Rel. on.)

Article 14 — Note 36

[1] 1952 Mad 193 (195) [AIR V 39 C 95] : I L R (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.*

[*See also* 1952 S C 123 (125) (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (S C), *Kathi Raning* v. *State of Saurashtra.* (Per Patanjali Sastri, C. J.: — If unfavourable bias is disclosed and is based on any of the grounds sex is only one of the grounds of discrimination, this article will come into play and the matter will have to be considered from the point of view of the principle of reasonable classification discussed in NOTE 1. The discrimination made between sexes may be justified on this principle even in the absence of a provision like ART. 15, cl. (3).[2]

Discrimination against women

The validity of various laws has been attacked on the ground of the law making a discrimination between the sexes. For instance, the rule of Muhammadan Law allowing a man to wed four wives while enjoining monogamy for the woman has been attacked as making an invidious distinction between sexes and as therefore violating the principle of equality under this article. The Bombay High Court[3] repelled the contention on the ground that the provisions of this part on Fundamental Rights do not apply to personal laws, a ground the correctness of which seems to be debatable. (See ART. 13, NOTE 2.)

Under S. 10 of the Divorce Act, a wife suing her husband for divorce must prove not only adultery by her husband but also desertion and cruelty, while proof of mere adultery by the wife is sufficient to entitle the husband to get a divorce from the wife. This provision also is not invalid on the ground of discrimination.[4] In justification of discrimination between husband and wife made in this provision, Panchapagesa Iyer, J., of the Madras High Court observed as follows in *Dr. Dwarkabai* v. *Prof. Nainan*[5] :

> "Section 10, as it stands, is not *prima facie* repugnant to ARTS. 13 to 15 of the Indian Constitution. It appears to be based on a sensible classification, and after taking into consideration the abilities of man and woman, and the results of their acts, and not merely based on sex, when alone it will be repugnant to the Constitution. Nothing in ARTS. 13 to 15 of the Constitution can be urged for proving that women also ought to be conscripted as soldiers along with men, or that girls also ought to be allowed, under the law, to be taken in adoption like boys. It is obvious that, under the second example, the discrimination is against women, because they would lose by not being adopted by persons having vast properties and yet even Mr. Thyagarajan was not prepared to urge that the Hindu Law of adoption as it stands is invalid and that girls ought to be allowed

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mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different, as under that article there is a presumption that the State action is reasonable and justified.)]

[2] *See* (1908) 52 Law Ed 551 (556) : 208 U S 412, *Muller* v. *Oregon*. (Inherent differences between sexes which make special legislation for protection of women necessary explained.)

[3] 1952 Bom 84 (Pr 13) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.

[4] 1953 Mad 792 (799, 800) [AIR V 40 C 302], *Dr. Dwarka Bai* v. *Prof. Nainan*.

[5] 1953 Mad 792 (799, 800) [AIR V 40 C 302].

> to be adopted like boys. I may add also that an adultery by a wife is different from an adultery by a husband. A husband commits an adultery somewhere, but he does not bear a child as a result of such adultery, and make it a legitimate child of his wife to be maintained by the wife. He cannot bear a child, nor is the wife bound to maintain the child. But if the wife commits adultery, she may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child under S. 488, Criminal P. C., read with S. 112 of the Indian Evidence Act, which has been made applicable to civil, criminal and revenue Courts alike. It is obvious that this very difference in the result of the adultery may form some ground for requiring a wife in a petition for divorce not only to prove adultery by the husband but also desertion and cruelty, whereas the husband need prove only adultery by the wife."

Regulations of a University requiring that colleges should provide certain facilities for women before they could be admitted are not discriminatory on the ground of sex but are only reasonable restrictions. And hence the denial of admission into a college to a woman student under such Regulations is not unconstitutional.[6]

Section 8 (1) (b) of the United Provinces Court of Wards Act (4 of 1912) is void on the ground of discrimination against women as such.[7] Under that section, females declared by the Provincial Government to be incapable of managing their own property come within the definition of disqualified proprietors whose estate can be taken over by a Court of Wards for management. In the case of male proprietors it is provided that they can be declared "incapable" only on certain grounds and after being given an opportunity to contest the proposed order. In the case of female proprietors, no such reservations are made. This discrimination between the sexes invalidates the law as the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of this article, but it is further necessary that the classification must be based on reasonable ground and on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.[8]

Classification in favour of women

Reference has already been made above to ART. 15 (3).

The validity of S. 497 of the Penal Code (adultery) was attacked as offending the principle of this article inasmuch as the section makes only the *man* punishable for adultery and does not make the *woman* punishable as an abettor. The Bombay High Court[9] rejected this

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6. 1954 Mad 67 (Pr 12) [A I R V 41 C 13] (DB), *University of Madras* v. *Shantha Bai.*

7. 1952 All 746 (748) (Pr 9) [AIR V 39] : ILR (1953) 1 All 29 (DB), *Cracknell* v. *State of Uttar Pradesh.*

8. 1952 All 746 (Pr 10) [AIR V 39]: ILR (1953) 1 All 29 (DB), *Cracknell* v. *State of Uttar Pradesh.*

9. 1951 Bom 470 (Pr 2) [A I R V 38 C 103] : I L R (1952) Bom 449 : 1952 Cri L Jour 23 (DB), *Yusuf Abdul Aziz* v. *State.* (Once the nature of the offence of argument and held that S. 497 of the Penal Code does not offend the principle of equality under this article. Similarly, the provisions of S. 488 of the Criminal Procedure Code have also been attacked as violating the principle of equality under this article inasmuch as the right to maintenance is conferred under that section only on a *wife* as against the husband and not on the husband as against the wife. In this instance also the argument was rejected by the Court and the validity of the section was held unassailable under this article.[10]

Section 354 of the Penal Code which makes assault or use of criminal force with intent to outrage the modesty of *any woman* (and does not include 'man' within the protection of the article) is not invalid as being a violation of the equal protection clause.[11]

The reservation of seats for women in a municipality in accordance with the municipal law has been held not to offend the principle of equality before the law.[12]

As seen in NOTE 33, special legislative provisions for the protection of women employees in establishments based on their inherent need for such protection is not unconstitutional.[13]

It cannot be said that the classification in favour of women, more particularly wives and that too those deserted by their husbands, are

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adultery is understood and appreciated, it is clear that there could be no question of the law operating unequally, because the law was not intended to operate upon women at all—The mischief aimed at under S. 497 is only against men and not against women — Again, the law has so provided that for the purpose of this section the wife shall not be deemed to be an abettor at all— Thus in the definition of who is an abettor an exception is carved out and that exception is in favour of women—It is impossible to contend that as the section stands it does not operate equally upon all persons.)

[10] 1952 Mad 529 (Pr 3) [A I R V 39 C 118] : 1952 Cri L Jour 1143, *Thamsi Goundan* v. *Kanni Ammal.* (AIR 1951 S C 16, Rel. on.)

[11] 1953 Madh B 147 (Prs 3, 4) [AIR V 40 C 51] : 1953 Cri L Jour 964, *Girdhar Gopal* v. *State.* (Under the section, even a woman committing the assault on another woman is punishable and there is no discrimination between the sexes on this point.)

[12] 1953 Bom 311 (314) [A I R V 40 C 98] (DB), *Dattatraya* v. *State of Bombay.* (The provision made in S. 10 (1) (c) of the Bombay Municipal Boroughs Act for reservation of seats for women and the rules made by Government with regard to the reservation of seats for their election to the Jalgaon Municipality are *intra vires* and they do not offend against any provision of Arts. 14, 15 and 16 of the Constitution— Further, the Constitution has only dealt with the constitution of Paliament and the State Legislatures; it has not dealt with local authorities, and under List 2 of the Seventh Schedule under Entry 5 the subject of "local government" has been left exclusively to the State Legislature and no restriction has been put by the Constitution on the manner in which the State Legislature may decide to constitute the municipal corporation and other local authorities —Therefore, unless there is some provision in the Constitution itself which prohibits the State Legislature from providing for separate represention for women, the mere fact that the Constitution has not provided for any reservation of seats for women in Parliament or in State Legislatures cannot be used as an argument against the competency of the State Legislature.)

[13] (1908) 52 Law Ed 551 (556) : 208 U S 412, *Muller* v. *Oregon.* (Inherent differences between the sexes, which make special legislation for protection of women necessary, explained.)

arbitrary and that it does not bear a reasonable and just relation to the case in respect to which a classification is made. Therefore, S. 488 of the Criminal Procedure Code, which is intended to prevent starvation of wives deserted by their husbands, cannot be questioned as inconsistent with the principle of equality under this article on the ground that the section only provides for maintenance of the wife and contains no similar provision in favour of men as against wives.[14] Under ART. 15 (3), the power of the State to make special provision for women and children is expressly reserved.

37. Discrimination in favour of agriculturists and agricultural activities and produce. — The more recent decisions of the United States of America are in favour of recognising the validity of distinctions made for the benefit of agricultural activities and so it has been held that the exemption of agricultural activities from criminal proceedings under Anti-Trust Laws is not void.[1] The trend to show special consideration for the difficulties of agriculturists is also apparent in various pieces of legislation in India, for example the Madras Agriculturists' Relief Act and other similar Acts of various States for the relief of agricultural debtors.

Madras Agriculturists' Relief Act

Section 4 of the Madras Agriculturists' Relief Act does not offend this article. The inclusion of simple mortgagees within the term "agriculturists", which, by the way, was due to the judicial interpretation of the term "saleable interest in land", is not a case of discrimination against money-lenders and would not amount to a case of class of persons being singled out as a subject for hostile legislation. On the other hand, it is conferring a benefit on these non-agriculturists and would also take them in for purposes of the benefit of the Act. So also, exemptions in clauses (a) to (i) of S. 4 are based upon reasonable classification and come within the ambit of the principles showing that they have not singled out a person or class of persons for discriminating and hostile legislation.[2]

38. Requiring of licences, etc. — Although under ART. 19 (1) (g) every citizen has a right to practise any profession or to carry on any occupation, trade or business, the State is not precluded from imposing in the interests of the general public any reasonable restrictions on the exercise of the right, especially in the matter of prescribing the qualifications for the practice of any profession or carrying on of any occupation, trade or business. Express provision is made reserving the power of the State in this matter under ART. 19 (6). The imposition of reasonable restrictions of the kind contemplated by ART. 19 (6) will not amount to an infringement of the equal protection clause.[1]

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[14] 1952 Mad 529 (530) (Pr 3) [AIR V 39 C 118] : 1952 Cri L Jour 1143, *Thamsi Goundan* v. *Kanni Ammal.*

Article 14 — Note 37

[1] (1940) 310 U S 141 (145, 146) : 84 Law Ed 1124 (1127), *Tigner* v. *Texas.* ((1902) 184 U S 540 : 46 Law Ed 679, *Connolly* v. *Union Sewer Pipe Co.*, Overruled.)
[But see (1902) 184 U S 540 (560) : 46 Law Ed 679 (690), *Connolly* v. *Union Sewer Pipe Co.* (Discrimination in favour of agricultural products or livestock exempting them from certain provisions of the Anti Trust laws *offends* the equal protection clause.)]

[2] 1952 Mad 11 (Pr 14) [A I R V 39 C 2] : I L R (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran.*

The restrictions imposed may be invalid *both* as imposing an unreasonable burden on a trade or business and also as violating the principle of equality under this article. Thus, where a license fee charged from persons carrying on a particular trade is excessive, it will be an unreasonable restriction under ART. 19 (6). At the same time, if an arbitrary discrimination is made between two classes of dealers in the same article and a much heavier fee is charged from one of them than from the other without any reasonable basis for such discrimination, the imposition of the higher license fee will be an infringement of this article.[2] (See also Notes on ART. 19.)

39. Tenancy laws.—See the undermentioned cases.[1]

40. Rent control laws. — The power of the State to make reasonable classification according to the circumstances can also be illustrated with reference to rent control legislation.[1]

Article 14 — Note 38

1. (1926) 272 U S 425 (428, 429) : 71 Law Ed 331, *McCardle* v. *Indianapolis Water Co.* (Classification requiring diploma to practise dentistry is valid.)

(1915) 240 U S 342 (357): 60 Law Ed 679 (687), *Rast* v. *Van Deman & Lewis Co.* (Extra License tax —Imposition of, on certain kinds of business in which goods were offered for sale with certain special inducement held not bad.)

(1900) 180 U S 452 (469): 45 Law Ed 619 (627), *W. W. Cargill Co.* v. *Minnesota.* (Requiring licenses from elevators and warehouses situated in certain places does not offend equality clause merely because license is not required from owners of warehouses and elevators elsewhere.)

(1900) 179 U S 89 (95) : 45 Law Ed 102 (105), *American Sugar Refining Co.* v. *Louisiana.* (Manufacturer engaged in business of refining sugar is not denied equal protection of laws because of the discrimination made imposing a license tax upon manufacturers engaged in such business, but exempting from the tax those who refine the products from their own plantations.)

2. 1952 Mad 764 (Prs 13, 14) [A I R V 39] : I L R (1953) Mad 217 (DB), *Varadachari* v. *State of Madras.* (Test of reasonableness of licence fee — Distinction bewteen tax and license fee explained — Licence fee is intended only to cover expense of regulating the trade and not for general purpose of State.)

Article 14 — Note 39

1. 1953 Orissa 171 (177, 178) [AIR V 40 C 59] : I L R (1953) Cut 45 (DB), *Sashibhusan* v. *Mangala.* (Discrimination between ryots on the one hand and proprietors and tenure-holders on the other is reasonable. Orissa Tenants Protection Act held not invalid.)

1952 Sau 114 (Pr 19) [AIR V 39] (SB), *Kalika Kumar* v. *Saurashtra State.* (Saurashtra Land Reforms Act (25 of 1951), Ss. 21, 22, 24 — Classification of Girasdars into *A*, *B* and *C* classes — Allotment of lands on a varying scale laid down to them is not discriminatory.)

Article 14 — Note 40

1. 1951 Assam 126 (Prs 6, 8) [AIR V 38 C 59] : I L R (1951) 3 Assam 407 (DB), *Shyamlal Mandal* v. *Municipal Board, Dhubri.* (The provisions contained in cls. (2) and (3) of S. 2, Assam Urban Areas Rent Control Act, 13 of 1949, cannot be challenged on the ground that it violates the Fundamental Right of a citizen guaranteed to him by Art. 14 of the Constitution of India. If the classification

Thus, the exemption from rent control law of buildings belonging to Government and local authorities has been held to be valid.[2] Similarly, it has been held that the power reserved to the Government to exempt a house from the operation of the rent control law does not affect the Fundamental Right under this article.[3] A provision in a rent control law classfying houses into those built before a specified date and those that were built after the specified date and exempting the latter class of houses from the rigours of the rent control law, has been held to be valid on the ground that the provision was intended to encourage house building at a time where there was a shortage of houses.[4] The vesting of discretion in the District Magistrate to grant permission to a landlord to sue his tenant for ejectment is not violative of this article although it is not hedged in by rigid statutory rules.[5]

41. Fugitive offenders.—The article applies also to Acts which were made by the British Parliament and which were applicable to British India, which Acts, by force of ART. 372, continue to be applicable to India. Thus, the Fugitive Offenders Act of 1881 is within the mischief of this article in its application to India. Section 14 of the

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of houses made by the Act into those belonging to Government and local authorities and those not so belonging does not offend the provisions of Art. 14 of the Constitution of India. The classification of landlords into (1) Government and local authorities, and (2) the rest equally does not suffer from the taint of discrimination.)

1951 Cal 539 (Pr 24) [AIR V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.* (Section 18 (5), W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), as amended by W. B. Act 62 of 1950, does not infringe the Fundamental Right under Art. 14 of the Constitution of India. The Legislature is free to classify tenants who incurred statutory forfeiture of their tenancies and it is free to choose to grant them relief where suits are pending against them on the ground. That is a matter of legislative policy with which the Courts are not concerned and so long as, within that class of tenants in pending suits, no inequality or unequal treatment is made, such legislation is free from any unconstitutional taint on the ground.—AIR 1951 S C 41, Ref.)

[2] 1953 Bom 170 (174) (Pr 8) [AIR V 40 C 52] : I L R (1953) Bom 200, *Rampratap* v. *Dominion of India.*

1951 Assam 126 (Prs 6, 8) [A I R V 38 C 59 : I L R (1951) 3 Assam 407 (DB), *Shyamlal Mandal* v. *Municipal Board, Dhubri.*

[3] 1953 Mad 351 (353) (Pr 8) [AIR V 40 C 120], *Dr. K. C. Nambiar* v. *State of Madras.* (Madras Buildings (Lease and Rent) Control Act (25 of 1949), S. 13, power under—W. P. No. 132 of 1951 (Mad) (DB), Foll.)

[*See also* 1951 Assam 126 (Prs 6, 8) [AIR V 38 C 59] : I L R (1951) 3 Assam 407 (DB), *Shyamlal Mandal* v. *Municipal Board, Dhubri.* (Classification of houses into those belonging to Government and local authorities and other houses, and the classification of landlords as Government and local authorities on the one hand and other persons on the other are valid.)]

[4] 1952 All 703 (706) (Pr 10) [AIR V 39] (FB), *Raman Das* v. *State of Uttar Pradesh.* (U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7, Proviso, in so far as it makes discrimination between owners of houses built prior to and after 1-7-1946 does not violate the equality clause under Art. 14 of the Constitution and the article as such does not affect the validity of the Act.)

[5] 1952 All 699 (703) (Pr 10) [AIR V 39] (DB), *Karam Chand Thapar & Bros.* v. *Vijay Anand.* (U. P. Temporary Control of Rent and Eviction Act (3 of 1947 as amended in 1948), S. 3 is not invalid.)

Act, which discriminates between fugitive offenders from some parts of the British Commonwealth and those from other parts and provides that in one class of cases extradition is to be ordered although a *prima facie* case is not made out against the accused while in the other it provides that extradition is to be ordered only if a *prima facie* case is made out, violates this article and is void so far as India is concerned.[1]

Special facilities for corporations

42. Illustrative examples — Miscellaneous.— The grant of special facilities to corporations for realisation of their claims from debtors is no violation of the Fundamental Right of equality.[1] The principle is that a special privilege may be given to particular enterprises or employments in the interests of economic stability and general welfare.[2]

Difference of sentence for same offence

The award of a different sentence for same offence according to circumstances of each case does not infringe the principle of equality before law.[3] The object of punishment is to reform society by holding out deterrents as precedents and it must be such as would be felt as punishment by the offender and must be commensurate with the degree of shock that it causes to the conscience of society. This is a rule of natural justice on which all laws are based.[4]

But where the same act constitutes an offence under two separate laws under one of whcih it is more severely punished than under the

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Article 14 — Note 41

[1] 1953 Mad 729 (736) (Prs 39, 42, 62, 63) [A I R V 40 C 281] : 1953 Cri L Jour 1364 (DB), *In re C. G. Menon.* (Geographical contiguity and frequency of intercommunication was the basis of classification — It was held that this did not furnish sufficient ground for differentiation—It was too vague and uncertain a criterion for a valid and reasonable classification.)

Article 14 — Note 42

[1] 1952 Vin Pra 18 (Pr 5) [AIR V 39 C 11], *Badri Batan Lal* v. *V. P. Government.* (Rules framed by Durbar of Datia, Vindhya Pradesh, under which no Civil Court proceedings would be necessary or legal for realization of claims of State Bank from its debtors—AIR 1951 Vin Pra 11, Foll.)

1951 Vin Pra 11 (Prs 9, 11) [AIR V 38 C 6], *Sikhar Chand* v. *Bank of Baghelkhand.* (Equality before the law or equal protection of the laws does not at all imply absolute equality and does not exclude classification on the basis of difference in status. Corporations, such as banks, can be treated separately from individuals; special privileges may be given to particular enterprises or employments in the interests of economic stability and general welfare. Hence Ss. 3 and 5 of the Vindhya Pradesh Ordinance, No. LVII of 1949, cannot be said to offend against Art. 14 of the Constitution and therefore to be void on that account.)

[2] 1951 Vin Pra 11 (Prs 9, 11) [A I R V 38 C 6], *Sikhar Chand* v. *Bank of Baghelkhand.*

[3] 1953 S C 10 (16) (Pr 22) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (S C), *State of Punjab* v. *Ajaib Singh.*

1951 Orissa 259 (Pr 3) [AIR V 38 C 61] : I L R (1951) Cut 98 : 52 Cri L Jour 700 (DB), *Siba Prasad* v. *State of Orissa.* (Sentencing a Marwari merchant to imprisonment on ground that mere fine would not be deterrent in his case as he was a rich man is not against the Act.)

[4] 1951 Orissa 259 (Pr 4) [AIR V 38 C 61] : I L R (1951) Cut 98 : 52 Cri L Jour 700 (DB), *Siba Prasad* v. *State of Orissa.*

other and the Executive has been given the absolute power to order under which of the two laws the prosecution is to take place and there is nothing to regulate the exercise of the power by the Executive according to any principle, there will be an infringement of this article.[5]

Disqualification for representing income-tax assessees

The provisions of S. 61 (3) of the Income-tax Act, 1922, laying down that a dismissed Government servant or a lawyer or a public accountant found guilty of professional misconduct, shall not be entitled to appear before income-tax authorities to represent an assessee, does not infringe the equal protection clause. There is nothing in the provision which is contrary to principles of natural justice.[6]

Partition Act (1893), S. 4

The Partition Act, 1893, S. 4, is not invalid under this article. It is not an illegal discrimination to enable a member of the same family to buy a share of the family property purchased by the stranger at a valuation by the Court and deny the same right to a stranger.[7]

Civil servants

If the Government frames a rule fixing a certain date and says that anybody who completes 55 years of age or 30 years' qualifying service on that date would be retired, there is no discrimination within this class and therefore the rule cannot be hit by this article.[8]

Where a person is appointed on special contract by Government on a temporary basis and his services are terminated in accordance with the rules which form part of the contract, after notice, he cannot complain that the provisions of Art. 311 were not applied to him and that he was discriminated against in violation of the equal protection clause under this article.[9]

A fire insurance company is not deprived of the equal protection of laws by an Act applicable to fire insurance companies only which makes the entire amount of insurance payable in case of total loss.[10]

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[5] 1952 Cal 639 (Prs 41, 45) [AIR V 39] : 1952 Cri L Jour 1441 (SB), *Ram Kissen* v. *State.* (West Bengal Black-marketing Act (1948), S. 12—Same act punishable both under Black-marketing Act and Essential Supplies Act—Punishment under former more severe — Executive having absolute power to direct under which Act accused should be prosecuted—Art. 14 is infringed.)

[6] 1951 Mad 897 (Pr 11) [AIR V 38 C 320] : I L R (1952) Mad 451 (DB), *Chandrasekhara* v. *I. T. Commissioner.*

[7] 1952 Mad 33 (Pr 6) [AIR V 39 C 13], *Krishna Pillai* v. *Parukutty Ammal.*

[8] 1953 Madh B 165 (Pr 13) [A I R V 40 C 62] (DB), *Dineshcharan* v. *State of M. B.* (Petitioner cannot challenge omission of Government to pass under Gwalior Civil Service Rules a pension payment order as contravening Art. 14—It does not apply to administrative acts—AIR 1951 Bom 132, Foll.—For a discussion of the principle whether the act of administrative officers can be questioned under this article, see Note 1, sub-heading "Equality in administration".)

1952 Raj 17 (Pr 10) [AIR V 39 C 11] : I L R (1951) 1 Raj 405 (DB), *Kewal Mal* v. *Heta Ram.*

[9] 1953 S C 250 (252) (Pr 10) [AIR V 40 C 61] (SC), *Satish Chandra* v. *The Union of India.* (Under this article, it must be shown that a person has been discriminated against in the exercise of some legal right which is open to others who are *similarly* situated.)

[10] (1899) 172 U. S. 557 (561, 563) : 43 Law Ed. 552 (554), *Orient Insurance Co.* v. *Daggs.*

Article 14
Note 42

Punishing the practice of untouchability

Under ART. 17 the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with the law. Hence, a law under which a person is punished for refusing his professional service to another on the ground of his being a member of a low caste does not offend the principle of equality laid down by this article.[11]

Disqualification to stand for election

Section 16 (1) (ix) of Orissa Municipal Act, 1950, comes well within the test of reasonable classification and does not offend this article. The disqualification of a legal practitioner, who is engaged on behalf of or against a municipality, from standing for a municipal election may be said to bear a just relation to the evil sought to be remedied.[12]

Prescribing different age of majority for certain persons

The Indian Majority Act which prescribes two different ages of majority for two classes of persons does not violate any principle of equality before the law. Hence, the provision in S. 3 of the Act that the age of majority for wards of Court or for wards of whose estates the Court of Ward has taken charge, etc., shall be 21 is not invalid under this article. It cannot be said that the classification adopted in S. 3 is unreasonable.[13]

Public safety legislation —

See the undermentioned cases.[14]

Habitual criminals

Suppose a statute provides for the sterilization of habitual criminals, defined, for the purpose of the statute, as persons convicted two or more times for crimes amounting to felonies involving moral turpitude. The statute is made applicable to persons convicted of larceny, including larceny by fraud, but expressly exempts from its operation persons convicted of embezzlement although, under many circumstances, the nature of the two crimes is intrinsically the same, and under the law, they are punishable in the same manner. It has been held by the Supreme Court of America that such a statute constitutes a violation of the equal protection clause.[15] Similarly, in India it has been held by the Allahabad High Court that the discrimination between habitual criminals who have a bad reputation and others who have not, made by the U. P. Prevention of Crimes (Special Powers) (Temporary) Act, 1949, is opposed to the provisions of this article, inasmuch as the difference in the treatment meted out to the two classes of habitual criminals under the Act has no intelligible connection with the acquisition or non-acquisition of a reputation as a bad character.[16]

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[11] 1951 Cal 167 (Pr 11) [AIR V 38 C 30R] : 52 Cri L Jour 1399 (DB), *Banamali Das* v. *Pakhu Bhandari*. (The West Bengal Hindu Social Disabilities Removal Act, 1948, does not offend against Art. 14 of the Constitution. The Act does not discriminate, but penalises and abolishes tendencies in Hindu society to discriminate. The Act tends to make all persons equal in society and before the law by directing that persons rendering services to other Hindus are not entitled to discriminate and refuse to perform such services on the ground of caste or class of particular Hindus.)

[12] 1952 Orissa 11 (Pr 37) [AIR V 39 C 2], *Bishnu Charan* v. *State of Orissa*.

[13] 1951 Pat 570 (Prs 23, 24) [AIR V 38 C 161]: I L R 30 Pat 735 (DB), *Gopeshwar Prasad* v. *State of Bihar*.

[14] 1953 S C 404 (407) [AIR V 40 C 89] : 1953 Cri L Jour 1621 (SC), *Kedar Nath* v. *State of West Bengal*. (Preventive Detention Law is an instance where Legislature indicates the general classification and leaves it to the executive to pick out persons to whom the law should be applied.)

1953 S C 52 (53) (Pr 10) [AIR V 40 C 14] : 1953 S C R 210 : 1953 Cri L Jour 508 (SC), *Godavari* v. *State of Bombay*. (Example of reasonable classification—Preventive Detention Law—Classification of detenus into those who were detained before a certain date and those that were detained after that date for fixing the maximum period of their detention is not unreasonable.)

1952 S C 324 (Prs 14, 15) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (SC), *Shamrao* v. *District Magistrate, Thana*. (Preventive Detention (Amendment) Act (1952), S. 3—Classification made by section is reasonable and fair—Classification is not hit by equality clause in Art. 14 of the Constitution.)

1952 S C 221 (Pr 8) [AIR V 39] : 1952 S C R 737 : 1952 Cri L Jour 1147 (SC), *Gurbachan Singh* v. *State of Bombay*. (City of Bombay Police Act (4 of 1902), S. 27 (1)—Externment from Greater Bombay—Discrimination in procedure—Discrimination is based upon reasonable classification.)

But where there is a reasonable classification of habitual criminals and the Executive is empowered to deal with the different classes in different ways, the legislation cannot be impugned.[17]

Control legislation

The regulation of prices in private business falls well within the powers of the State. It has been held that in the exercise of this power the State can introduce such reasonable distinctions as appear to be just and necessary according to the circumstances of each case. Thus, it has been held that the fixing of a higher price for milk when purchased from middlemen than when purchased from the producer is not bad.[18]

Clause 15 of the West Bengal Rice Mills Control Order, 1949, does not infringe this article.[19]

Clause 25 of the Rajasthan Foodgrains Control Order, 1949, is equally applicable to all persons who come within the purview of the Order and therefore there is no discrimination in the law itself.[20]

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[15] (1942) 316 U S 535 (538) : 86 Law Ed 1655 (1658), *Skinner* v. *Oklahoma.*

[16] 1951 All 718 (Pr 28) [AIR V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.* (Even within the class of habitual criminals who have acquired a bad reputation the Act makes an unconstitutional discrimination between some and others in that some are left to be prosecuted under S. 110, Criminal P. C., while others are prosecuted under the Act. The Act has laid down no standard to guide the Magistrate's choice of one of the two procedures and no standard can even be imagined by the Court.)

[17] 1953 Mad 664 (668) (Prs 9, 11) [AIR V 40 C 254] : I L R (1953) Mad 937 : 1953 Cri L Jour 1174 (DB), *P. Arumugham* v. *State of Madras.* (Madras Restriction of Habitual Offenders Act (6 of 1948), Ss. 2 (4) and 16 do not contravene Art. 14. The Act cannot be said to be discriminatory merely because it left to the discretion of Government or the Magistrate to take action in respect of the same class of persons, viz., habitual offenders either under S. 110, Criminal P. C., or under the provisions of the Act or because it made a discrimination between persons coming under S. 2 (4) and persons coming under S. 16 (1) of the Act. All persons against whom action can be taken under S. 110, Criminal P. C., would not necessarily fall within the definition of habitual offenders under S. 2 (4) : AIR 1951 All 718, Disting.)

[18] (1934) 291 U S 502 (520, 521) : 78 Law Ed 940 (947), *Nebbia* v. *New York.*

[19] 1951 Cal 90 (Pr 12) [AIR V 38 C 26], *Anumathi Sadhukhan* v. *A. K. Chatterjee.*

The prohibition of carriage of rice by rail or motor without permit while not imposing such a restriction on other forms of conveyance has been held not to be invalid.[21] See also the undermentioned cases.[22]

As to the violation of the principle of equality before the law, committed by officials in the administration of controls, see NOTE 1 under sub-heading "Equality in administration."

Grain procurement

A scheme for the levy of a larger amount of grain from larger producers under the rationing law is not invalid.[23]

Nationalization of transport

Classification of motor operators as new and dislodged operators from the date from which the policy of nationalization of bus service came into force and the policy of making special provision for the benefit of dislodged operators is reasonable and not discriminatory.[24] (See also ART. 19 (6) (ii).)

Imposing of higher liability on certain classes of companies

It has been held in the United States that a law providing for damages by way of punishment against a railway company in certain circumstances is not bad as offending the equal protection clause. So it has been held that the railway company may be made liable for

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20. 1952 Raj 74 (Pr 6) [AIR V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr., Civil Supplies.*

21. 1953 All 545 (546) (Pr 7) [AIR V 40 C 266] : 1953 Cri L Jour 1269 (DB), *Har Murat* v. *State.* (U. P. Foodgrains Movement Control Order (1949), Cl. 3 (vii), is not unconstitutional—Government may have acted on the idea that it is only by such means that grains are generally carried for trading purposes.)

22. 1952 Cal 639 (643, 644) (Prs 45, 46) [AIR V 39] : 1952 Cri L Jour 1441 (SB), *Ram Kissen* v. *State.* (West Bengal Black Marketing Act (32 of 1948), S. 12 (1).)

1953 Him Pra 41 (47) [AIR V 40 C 19], *Hazari Lal* v. *State of Himachal Pradesh.* (Himachal Pradesh Cotton Cloth Dealers Licensing Order, 1948—Order directing retail dealers in cloth to carry on business through co-operative societies —Order is valid—On account of prevalence of blackmarketing State was perfectly justified in singling out retail cloth dealers in Himachal Pradesh and imposing the restriction on them.)

1952 Ajmer 56 (Pr 6) [AIR V 39], *Firm Sohanlal Ranglal* v. *Director, F. & C. S.* (Licensed dealer in cotton bales directed under Cotton Control Order to hand over cotton to particular mill—There is no question of denial of right of equality.)

1952 Mad 715 (Prs 6, 7, 9, 11, 13) [AIR V 39] (DB), *V. Menon* v. *Dev. Dept., Madras.* (Cotton Textiles (Control) Order (1948)—All India Yarn Distribution Scheme—Preferential treatment to consumer quota holders not bad : (1950) 94 Law Ed 381: 338 U S 604, *Secretary of Agri.* v. *Central Roig. Ref. Co.*, Rel. on. Where some of the master-weavers, though they were getting supplies direct from the mills during the basic period of 1940-42, were excluded from the list of "consumer quota holders" because they had not been doing business in the first control period there is nothing unreasonable in this policy of the Government. Such persons ought to be really included among the new comers.)

23. 1952 Pat 220 (Prs 10, 26) [AIR V 39 C 55 (22)] : I L R 31 Pat 203 : 1952 Cri L Jour 710 (SB), *Mohd. Anzar Husnain* v. *State of Bihar.*

1953 Cal 548 (559) (Prs 47, 48) [AIR V 40 C 205], *Atulya Kumar* v. *Director of Procurement & Supply.* (If surplus foodgrain has to be procured, the class most likely to have surplus is the large grower.)

24. 1952 Nag 353 (354) (Pr 7) [AIR V 39] : I L R (1953) Nag 110 (DB), *Shah Transport Co.* v. *State of M. P.*

Article 14
Note 42

double the amount of all damages for injury to animals, etc., straying on the railway road, caused by railway engines, etc., where the railway line was not fenced.[25] Similarly, it has been held that an Act making the railway company liable for injury to employee by negligence of a fellow employee does not offend the equal protection clause as there are peculiar hazards in the operation of a railway road.[26] (Under the ordinary law the employer was not liable for injury to an employee caused by the negligence of a fellow employee.) But a State statute imposing an attorney's fee not exceeding $ 10 in addition to costs, upon railway corporations omitting to pay certain claims within a certain time after presentation, which provision applied to no other corporations or individuals, was held to be unconstitutional as denying to railway corporations the equal protection of the laws.[27]

Evacuee property law

The Administration of Evacuee Property Act, 1950, is not unconstitutional as contravening this article.[28] The Act cannot be attacked on the ground that it applies only to certain States and not to others. India is a vast country and conditions differ in various parts ofi t. So one cannot insist on having one uniform rule applicable throughout the country.[29] (See also Note 15.) There is nothing unreasonable in the definition of "evacuee" given in S. 2 (d) of the Act and the Act cannot be held to be invalid on the ground that the evacuee cannot be treated as a class and that being an evacuee cannot be the basis for any reasonable classification.[30] The fact that the Act has laid down a special procedure and constituted special courts for declaring any property as evacuee property and that the procedure is of a summary nature is not sufficient to hold that the Act violated this article.[31] (See also Note 25.)

See also the undermentioned cases.[32]

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25. (1885) 115 U S 512 (523) : 29 Law Ed 463 (466), *Missouri Pacific R. Co.* v. *Humes.*

26. (1899) 175 U S 348 (353, 354) : 44 Law Ed 192 (195), *Tullis* v. *Lake Erie & Western R. Co.*

27. (1896) 165 U S 150 : 41 Law Ed 666 (672), *Gulf. C. & S. F. R. Co.* v, *Ellis.*

28. 1953 Hyd 157 (Prs 5, 6) [AIR V 40 C 68] : I L R (1953) Hyd 147 (DB), *Mohamed Habibuddin* v. *Govt. of Hyderabad.*

1953 Sau 73 (Pr 5) [AIR V 40 C 31] : 4 Sau L R 268 (DB), *Samsudin* v. *Asst. Custodian, Evacuee Property.* (AIR 1951 Bom 440 and Misc App 198 of 1950 (Bom), Rel. on.)

1952 Punj 389 (Pr 12) [AIR V 39] (DB), *Firm Sahib Dayal* v. *Asst. Custodian Evacuee's Property.* (The unlawful administration by the Custodian of the provisions of the Administration of Evacuee Property Act does not affect the constitutional validity of the Act. See also Note 1, sub-heading "Equality in administration".)

29. 1951 All 746 (Pr 8) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.*

30. 1951 All 746 (Prs 80, 81) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.*

31. 1951 All 746 (Pr 78) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.*

32. 1951 All 746 (Prs 82, 84) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.* (Though undoubtedly, at first sight, a

Abducted persons

The Abducted Persons (Recovery and Restoration) Act (65 of 1949) is not unconstitutional under this article.[33] Muslim abducted persons constituted a well-defined class for purpose of legislation and an Act specially dealing with such persons and providing for their recovery and restoration, does not contravene this article.[34]

Refugees from Pakistan

Refugees from Pakistan form a class by themselves and a legislation for their benefit, under which discrimination is made in their favour as compared with other citizens, is not unconstitutional under this article.[35]

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provision (S. 2 (d) read with S. 10 of the Administration of Evacuee Property Act, 1950) which amounts to this that on account of a cosharer being declared an evacuee, the property of other co-sharers will also become evacuee property and subject to the control of the Custodian seems to be harsh and opposed to principles of natural justice on account of the Court's unawareness of the various reasons which may have actuated the Legislature in coming to the conclusion that provisions of this drastic nature were needed for the purpose of safeguarding not only evacuee property but the interest of displaced persons in this country and of the country itself, the Court would not be justified in declaring this part of the Act as *ultra vires* of the Constitution on this ground : 6 Cranch 87 and 47 Law Ed page 323, Rel. on.)

1952 Pepsu 12 (Pr 7) [AIR V 39 C 8] : 3 Pepsu L R 465, *Sardara Singh* v. *Custodian, Muslim Evacuee's Property.* (Section 12 of the Act which empowers the Custodian to vary the terms of allotment and leases made by himself irrespective of the fact whether the other side agrees to it or not is not repugnant to Art. 14 of the Constitution and as such is not void. The power given to the Custodian is by virtue of the office that he holds and a law which vests a public officer or even a class of public officers with powers not possessed by an ordinary citizen cannot be regarded as denying to the citizen the equality before the law. According to S. 12, the Custodian has power to vary the terms of all allotments and leases granted or entered into after 14th August 1947 irrespective of the fact whether the other party belongs to a particular class or community. So it cannot be said that any distinction has been made between persons who obtain allotment and leases of evacuee property.)

1952 Punj 389 (Pr 12) [AIR V 39] (DB), *Firm Sahib Dayal* v. *Asst. Custodian, E. P.* (Section 48 of the Act does not deal with the powers of the Custodian to adjudicate upon the debts which may be due to an evacuee from a non-evacuee and is not void as violating the Fundamental Rights guaranteed by Art. 14 of the Constitution : AIR 1951 Mad 930 and AIR 1951 Bom 440, Rel. on.)

[33] 1953 S C 10 (16) (Pr 22) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.* (The fact that the Tribunal dealing with cases of Muslim abducted persons under the Abducted Persons (Recovery and Restoration) Act (65 of 1949) is empowered to exercise its discretion and dispose of the cases in different ways does not amount to discrimination.)

[34] 1953 S C 10 (16) (Pr 22) [AIR V 40 C 4] : 1953 S C R 254 : 1953 Cri L Jour 180 (SB), *State of Punjab* v. *Ajaib Singh.*

[35] 1952 Cal 679 (682) (Pr 6) [AIR V 39], *Aswini Kumar* v. *State of West Bengal.* (West Bengal Land Development and Planning Act (21 of 1948), cannot be held to offend Art. 14, on the ground that it discriminates between the citizens and non-citizens. It may be that the Act deprives a citizen of his property with a view to provide accommodation for refugee but that does not offend Art. 14. The refugees form a class by themselves. They do not stand on the same footing as a citizen. Their status and position are different. They are differently circumstanced. Moreover, the Act does not expressly purport to be dealing with aliens. All immigrants need not necessarily be aliens or foreigners. Besides, the Act was enacted for various other purposes which are mentioned in S. 2 (d) of the Act. Further, merely because the application of a

Civil Procedure Code—

See the undermentioned case.[36]

Criminal Procedure Code

Sections 523 and 524 of the Criminal Procedure Code cannot be said to deny to any person equality before the law or the equal protection of the laws.[37] It has already been seen above that S. 488 of the Code is not liable to attack under this article on the ground of the provision being only in favour of a woman and not in favour of a man as against a woman. See also NOTE 36.

Freedom of association

Freedom of association is one of the Fundamental Rights guaranteed by this Constitution under ART. 19 (1) (c). But the State has power under ART. 19 (4) to impose reasonable restrictions on this right in the interests of public order or morality. It has been held in the United States that the members of the Ku Klux Klan are not deprived of the equal protection of the laws by being required to file their constitution, bye-laws, rules, regulations and roster of membership, merely because members of labour unions, Masonic fraternities, etc., are not required to do so.[38]

Restrictions as to language

It has been held that Chinese merchants in Philippine Islands, who are chiefly affected by the statute requiring their account books to be kept in English, Spanish, or Philippine dialects, are thereby denied the equal protection of the laws.[39]

Political sufferers

The Madras Restoration of Village Officers (Validating) Act (18 of 1939) only purports to restore to persons who were justly entitled to the office, what they lost for political reasons. Such a policy of justice can never be said to be discriminatory. Hence, the Act cannot be held to be unconstitutional on the ground of discrimination.[40]

Taking over by Government of a business, factory, etc.

The Sholapur Spinning and Weaving Company (Emergency Provisions) Act (28 of 1950) cannot be assailed on the ground of its violation of this article.[41] (The Act empowered the Government of India to take over the control and management of the company in

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particular statute may in some cases actually result in discrimination, does not make the whole Act void as offending Art. 14 of the Constitution : AIR 1951 S C 41, Foll.; AIR 1951 Cal 539. Rel. on.)

[36] 1953 Ajmer 40 (1) (Prs 3, 5) [AIR V 40 C 43], *Cloth Merchants Association, Ltd.* v. *Ramrikh Jasraj.* (The provisions of the Code of Civil Procedure providing for a different method of service of processes (i. e., by registered post) on residents of Part B States is not inconsistent with the Constitution of India. All residents of Part B States have been treated alike. The classification cannot be considered offensive to the Constitution.)

[37] 1951 Madh B 159 (Pr 9) [AIR V 38 C 64] : 52 Cri L Jour 1953, *Madan* v. *The State.*

[38] (1928) 278 U S 63 (73) : 73 Law Ed 184 (189), *New York Ex. Rel. Bryant* v. *Zimmerman.*

[39] (1926) 271 U S 500 (528) : 70 Law Ed 1059 (1071), *Yu Cong Eng* v. *Trinidad.* (The statute deprives the Chinese merchants of something indispensable to the carrying on of their business and is obviously intended chiefly to affect them as distinguished from the rest of the community.)

[40] 1952 Mad 150 (Pr 5) [AIR V 39 C 65] (DB), *Purushotham* v. *Venkatappa.*

[41] 1951 S C 41 (Pr 65) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.* (Per *Kania, C. J.; Fazl Ali and Mukherjea, JJ.; Patanjali Sastri and Das, JJ.*, contra.)

question and its properties and effects by appointing their own directors and to delegate all or any of their powers to the Provincial Government.) (See also NOTE 8).

Court of Wards Act

A Court of Wards Act providing for taking over of management of estate by Court of Wards in certain cases for purpose of protecting land revenue and for the protection of persons who are incapable of managing their own estates, is not unconstitutional under this article.[42] But any provision therein which makes an invidious distinction between different proprietors on a basis which is not admissible in law can be attacked as a violation of this article. Thus, a provision which enables the Government to declare a female proprietor, as such, as incapable of managing her estate, will be invalid under this article. See NOTE 36.

Other examples —

See the undermentioned cases.[43]

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

15. *(1)* The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

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[42] 1953 Punj 30 (37) (Pr 45) [AIR V 40 C 9] (DB), *Harmahendra Singh* v. *Punjab State.*

[43] 1953 Cal 508 (509) [AIR V 40 C 192] (DB), *Narayan Chandra* v. *Ananda Bisni.* (Sugar (Temporary Excise Duty) Act (9 of 1947), S. 3, cannot be said to benefit only a limited class, viz., the wholesale dealers and not retail dealers — Hence it is not invalid under this article.)

1952 Cal 16 (Pr 13) [AIR V 39 C 6], *Krishna* v. *Director of L. H. & D. E. Command.* (Requisitioned Land (Continuance of Powers) Act (17 of 1946) does not contravene Art. 14 or Art. 31 and is not void under Art. 13—Though in the matter of disputed premises requisitioned under the Act the local officers may have discriminated its owners from the persons owning lands near about, this cannot be regarded as discrimination within Art. 14.)

1952 Pat 194 (Pr 19) [A I R V 39 C 55 (15)] (DB), *Ram Prasad* v. *State of Bihar.* (Sathi Lands (Restoration) Act cannot be held to be invalid under this article.)

('51) 4 Sau L R 234 (236, 237) (DB), *Rana Kanubha Sensabhai* v. *State.* (Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance (41 of 1949), S. 29(2)—Validity—Tenant or agricultural labourer or artisan entitled to possession of any land or dwelling house may take possession with the consent of the person in whose possession such land or dwelling house is. But a landlord is debarred from obtaining possession except under an order of the Mamlatdar even when his tenant is willing to surrender possession to him—*Held* not discriminatory.)

(1894) 154 U S 362 (399) : 38 Law Ed 1014 (1024), *Reagan* v. *Farmers Loan & Trust Co.* (Fixing and enforcing by railroad commission of unjust and unreasonable rates for transportation by railroad companies, is an unconstitutional denial of equal protection of the laws.)

Article 15
Note 1

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[a][*(4)* Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

a. Added by the Constitution (First Amendment) Act, 1951 [18-6-1951].

GOVERNMENT OF INDIA ACT, 1935

Note. — For text of S. 298 of the Government of India Act, 1935, which corresponds to this article, see NOTE 1 of this article.

COGNATE PROVISIONS

The State — Interpretation of — See ART. 12.

Scheduled Castes and Scheduled Tribes—Interpretation of—See ART. 366 (24) and (25).

Synopsis

1. Analogous law.
   - Constitution of the United States of America.
   - Government of India Act, 1935, S. 298.
   - Cognate articles in the Constitution.
2. Amendment.
3. Scope and applicability of the article.
4. Who can question constitutionality.
5. Retrospective effect.
6. Value of American decisions.
7. "The State."
8. "Discriminate against."
9. "Citizen."
10. "On grounds only of religion, etc."
11. Discrimination on ground of religion.
    - Communal electorates.
12. Discrimination on ground of race or caste.
13. Discrimination on ground of sex.
    - Discrimination as to admission into educational institutions.
14. Discrimination on ground of place of birth.
15. "Or any of them."
16. Customary law.
17. Personal law.

17a. Admission into educational institutions.

17b. Electoral law.

18. Clause (2). See Note 3.
19. Dedicated to the use of general public.
20. Clause (3).
21. Clause (4).

Constitution of the United States of America

1. Analogous law. — It has been seen in the notes on ART. 14 that it corresponds to the "rule of law" under the English law and to the clause as to the equal protection of the laws in the 14th Amendment to the Constitution of the United States of America. It has also been seen in the notes on ART. 14 that ART. 14 enacts the general principle of equality before the law and the succeeding articles, namely, ARTS. 15, 16, 17 and 18 constitute specific applications of that general principle. The Constitution of the United States of America does not contain any exact parallel to this article. There are, however, certain analogous provisions in the Constitution of the United States of America to which reference may be made. There is a provision in that Constitution which states that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.[1] The 19th Amendment of the American Constitution provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. It has been pointed out by a learned Judge of the Calcutta High Court that both the language and theme of the above Amendment are different from those of ART. 15 of our Constitution and that the Court should not be guided by American decisions in determining questions arising under this article.[2]

In the absence of specific provisions relating to discrimination on the ground of religion, race or sex, the equal protection of the laws clause in the 14th Amendment has itself been considered as prohibiting hostile discrimination against any person on such grounds.[3] Reference may be made to the commentaries on ART. 14 where several American decisions bearing on the subject have been cited and discussed.

Government of India Act, 1935, S. 298

Government of India Act, 1935, S. 298 runs as follows :

Persons not to be subjected to disability by reason of race, religion, etc.

"298. (1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

(2) Nothing in this section shall affect the operation of any law which—

(a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or

(b) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

Article 15 — Note 1

[1] *See* Article IV, Section 2 (1).

[2] 1951 Cal 563 (Pr 37) [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen.*

[3] *See* (1873) 21 Law Ed 394 (410) : 16 Wall 36, *Slaughter House Case.* (The equal protection clause was clearly intended to prevent hostile discrimination against the Negro race.)

Article 15
Note 1

(3) Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities."

It will be seen that the above section does not enact any general prohibition against discrimination against a citizen solely on grounds of religion, race, etc. The section more or less corresponds to Art. 16 providing for equality of opportunity in matters of public employment and to Art. 19 as regards acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession. The section expressly preserves the validity of laws restricting the powers of alienation of agricultural property by members of agricultural communities. The section also excepts from its operation rights, privileges and disabilities attaching to members of a community by virtue of some personal law or custom having the force of law.

Some of the decisions bearing upon the above section (S. 298, Government of India Act, 1935) are referred to below.[4]

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[4] 1947 F C 1 (Pr 11) [AIR V 34 C 1] : 1946 F C R 67 : ILR (1946) Kar (F C) 27 (F C), *Manikkasundara* v. *R. S. Nayudu.* (The Madras Temple Entry Authorisation Act (22 of 1939) does not amount to a prohibition of the holding of property on grounds only of religion. Section 298, Government of India Act, therefore, does not apply to it.)

1942 F C 27 (29) [AIR V 29] (F C), *Megh Raj* v. *Allah Rakhia.* (When a particular piece of legislation is impeached as contravening S. 298, the Court has to consider the provisions of the impugned Act and to determine whether directly or in effect it prohibits any person from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession, on grounds only of religion, place of birth, descent, etc. The Punjab Restitution of Mortgaged Lands Act (4 of 1938) cannot be said to prohibit persons of particular descent, namely, communities classed as non-agricultural, from holding property inasmuch as under the provisions of that Act agriculturist mortgagees though they may be fewer in number are as much liable to be dispossessed by order of the Collector as non-agriculturist mortgagees.)

1941 Lah 182 (186, 187, 188, 189) [A I R V 28] (FB), *Punjab Province* v. *Daulat Singh.* (The pith and substance of the Punjab Alienation of Land (Second Amendment) Act (10 of 1938) was to penalize certain transactions resulting in the acquiring of a beneficial interest in land by certain persons on the ground of descent alone and it cannot be said that it was the nature of the transaction which was attacked by the Act. The Act would therefore be invalid as offending against the provisions of S. 298 (1) of the Government of India Act, 1935, and is not saved by the provisions of S. 298 (2) (a) qua sales or mortgages which had been effected before the commencement of the Act. In other words, the Act is *intra vires qua* sales or mortgages of agricultural land effected by agriculturists in favour of agriculturists who are benamidars for non-agriculturists after the commencement of the Act but it is *ultra vires qua* transactions affecting rights in agricultural land, whether sales or mortgages, effected before the passing of the Act.)

1946 Bom 216 (235) [AIR V 33 C 59] : ILR (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.* (What was sought to be enacted by the sections in Part XII of the Government of India Act commencing with S. 292, was not a restriction on the powers of the Legislature but was certain fundamental principles of British jurisprudence international law, His Majesty's preroga-

Article 15
Note 1

Cognate articles in the Constitution

Article 14 enunciates the general principle of equality before the law and equal protection of the laws. Article 16 guarantees equality of opportunity in matters of public employment. Article 17 abolishes untouchability and makes the enforcement of any disabilities arising

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tive to grant pardons, remissions of punishments and the like which should not be in any manner whatsoever affected or departed from in the exercise of the legislative powers invested in the Indian Legislature under the terms of the Act. Examples of this are to be found, *inter alia*, in the provisions of S. 298 (1) and S. 299 (1) and (2), which are not merely restrictions on the legislative powers of the Indian Legislature but are in reality the statutory recognition of the fundamental principles of British jurisprudence enacted therein.)

1943 Lah 233 (235, 236) [AIR V 30] (DB), *Sajawal Bakhsh* v. *Md. Hussain*. (The prohibition referred to in S. 298, means absolute prohibition. It does not mean prohibition to hold property which may be dependent on the wishes of certain persons who are entitled to purchase land in preference to the vendees. Therefore, no prohibition is imposed on any person so far as acquisition of property is concerned by S. 15(a), Punjab Pre-emption Act. There is no prohibition to the holding of any property because when a collateral of the vendor chooses to exercise his right and is successful in a suit for preemption, he gets the land because "priority of acquisition" is accorded in his favour by the Punjab Pre-emption Act and not because the defendant is prohibited from acquiring or holding property. The pre-emptor under S. 15 (a), Punjab Pre-emption Act, does not succeed on the ground of descent alone but because in addition to descent from vendor he fulfills the conditions laid down in S. 14, Punjab Pre-emption Act. He succeeds firstly because on the date of the sale he is a member of an agricultural tribe as the vendor and secondly because he is a descendant of the vendor. Section 15, Punjab Pre-emption Act, therefore, does not fall within the express language of S. 298, and is valid and binding and has not been invalidated on the ground that it is repugnant to the provisions of S. 298.)

1942 Lah 243 (248, 251) [AIR V 29] (DB), *Madho Singh* v. *James Skinner*. (Since two forms of alienation alone, namely, sales and mortgages, are specifically mentioned in the saving clause in S. 298 (2), the others must be taken to have been excluded on the rule of construction that what it expressed makes what is not expressed cease. Consequently, S. 298 (2), limits the operation of S. 3, Punjab Alienation of Land Act, only to sales and mortgages. Therefore, only those parts of the Punjab Alienation of Land Act are now in force in the Punjab, which relate to sales and mortgages of agricultural land and the remaining provisions of that Act prohibiting or restricting other forms of alienations, being repugnant to S. 298 (1), Government of India Act, 1935, and not being within the exception contained in sub-s. (2) of that section are no longer law after 1st April 1937. The effect of S. 298, Government of India Act, therefore, is that on and after 1st April 1937 a person belonging to a notified agricultural tribe under S. 3, Punjab Alienation of Land Act, is free to exchange, gift or bequeath agricultural land or grant occupancy rights in it to a person who does not belong to any of the agricultural tribes in the same group. Section 292, Government of India Act, no doubt saves the existing law but it is clearly laid down there that the saving clause is subject to the other provisions of the Government of India Act. Since S. 298, Government of India Act, comes directly into conflict with S. 3, Punjab Alienation of Land Act, so far as exchanges are concerned, S. 292 must be read subject to S. 298 with the result that the latter section will prevail over any other existing law in force. Similarly, S. 293, Government of India Act, cannot be successfully invoked in support of the contention that the Punjab Alienation of Land Act has not been in any way altered or affected by S. 298, Government of India Act. Section 293 can in no way be treated as a saving clause merely because by an Order in Council the Punjab Alienation of Land Act too was in some respects altered or modified so as to be brought into accord with the Government of India Act.)

out of untouchability an offence punishable in accordance with law. Article 29 (2) provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Article 46 provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled tribes and shall protect them from social injustice and all forms of exploitation. The Constitution contains special provisions relating to scheduled castes and scheduled tribes and the Anglo-Indian community and the safeguarding of the interests of these communities (Arts. 330-342).

2. **Amendment.** — Clause (4) was added by the Constitution (First Amendment) Act, 1951, S. 2. For the genesis of this amendment and for the scope of the clause, see Note 21.

3. **Scope and applicability of the article.** — As seen in the notes on Art. 14, this is one of the articles which contain a specific application of the principle of equality before the law declared by Art. 14. To adopt the words of Kania, C. J., in *Gopalan* v. *State of Madras*,[1] it is "one of the constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation." The article prohibits discrimination against any citizen solely on grounds of religion, race, caste, sex or place of birth.

The article contains four clauses. The first clause enacts the above prohibition which is directed against "the State." Clause (2) is of wider import. It extends the prohibition of discrimination on the grounds mentioned in cl. (1) to private individuals and institutions also in certain cases. The clause provides that no citizen shall be subjected to any disability or other restriction with regard to access to shops, public restaurants, hotels and places of entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of the State funds or dedicated to the use of the general public.

It has been seen in the notes on Art. 14 that in America it was held in certain cases that the equal protection clause was only aimed at State action and did not affect the infringement of the principle of equality by individuals against individuals or groups of private individuals against other groups of private individuals. Such a view will be wholly untenable under our Constitution in cases covered by Art. 15 (2). It may also be noted that under Art. 17 the enforce-

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Article 15 — Note 3

[1] **1950 S C 27 (Pr 26) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).**

[*See also* 1951 Mad 120 (Pr 43) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras*.

1951 Punj 93 (Pr 15) [AIR V 38 C 22] : ILR (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab*. (AIR 1950 S C 27, Foll.)]

ment of any disability arising out of untouchability is specifically made punishable as an offence according to law.

Clauses (3) and (4) are by way of exception to the general rule enacted in cl. (1) and are intended to enable the State to make special provisions for the benefit of the weaker members of society.

The rights protected under this article are *personal* rights of the citizens and not their rights *as members* of any caste or community.[2] Hence, where a citizen is denied equality of treatment on the ground solely of his belonging to a particular caste or community, it would be no answer to say that it is not every member of his community that is so treated and that the rights of any caste or community as such are not affected.[3]

The Fundamental Right conferred by this article is conferred on a citizen as an individual and is a guarantee against his being subjected to discrimination in the matter of the rights, privileges and immunities, pertaining to him as a citizen generally.[4] The mandate in the article extends to political as well as other rights.[5] The article prohibits discrimination in all matters including admission into educational institutions.[6]

The article prohibits the State from discriminating against any citizen solely on the grounds specified therein. The words of paramount importance in cl. (1) are the words "discrimination" and "only." What the article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the article.[7] The discrimination referred to is *invidious* discrimination and not *any* differentiation (see NOTE 8). In *Anjali* v. *State of West Bengal*,[8] Chakravartti, Acting Chief Justice, observed as follows :

> " All differentiation is not discrimination, but only such differentiation as is invidious and as is made, not because of any real

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[2] 1951 Mad 120 (Pr 46) [A I R V 38 C 14] : I L R (1951) Mad 149 (FB). *Champakam Dorairajan* v. *State of Madras.*

[3] 1951 Mad 120 (Pr 46) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Dorairajan* v. *State of Madras.* (Brahmin students denied admission into State educational institution under Communal Government Order fixing the number of seats for each community—It is no answer to say that all Brahmins have not been refused admission.)

[4] 1953 S C 384 (385) (Pr 7) [AIR V 40 C 86] (S C), *Nain Sukh Das* v. *U. P. State.* (Where the citizen's right individually has not been violated, he cannot apply to the Supreme Court under Art. 32 merely because there is law which discriminates between different communities.)

[5] 1953 SC 384 (385) (Prs 3, 4) [AIR V 40 C 86] (SC), *Nain Sukh* v. *U. P. State.* (System of elections to local bodies on basis of communal electorates is bad.)

[6] 1952 Cal 822 (824) (Pr 9) [AIR V 39], *Anjali* v. *State of West Bengal.* (So it was held by *Bose, J.* that Art. 29 (2) which deals with admission into educational institutions is controlled by Art. 15 (1) and so discrimination in such matters on ground of *sex* alone is prohibited under this article although Art. 29 (2) does not mention *sex* as ground on which discrimination is prohibited — But *Chakravartti, Ag. C. J.*, doubted the correctness of this view when the case went on appeal though he did not express his final opinion : *see* AIR 1952 Cal 825 (831)).

[7] 1952 Cal 825 (829) (Pr 16) [AIR V 39]. *Anjali* v. *State of West Bengal.*

[8] 1952 Cal 825 (829) [AIR V 39].

difference in the conditions or natural difference between the persons dealt with, which makes different treatment necessary, but because of the presence of some characteristic or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiation made as a justifying reason. Next, the discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the article."

See also the observations of Patanjali Sastri, C. J., in *Kathi Raning's case*[9] quoted in NOTE 8.

Comparing this article with ART. 14, discrimination by the State against any citizen solely on grounds of religion, race, caste, place of birth, or any of them, is *ipso facto* condemnable under this article. But in the case of a breach of a rule of equality under ART. 14, there is a presumption in favour of the State's action being justifiable as a reasonable exercise of the State's power of classification of subjects, persons and territories for purposes of good government. The mere fact of inequality will not be a blemish under ART. 14, unless the inequality perpetrated is shown to be arbitrary and unjust and based on considerations irrelevant to the matter in issue.[10] In the words of Patanjali Sastri, C. J., if bias based on any of the grounds mentioned in ARTS. 15 and 16 is disclosed, "it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under ART. 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified".[11]

This article may also be compared with ART. 19. The various freedoms and rights guaranteed by ART. 19 are hedged in by provisions reserving the power of the State to impose reasonable restrictions on such freedoms and rights, in general public interests. It is noteworthy that this article does not contain any such general exception, giving power to the State to abridge the right guaranteed by this article in general public interests. There are no doubt the specific provisions giving power to the State to make special provisions for the benefit of some of the weaker members of society, but there is no general power of abridging the right guaranteed by this article in public interest.[12]

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[9] **1952 S C 123 (125) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (S C), *Kathi Raning* v. *State of Saurashtra*.**

[10] **1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435: 1952 Cri L Jour 805 (S C), *Kathi Raning* v. *State of Saurashtra*.**

[11] **1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (S C), *Kathi Raning* v. *State of Saurashtra*.**

[12] **1952 Vind Pra 17 (Pr 5) [AIR V 39 C 10], *Jangi Lal* v. *Baijnath Singh*.**

Suppose a law is passed prohibiting persons not born in a particular State from holding or acquiring land in that State, although they may be citizens of India. Such a law will be void under this article as discriminating against a citizen of India solely on the ground of the place of his birth. Can the law be validated by recourse to ARTICLE 19 (5) which enables reasonable restrictions to be imposed in the interests of the general public on the right granted under ART. 19 (1) (f) to acquire, hold, and dispose of property? It is apprehended that such a course is not open under the Constitution.[13]

As to the mutual effect of this article and ARTICLE 29 (2), see NOTE 17a.

4. Who can question constitutionality. — Although this article only applies to *citizens*, a person who is not a citizen of India may rely on the Fundamental Rights guaranteed by this Part, not for *enforcing* those rights, but merely in order to point out to the Court that a particular law under which he is being prosecuted is void as being repugnant to the Fundamental Rights and that, therefore, no penal consequences can follow from such law.[1] In the United States of America also it has been held that the unconstitutionality of a law on the ground of its making an illegal and unjustifiable discrimination against a person solely on the ground of his belonging to a particular race may be raised by a person who is not himself discriminated against.[2]

But the right granted under this article is an individual right and it is only a person who has himself been injured in the exercise of his right that can move the Supreme Court under ART. 32 for its *enforcement*.[3]

5. Retrospective effect.—It has been seen under ART. 13 that the effect of cl. (1) of that article is not to render the laws affected thereby void *ab initio* so as to nullify anything already done or suffered or any liability incurred before the coming into force of the new Constitution and that the effect of that clause is only that such laws become void from the date of the coming into force of the Constitution. This rule can have no application when nothing has been done or suffered already before the Constitution and there is no attempt to nullify what has already happened. Thus, when after a suit has been filed and during the pendency of the suit, before a decree is passed in the suit, the new Constitution comes into force, thereby rendering void certain law, which would have otherwise governed the suit, there is no objection to the Court passing a decree which will take note of the fact that the particular law in question has become void during the pendency of the suit.[1]

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[13] *See* 1952 Vind Pra 17 (Pr 5) [AIR V 39 C 10], *Jangi Lal* v. *Baijnath Singh*.

Article 15 — Note 4

[1] 1951 Bom 470 (Pr 3) [AIR V 38 C 103] : ILR (1952) Bom 449 : 1952 Cri L Jour 23 (DB), *Yusuf Abdul Aziz* v. *State*.

[2] (1917) 62 Law Ed 149 (164) : 245 U S 60, *Buchanan* v. *Warley*. (A white person who has sold land to a coloured person under a contract providing that the purchaser shall not be required to accept a deed unless he shall have a right, under the law of the city and state, to occupy the same as residence, may, in an action by him to compel the specific performance of the contract, attack the constitutionality of a city ordinance which prohibits the purchase of such land by a coloured person.)

[3] 1953 S C 384 (385) (Pr 5) [AIR V 40 C 86] (SC), *Nain Sukh Das* v. *U. P. State*. (Election to municipality on a system of communal electorates is bad — But one who has not been personally affected cannot move the Supreme Court under Art. 32 —He may have his remedy under Art. 226 to enforce his ordinary legal right as a rate payer to see that a legally constituted municipality is functioning.)
1951 Bom 470 (Pr 3) [AIR V 38 C 103] : ILR (1952) Bom 449 : 1952 Cri L Jour 23 (DB), *Yusuf Abdul Aziz* v. *State*.
[Compare 1951 S C 41 (44) (Pr 7) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India*. (Unless the complainant himself is injured, he cannot get relief merely because somebody else may be hurt— (1914) 235 U. S. 151, *McCabe* v. *Atchison T. & S. F. R. Co.*, Foll.)]

6. Value of American decisions. — American decisions are not directly applicable in considering ART. 15 (1). Implicit reliance should not be placed on American precedents without due regard to the fact that the Indian Constitution, unlike the American, runs into details and considerably narrows the scope for judicial interpretation, and without paying due attention to the difference in language between the articles of the two Constitutions.[1] So, a learned Judge of the Calcutta High Court observed as follows, while considering the question whether the rule contained in O. 25, R. 1, cl. (3) of the Code of Civil Procedure empowering the Court to demand security from a woman plaintiff was void as being repugnant to cl. (1) of this article:

> "I refuse to be guided in this case by the American precedents. The 19th Amendment of the American Constitution provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Both the language and the theme of the 19th Amendment of the American Constitution are different from those of ART. 15 of the Constitution of India. The craze for American precedents can soon become a snare. A blind and uncritical adherence to American precedents must be avoided, or else there will soon be a perverted American Constitution operating in this land under the delusive garb

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Article 15 — Note 5

[1] 1952 Vind Pra 19 (Pr 4) [AIR V 39 C 12], *Baijnath Singh* v. *Jangi Lal.* (A suit for pre-emption was filed by a non-resident of Rewa State before the coming into force of the Constitution — A pre-emption decree was passed in his favour in spite of the fact that under S. 49, Rewa Land Revenue and Tenancy Code, the pre-emptor could not acquire the property except with the permission of the Chief Revenue Authority— At the time of passing the decree the disability under S. 49 of the Code had ceased in view of Art. 15 of the Constitution of India and it was no longer necessary to take the permission of Chief Revenue Authority— *Held* that the Court in taking notice of Art. 15 of the Constitution had not committed any mistake and as such there was no mistake in passing the pre-emption decree.)

Article 15 — Note 6

[1] 1951 Mad 120 (Prs 13, 28) [A I R V 38 C 14] : I L R (1951) Mad 149 (FB). *Champakam Dorairajan* v. *State of Madras.*

of the Indian Constitution. We are interpreting and expounding our own Constitution."[2]

7. **"The State."**—The expression "the State" has been defined in ART. 12 for purposes of this Part. Hence the words "the State" in this article also must be taken in the sense defined in ART. 12. Reference is made to the commentary on ART. 12 for a fuller discussion of the meaning of the term "the State". As seen in NOTE 3, the right to non-discrimination on the ground of religion, race, caste, sex or place of birth, falls into two types according to the provisions of this article; (i) the right to non-discrimination by State (cl. (1)), and (ii) the right to non-discrimination in regard to matters specified in cl. (2). In regard to matters specified in cl. (2), although the discrimination may be perpetrated by private individuals, or by the public, or any section of the public, the citizen who is the victim of such discrimination has a legal right to complain and get appropriate relief.

The definition of "the State" in ART. 12 declares that the State shall include the Government and the Parliament of India, the Government and the Legislature of each of the States and all local or other authorities within the territory or under the control of the Government of India. The question can legitimately be raised whether with reference to *personal law or customary law*, it can be said that the State as defined in ART. 12, namely, in the context, the Legislature or the Executive of the Union or of any of the States, discriminates against any citizen on grounds of religion, etc., seeing that such a law is not made by the State. But the same question can be raised with reference to all laws which were in force before the Constitution and which under ART. 372 will continue to be applicable, because even in such cases the laws will not be those made by the State as defined in ART. 12. And notwithstanding this, it is established that even laws prior to the Constitution may be declared void as being in contravention of this article. The same reasoning will conceivably apply to personal and customary law. The basis of this seems to be that under ART. 13 all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III, shall to the extent of such inconsistency be void. If a law is such that it cannot be promulgated by the State after the Constitution by reason of any of the prohibitions contained in this Part, then presumably it must be considered inconsistent with the provisions of this Part. It is on this reasoning that personal laws and usages having the force of law, and laws made prior to the Constitution, would be subject to the provisions in the Part on Fundamental Rights which prohibit "the State" from making certain types of laws.[1]

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[2] 1951 Cal 563 (Pr 37) [AIR V 38 C 165], *Mahadeo Jiew* v. *B. B. Sen.*

Article 15 — Note 7

[1] *See* 1951 Punj 445 (Prs 6, 7) [A I R V 38 C 142], *Nathu* v. *Ralla*. (In this case Punjab Customary Law restricting right of alienation of ancestral land of male proprietor was held not based on distinction solely of race and caste and so was not bad.)

According to ART. 53, the executive power of the Union shall be vested in the President. The term "Government" is ordinarily used as synonymous with the Executive and hence it clearly includes the President of the Union. Hence, the President cannot discriminate against any citizen solely on grounds of religion, race, caste, etc., in any official act of his.[3] It is also clear that the power of making special provision by way of exception to cl. (1) of this article conferred by cls. (3) and (4) of this article upon the State, would also apply to the President. Hence, the President can take appropriate action under cls. (3) and (4) for purposes mentioned therein.[3] It has, therefore, been held that the Constitution (Scheduled Castes) Order, 1950, passed by the President under ART. 341 of the Constitution is not *ultra vires*, because it must be treated as passed by "the State" for purposes of cl. (4) of this article.[4]

The prohibition against the State contained in cl. (1) of this article will also apply to public officials acting for and on behalf of the State in the discharge of their official duties in carrying on the administration of the country.[5] As observed by Mr. Justice Matthews in *Yick Wo* v. *Hopkins*[6]: "Though the law itself be fair on its face and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (See also notes on ART. 14.)

In America it has been held that even *judicial action* may be regarded as State action for purposes of the law against discrimination on ground of race, birth, etc.[7] But the tenability of this view under this Constitution is open to question. See notes on ART. 12.

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2. 1952 Punj 143 (Pr 4) [A I R V 39 C 52] : I L R (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.*

3. 1952 Punj 143 (Pr 4) [AIR V 39 C 52] : ILR (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.*

4. 1952 Punj 143 (Prs 6, 7) [A I R V 39 C 52] : ILR (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.* (Special treatment given to certain castes in the Punjab.)

5. (1938) 83 Law Ed 208 (210): 305 U S 337, *Missouri Ex Rel Gaines* v. *Canada.* (Curators of State university refusing admission to Negro students—Equal protection clause is violated.)
[*See also* (1879) 25 Law Ed 676 (679) : 100 U S 339, *Ex parte Commonwealth of Virginia.* ('State' includes agents of state.)
1951 Mad 930 (Prs 20, 21) [A I R V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.* ((1886) 118 U S 356: 30 Law Ed 220, *Yick Wo* v. *Hopkins*, Ref. to.)]

6. (1886) 30 Law Ed 220 (227) : 118 U S 356.

7. (1948) 334 U S 1 (14) : 92 Law Ed 1161 (1181), *Shelley* v. *Kraemer.* (Judicial enforcement of covenants restricting use or occupancy of real property to persons of Caucasian race violates equal protection clause—Though 14th Amendment is directed against State action only and does not reach private conduct, however discriminatory, judicial action even for enforcement of private agreements is State action and within 14th Amendment and enforcement of restrictive covenants against certain races is none the less discriminatory because it will enforce them against any race against whom they are directed.)

Educational institutions will be within the purview of ART. 15 (1) only if they are *State maintained* and not otherwise.[8]

8. "Discriminate against."—The words "discriminate against" imply an unfavourable bias affecting the differentiation which the State is making.[1] In *Kathi Raning* v. *State of Saurashtra*,[2] Patanjali Sastri, C. J., observed as follows :

> "All legislative differentiation is not necessarily discriminatory. In fact the word 'discrimination' does not occur in ART. 14. The expression 'discriminate against' is used in ART. 15 (1) and ART. 16 (2) and it means according to the OXFORD DICTIONARY, 'to make an adverse distinction with regard to'; 'to distinguish unfavourably from others'. Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in ARTS. 15 and 16, it may well be that the Statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles."

In *Mahadeb Jiew* v. *B. B. Sen*,[3] P. B. Mukharjee, J., of the Calcutta High Court observed as follows :

> "Discrimination is comparative in its connotation. Discrimination on the ground of sex alone must mean that one sex is discriminated as against the other. Discrimination is double-edged. To discriminate against one sex is to discriminate in favour of the other, but inherent in the very notion of every discrimination is a measure of comparison. The language used in ART. 15 (1) of the Constitution 'discriminate against' should, in my view, be understood in the above light. There cannot be any discrimination 'against' without a resulting and corresponding discrimination in favour of someone else which would be commonly known as preference for that someone else. Discrimination and preference are twin and inseparable ideas. Etymologically the word 'discriminate' comes

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[8] 1954 Mad 67 (69) (Pr 7) [A I R V 41 C 13] (DB), *University of Madras* v. *Shantha Bai.* (Regulations of University of Madras which is State-aided and not State-maintained are not within the prohibition of Art. 15 (1).)

Article 15 — Note 8

[1] 1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.*

1951 Mad 120 (Pr 15) [AIR V 38 C 14]: I L R (1951) Mad 149 (FB), *Champakam Dorairajan* v. *State of Madras.* (Per *Rajamannar, C. J.*—The words "discriminate against" in Art. 15 (1) mean "make an adverse distinction with regard to" "distinguish unfavourably from others"—What the article says is that no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste.)

1952 Cal 825 (829) (Pr 16) [A I R V 39] (DB), *Anjali* v. *State of West Bengal.* (Only discrimination that is invidious that is objectionable—See the observations from this case quoted in Note 3.)

[2] 1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC)

[3] 1951 Cal 563 (Pr 30) [A I R V 38 C 165].

from the Latin origin *discriminare* which means to divide, separate or distinguish. James Murray's NEW ENGLISH DICTIONARY, published by Oxford Clarendon Press (1897), Vol. III, p. 436 gives the meaning of the expression 'to discriminate against' as 'to make an adverse distinction with regard to or to distinguish unfavourably from others'."

Although it is stated in the above quotation that there cannot be discrimination against any one without resulting in a corresponding discrimination *in favour* of someone else, it is clear that where two persons are situated in circumstances which are exactly similar to each other in all material particulars and yet the State takes some action which places one of them alone under a disadvantage, the action of the State must be deemed to be discriminatory against him. Conversely, discrimination in favour of a person solely on the ground of his caste or religion, etc., may be legitimately regarded as discrimination against persons of other castes.[4] This has been recognised even by Mukharjee, J., in the above case where he points out that the moment a special provision for the benefit of women or children is made under cl. (3) of this article, that would necessarily mean that a discrimination is made against those who are not women and children and such persons would be entitled to challenge the special provision under cl. (1) of this article but for the special exception provided in clause (3).

Merely because members of a particular community, for example, Muslims, constitute a large majority of persons affected by a certain Act, it does not necessarily follow that it is discriminatory against them.[5]

The law which discriminates against some citizens solely on the ground of their religion, race, etc., does not cease to be discriminatory merely because provision is made for compensating such citizens in some other way.[6]

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[4] 1952 Punj 143 (Pr 6) [AIR V 39 C 52] : ILR (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.*

[5] 1951 Mad 930 (Pr 20) [A I R V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.* (Evacuee Property Ordinance 1949 is not *ultra vires.*)

[6] (1938) 83 Law Ed 208 (209): 305 U S 337, *Missouri Ex Rel. Gaines* v. *Canada.* (Exclusion of Negroes from State-maintained law school open to White students discriminates against Negroes in violation of equal protection clause although it provides by statute for payment of tuition at university of adjacent State for any Negro resident of the State — Such conditions do not affect the fact of discrimination.)

[*See also* (1950) 339 U S 629 (636) : 94 Law Ed 1114 (1129), *Sweatt* v. *Painter.* (Negro student denied admission to University of Texas Law School— Student asked to join another law school alleged to supply substantially equal facilities — *Held* by the Supreme Court of America that as the privileges, advantages and opportunities offered by the new law school were not substantially equivalent to those offered by the State to the White students at the University of Texas, the equal protection clause of 14th Amendment had been violated and the Negro student petitioner was entitled to mandamus.)]

A law which does not itself discriminate against any citizen on the ground of his caste or community, but *penalises* discrimination being practised by persons of a particular religion, does not offend cl. (1) of this article and is not *ultra vires*.[7] In this connection, reference may be made to Art. 17 under which the enforcement of any disability based on untouchability is an offence punishable in accordance with law.

Where the State is granting an indulgence under powers which it has under the Constitution, as for instance by allowing fee concessions for Harijan boys in schools (under cl. (4),) it is entirely for the State to decide how far the indulgence should go and those who are outside the limit marked by the State are not entitled to complain of discrimination against them.[8]

9. "Citizen." — Unlike Art. 14, which applies to all persons whether citizens or non-citizens, natives or aliens, this article applies only to citizens.[1] As to the meaning of the word "citizen" for the purpose of this Constitution, see Arts. 5 to 11 and the commentary thereon. As seen in Note 3 on Art. 5, a corporation is not a citizen for the purpose of this Constitution, the reason being that the definition of "citizen" in Art. 5 only contemplates natural persons and not juristic persons. There are also American decisions to the effect that a corporation is not a citizen.[2]

It has been seen in Art. 5 that under our Constitution only one type of citizenship is recognised whereas under the Constitution of the United States of America there is a double citizenship, a citizenship of the State and another of the Federation. Citizenship of each State entails certain special privileges so far as that State is concerned, which are not open to citizens of other States. The undermentioned are some of the decisions of the Supreme Court of the United States bearing upon this aspect.[3]

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[7] 1951 Cal 167 (Pr 12) [AIR V 38 C 30R] : 52 Cri L Jour 1399 (DB), *Banamali Das* v. *Pakhu Bhandari*. (West Bengal Hindu Social Disabilities Removal Act (37 of 1948) does not discriminate against any citizen only on the ground of caste, religion or race — It makes it impossible for some Hindus to discriminate against other Hindus — That does not offend against Art. 15 of the Constitution.)

[8] 1953 Mad 21 (Pr 5) [A I R V 40 C 8], *In re M. Thomas*. (Fee concession to Harijan boys extended to Harijan boys who were converted to Christianity or whose parents were so converted but not to boys whose grandfathers or other ancestors were converted — No discrimination.)

Article 15 — Note 9

[1] 1951 Bom 470 (Pr 3) [AIR V 38 C 103] : I L R (1952) Bom 449 : 1952 Cri L Jour 23 (DB), *Yusuf Abdul Aziz* v. *State*.
1951 Mad 930 (Pr 12) [A I R V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras*. (A person who has migrated from the territory of India to the territory included in Pakistan after 1-3-1947 cannot be deemed to be a citizen of India, and Art. 15 does not apply to him.)

[2] (1898) 172 U S 239 (259) : 43 Law Ed 432 (440), *Blake* v. *McClung*.
(1868) 19 Law Ed 357 (359) : 8 Wall 168, *Paul* v. *Virginia*.

[3] (1868) 19 Law Ed 357 (360) : 8 Wall 168, *Paul* v. *Virginia*. (Special privileges enjoyed by citizens in their own States are not secured in other States by this

10. "On grounds only of religion, etc."—Clause (1) of this article only applies where the discrimination against a citizen is *solely* based on the ground of religion, race, etc. If a law is based upon several factors and the religion, race, etc., of a person is only one of the factors concerned, the law would not be *ultra vires* under clause (1).[1]

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provision such as grants of corporate existence and powers — State may exclude foreign corporations.)

(1898) 43 Law Ed 432 (438) : 172 U S 239 (254), *Blake* v. *McClung.* (State statute giving to residents priority over non-residents in distribution of assets of foreign corporation is against U. S. Constitution, Art. 4 giving equal privileges and immunities to citizens of several States.)

(1877) 24 Law Ed 248 (249): 94 U S 391, *James W. McCready* v. *Commonwealth of Virginia.* (A State can grant to its own citizens exclusive use of lands covered by water for raising oysters and prohibit such use to citizens of other States.)

(1876) 23 Law Ed 806 (807) : 93 U S 72, *Chemung Canal Bank* v. *Lowery.* (A State statute, which provides that when defendant is out of State, limitation shall not run against plaintiff if latter resides in State but shall if he resides out of State, does not produce any constitutional discrimination between citizens of different States.)

(1871) 20 Law Ed 449 (453) : 12 Wall 418, *Ward* v. *Maryland.* (State statute requiring license for sale of goods by non-residents is unconstitutional—It is repugnant to Art. 4, S. 2 of the U. S. Constitution.)

Article 15 — Note 10

[1] 1951 Bom 470 (Prs 4, 5) [AIR V 38 C 103] : I L R (1952) Bom 449 : 1952 Cri L Jour 23 (DB), *Yusuf Abdul Aziz* v. *State.* (What led to discrimination in S. 497, Penal Code, in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in S. 497 a position in law which takes a sympathetic and charitable view of the weakness of women in this country. Therefore S. 497 does not contravene Art. 15 (1).)

1952 Punj 309 (332) (Pr 144) [A I R V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

1951 Mad 120 (Prs 12, 37, 57) [A I R V 38 C 14] : I L R (1951) Mad 149 (FB), *Champakam Dorairajan* v. *State of Madras.*

1953 Madh B 147 (Pr 5) [AIR V 40 C 51] : 1953 Cri L Jour 964, *Girdhar Gopal* v. *State.* (Indian Penal Code, S. 354 is not invalid on the ground of discrimination in favour of women by extending the protection only to them — Discrimination is not based solely on ground of sex — Discrimination also based on propriety, public morals, decency decorum and rectitude is not bad.)

1953 Bom 311 (313) (Pr 7) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay.* (Reservation of seats for women in a municipal election under the State municipal law is not a discrimination made solely on ground of sex but on various other considerations.)

1952 Bom 451 (452) [A I R V 39] : I L R (1943) Bom 51 : 1952 Cri L Jour 1600 (DB), *Vithal Maruti* v. *State.* (Bombay Beggars Act (23 of 1945), S. 5 is not unconstitutional—To discrimination based not only on place of birth but also on some other considerations, along with place of birth, the bar of the Constitution does not apply.)

1952 Cal 825 (829, 830) (Prs 14 to 17) [A I R V 39], *Anjali* v. *State of West Bengal.* (On appeal from. 1952 Cal 822 (824) (Pr 15) [AIR V 39], *Anjali* v. *State of West Bengal.*)

1952 Cal 61 (Pr 6) [AIR V 39 C 19-20], *Indra Narayan* v. *State of West Bengal.* (The West Bengal Food Grains (Movement Control) Order (1951) no doubt requires a permit for foodgrains to be moved from a cordoned area to a place outside it but this restriction is not motived by the fact that a citizen was

A girl student was refused admission to a mixed college; but the refusal was not merely due to her sex but was due to the fact that under a scheme of better orginasation of both male and female education at the centre, which covered development of the women's college there as a step towards the advancement of female education, and also for the purpose of relieving pressure on the mixed college at that centre, it was considered reasonable to restrict further admissions of women students to the mixed college. It was held that there was no discrimination on the ground of sex *alone*.[2]

Discrimination on the basis of the political or social importance of a family is not hit by this article.[3]

Article 16 (2) refers to certain additional grounds of discrimination which are not referred to in this article, namely, descent and residence.

11. Discrimination on ground of religion.—The mere fact that a law such as an Act abolishing bigamy among Hindus or providing for the better management of Hindu religious institutions affects only the followers of a particular religion, cannot be a ground for saying that in enacting such a law the State is discriminating against a certain body of citizens solely on the ground of their religion. Similarly, as has been seen in NOTE 8, the mere fact that the majority of people affected by the working of a particular Act happen to be

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born at a particular place. The cordoned areas have to be determined because of the fact that in the interest of the general public it may be necessary to forbid foodgrains from being moved out of a cordoned area unless a permit is taken. The delimitation of the cordoned areas is made on entirely different grounds. It is not made merely on the ground that a person is born within a certain area.)

1951 Cal 563 (Prs 28, 29) [A I R V 38 C 165], *Mahadeo Jiew* v. *B. B. Sen*. (Superadded to sex, if there are proprietary considerations, then the discrimination cannot be said to be on the ground of sex alone. The important consideration in O. 25, R. 1 (3), Civil P. C., is "sufficient immoveable property in India". Provision in O. 25, R. 1 (3) cannot be read as meaning that security of costs is to be ordered only on the ground of sex and only because the plaintiff is a woman.)

1951 Punj 93 (Prs 14, 17) [A I R V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab*. (Article 15 (1) would apply when a person is kept out from or is admitted into any college or educational institution on the ground solely of caste, religion, race or sex or any of them. Though under the Constitution race, caste, religion, language or any of them cannot be the basis of selection other grounds can be taken into consideration when the question of admission of candidates is being decided. No such ground of exclusion held had been made out in the present case. A I R 1951 Mad 120, Rel. on; AIR 1950 S C 27, Ref.)

[2] 1952 Cal 825 (829, 830) (Prs 16, 17) [A I R V 39] (DB), *Anjali* v. *State of West Bengal*.

[*See also* 1954 Mad 67 (Pr 12) [A I R V 41 C 13], *University of Madras* v. *Shantha Bai*. (University regulations which required certain facilities to be provided before girls could be admitted into a college were not unconstitutional.)]

[3] 1953 Punj 30 (Pr 35) [AIR V 40 C 9] (DB), *Harmahendra Singh* v. *Punjab State*. (Punjab Court of Wards Act (2 of 1903), S. 5 is not invalid.)

Muslims, is not sufficient to characterise the Act as a discriminatory measure offending cl. (1) of this article. On these principles, it has been held that the Madras Hindu Bigamy Prevention and Divorce Act (6 of 1949)[1] and the Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946)[2] are not repugnant to cl. (1) of this article. The mere fact that monogamy is enforced on Hindus and not on Muslims does not make these Acts repugnant to this article. It was for the Legislature to take into account the social customs and beliefs of the Hindus and other relevant considerations before deciding whether it was necessary to provide for special provisions dealing with bigamous marriages among them. If the Legislature acting on these considerations wanted to provide for a special procedure in dealing with bigamous marriage among Hindus, it cannot be said that the Legislature was discriminating against Hindus only on the ground of religion.[3] As seen in NOTE 1 on ART. 14, it is perfectly competent to the Legislature to take account of the degree of evil which is prevalent under various circumstances and the Legislature is not bound to legislate for all evils at the same time, and an Act passed by the Legislature cannot be attacked merely because it tackles only some of the evils prevalent in society and does not tackle other evils of the same or worse kind which may be prevalent. (See also NOTE 16.) Under SCH. VII, LIST 3, Entry 5, the Union Parliament and the State Legislatures have concurrent jurisdiction to make laws about marriage, divorce, adoption, joint family and partition, etc., which means that they have power to affect the personal law of Hindus and Muhammadans by legislative enactments. This is an indication of the basis of the classification in such matters and shows that *religion* does not constitute such basis. At the same time, if religion is actually made the sole basis of legislative differentiation, a Fundamental Right under the Constitution will be violated, and the mere fact that the subject falls within the legislative jurisdiction of the Parliament or of a State

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Article 15 — Note 11

1. 1952 Mad 193 (Pr 4) [AIR V 39 C 95] : I L R (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswati Ammal*. (The Act makes no discrimination between Hindus and Muhammadans on the ground of religion. The essence of the classification is not the religion of Hindus but that they have all along been preserving their personal law peculiar to themselves which was derived from the Smritis, commentaries, custom and usage, in the same manner in which the Muhammadans are subject to their personal law. It is that personal law that was now sought to be affected by the Act to the extent of modifying and abrogating the rule that a Hindu is entitled to marry any number of wives without restriction; in other words, abolition of polygamy: AIR 1951 S C 226 and AIR 1951 S C 318, Ref.)
2. 1952 Bom 84 (Pr 26) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354, *The State of Bombay* v. *Narasu Appa*. (It cannot be held that the Bombay Prevention of Hindu Bigamous Marriages Act discriminates against the Hindus in preference to the Christian and the Parsi citizens of the State, in so far as it subjects the Hindus alone to the specially severe provisions as to punishment and procedure.)
3. 1952 Bom 84 (Pr 26) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354, *The State of Bombay* v. *Narasu Appa*.

Legislature, will not validate the law.[4]

The Madras Hindu Religious and Charitable Endowments Act (19 of 1951) has been held as not repugnant to cl. (1) of this article. The classification of institutions and religious endowments based on religion, as Hindu, Muhammadan or Christian, cannot be said to be either arbitrary or unreasonable having regard to the objects sought to be attained, namely, better administration and management of such institutions. Nor is such a classification made for the first time by the Legislature. The classification is not based solely on religion, as institutions included in the class covered by the legislation are religious as well as secular and having regard to the object in view, institutions having several characteristics in common have been classified in one group. The Legislature is not precluded from taking up one set of institutions for legislative consideration at one·time and enacting laws in respect of them, reserving other types of institutions for future consideration.[5]

It cannot be said that under the provisions of the Administration of Evacuee Property Ordinance, 1949, discrimination has been made against Muslims as such, though actually most of the persons to whom the provisions of the Ordinance may apply are likely to be Muslims. There is nothing in the Ordinance necessarily leading to any discrimination. If a non-Muslim falls within the definition of "evacuee", then the Ordinance equally·applies to him.[6]

A discrimination as regards fee concessions in educational institutions between Harijan boys, who were converted to Christianity or whose parents were converted to Christianity, and Harijan boys whose grandfathers or other ancestors were converted to Christianity, is not a discrimination based on religion.[6a]

Communal Electorates

Any law providing for elections on the basis of separate electorates for members of different religious communities offends against cl. (1) of this article. The constitutional mandate to the State not to discriminate against any citizen on the ground, *inter alia*, of religion clearly extends to political as well as to other rights and any election held after the Constitution in pursuance of such a law, subject to cl. (4), must be held void as being repugnant to the Constitution.[7] But it is not each and every citizen that can move the Supreme Court under Art. 32 in such a matter. It is only a citizen who has individually suffered an injury or who is individually threatened with an injury to his Fundamental Right that can move the Supreme Court under Art. 32 for the enforcement of his Fundamental Right.[8]

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[4] 1952 Mad 193 (Pr 4) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.*

[5] 1952 Mad 613 (Pr 29) [A I R V 39], *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (But Act held *ultra vires* under Art. 19 (1) (f) as the restrictions imposed were too drastic in scope and unreasonable.)

[6] 1951 Mad 930 (Pr 20) [AIR V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.*

[6a] 1953 Mad 21 (Pr 5) [AIR V 40 C 8], *In re M. Thomas.*

[7] 1953 S C 384 (385) (Pr 4) [AIR V 40 C 86] (S C), *Nain Sukh Das* v. *U. P. State.* (Election to Municipal Board.)

1953 Bom 311 (313) (Pr 7) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay.* (In this case, it was held that provision for separate representation for women in Municipal Board under State made law is not unconstitutional and that such reservation was covered by cl. (3).)

12. Discrimination on ground of race or caste. — The requisitioning of land by the Government for construction of a colony intended for the exclusive benefit of a particular caste or community will be unconstitutional under this article,[1] unless the case is covered by cl. (4) of the article. Similarly, an Act, which is made applicable only to members of certain communities in certain areas, and subjects them to various restrictions, is unconstitutional.[2]

The Punjab Customary Law restricting the right of alienation of ancestral land in the hands of a male proprietor is not repugnant to cl. (1) of this article as being a discrimination based on race or caste as it is equally applicable to all persons living in Punjab irrespective of race or caste.[3]

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[8] 1953 S C 384 (385) (Pr 7) [AIR V 40 C 86] (S C), *Nain Sukh Das* v. *U. P. State.* (Election to Municipal Board on basis of communal electorates—Petition under Art. 32 — It was not petitioners' case that any discrimination was being practised against them or was threatened against them—Grievance was that on account of the system of communal representation, they could not vote for or stand for the seats allotted to the community other than their own — No allegation that they actually sought to assert those rights by taking appropriate proceedings to have the bar removed and the election conducted in accordance with the Constitution — *Held* that the alleged discrimination was in respect of rights which they in fact never sought to exercise and took no steps to assert while there was still room for doing so, and for the exercise of which the opportunity is now lost.)

Article 15 — Note 12

[1] 1952 Bom 461 (462) (Pr 3) [AIR V 39] : I L R (1953) Bom 44 (DB), *Jagwant Kaur* v. *State of Bombay.* (Action of the State Government in requisitioning land under S. 5, Bombay Land Requisition Act, 1948, for the construction of a colony intended for the benefit only of Harijans is of a discriminatory nature and can be successfully challenged under Art. 15 of the Constitution of India, as it was before its amendment by the insertion of cl. 4.)

[2] 1952 Sau 124 (125) [AIR V 39] : 1953 Cri L Jour 21 (DB), *Sanghar Umar* v. *State.* (Nawanagar Pass Hajari Dhara Act (Smt. 2003) (1947 A D). The Act which has been made applicable to certain communities of the villages mentioned in the schedule and subjects them to the restrictions contained in the Act discriminates against them on the ground of their caste or communities only. It, therefore, offends Art. 15 (1) of the Constitution and is void. Further the important restrictive provisions of the Act, namely, Ss. 4, 5, 6, 10, 11, 13 and 14 impose restrictions not depending upon the individual propensities of the persons to whom the Act has been applied. Since a person who might not have committed a single offence and might be living a pure life would legally be subjected to the restrictions as a result of the provisions of the sections and since no public interest can be served by subjecting a person to the severe restrictions undeservingly these sections are void and of no effect as being in contravention of the provisions of Art. 19 (1) (d) and (e). The other provisions of the Act being merely ancillary to these main provisions cannot stand independently. The whole Act, therefore, fails and must be declared void.)

[3] 1951 Punj 445 (Pr 7) [AIR V 38 C 142], *Nathu* v. *Ralla.*

The Communal G. O. of the Madras Government fixing the proportion of seats for each community for admission of students into the State educational institutions has been held by the Supreme Court in *State of Madras* v. *Sm. Champakam Dorairajan*[4] as invalid being repugnant to the specific provisions of Art. 29 (2). It was held by the Supreme Court that the provisions of Part III on Fundamental Rights are not controlled by the provisions in Part IV dealing with the Directive Principles of State Policy and therefore it was not open to the State to make any such regulations as those in the above Communal G. O. under Art. 46. The undermentioned decisions of the Supreme Court of America dealing with the racial segregation laws and practices against Negroes in America may be of interest with reference to cl. (1) of this article in its aspect relating to discrimination on the ground of race.[5] Reference may also be made to notes on

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[4] 1951 S C 226 (Prs 8, 11) [AIR V 38 C 40] : 1951 S C R 525 (S C). (Affirming on appeal : A I R 1951 Mad 120.)

[5] (1950) 94 Law Ed 1149 (1154) : 339 U S 637, *McLaurin* v. *Oklahoma S. Regents.* (Negro student given different treatment solely because of his race by being required to occupy a seat in a row specified for coloured students in the library, cafeteria, etc.—Equal protection clause broken.)

(1950) 339 U S 629 (636) : 94 Law Ed 1114 (1120), *Sweatt* v. *Painter.* (Negro refused admission to University of Texas Law School on ground that substantially equivalent facilities were offered by a Texas Law School open only to Negroes — Refusing either to affirm or disaffirm doctrine of *Plessy* v. *Ferguson*, 163 U S 537, that separate but equal facilities for Negroes satisfy requirements. Supreme Court held that equal protection clause required that Negroes should be admitted since the school for Negroes did not afford equal facilities.)

(1948) 334 U S 1 (14) : 92 Law Ed 1161 (1181), *Shelley* v. *Kraemer.* (Restrictive covenants against use or occupancy of real property by persons other than those of Caucasian origin—Enforcement of such covenants by judicial action is against equal protection clause.)

(1946) 328 U S 373 (381) : 90 Law Edn 1317 (1324), *Morgan* v. *Commonwealth of Virginia.* (Race segregation statute requiring bus passengers to change seats from time to time is as applied to inter-state passengers an undue burden on inter-state commerce.)

(1941) 313 U S 80 (93, 94) : 85 Law Edn 1201 (1210), *Mitchell* v. *United States.* (An unjust discrimination by a railroad in the furnishing of accommodation to a coloured passenger is a proper subject for relief by the Interstate Commerce Commission — Discrimination by refusing to first class coloured passenger accommodation equal in comfort and conveniences to those afforded to first class white passengers is violation of Inter-state Commerce Act.)

(1939) 83 Law Ed 208 (209) : 305 U S 337, *Missouri Ex Rel. Gaines* v. *Canada.* (Exclusion of Negroes from State owned educational institutions is violation of equal protection clause—Making provision in University in another State does not make a difference.)

(1917) 245 U S 60 (82) : 62 Law Ed 149 (164), *Buchanan* v. *Warley.* (Coloured person has the right to acquire property without State legislation discriminating against him solely because of colour, under 14th Amendment and other provisions—City Ordinance prohibiting Negroes from occupying lot in a block where the majority of the residences are occupied by white persons is bad. (1901) 46 Law Ed 623 (626) : 184 U S 425 (429), *Booth* v. *Illinois* and (1903) 47 Law Ed 323 (327) : 187 U S 606 (609), *Otis & Gassman* v. *Parker*, Rel. on.)

(1910) 54 Law Ed 936 (938) : 218 U S 71, *Chiles* v. *Chesapeake & O. R. Co.* (Congressional inaction is equivalent to a declaration that a carrier may by its regulations separate White and Negro inter-state passengers.)

Art. 14 in this connection. See also the undermentioned case.[6] But subsequent to the decision of the Supreme Court in *State of Madras* v. *Sm. Champakam Dorairajan* referred to above, cl. (4) was added to this article by the Constitution (First Amendment) Act, 1951. (See Note 21).

13. Discrimination on ground of sex. — Section 497 of the Penal Code (adultery) is not repugnant to cl. (1) of this article on the ground of its discriminating against men as such solely by reason of their sex. It cannot be said that merely because the woman is not liable as an *abettor*, the section discriminates against men solely on the ground of sex. The reason is that the differentiation in favour of women was not due to the fact that woman had a different sex from man, but that women in this country were so situated that special legislation was required for their protection.[1] It has been seen in the notes on Art. 14 that S. 488 of the Criminal Procedure Code is not repugnant to that article merely because it only entitles a woman to obtain maintenance from her husband and not *vice versa*.

Section 354 of the Penal Code, which only protects the modesty of a woman by making punishable assault or use of criminal force with the intention of outraging the modesty of a woman, is not unconstitutional on that ground.[1a]

The provisions of Order 25, Rule 1 (3) of the Code of Civil Procedure under which a woman plaintiff may be required to deposit security for costs if she has not sufficient immovable property, has been held not to be *ultra vires* on the ground of discriminating against women as such.[2]

(1896) 163 U S 537 (548, 549) : 41 Law Ed 256 (260), *Plessy* v. *Ferguson*. (A law which requires the separation of white and coloured races in public conveyances is a reasonable exercise of Police Power of a State—Statute providing for separate railway carriages for the white and coloured races by railway companies is valid.)

(1879) 25 Law Ed 676 : 100 U S 339, *Ex parte Commonwealth of Virginia*. ('State' includes 'agent of the State'—Ministerial act of a Judge in selecting jurors — Systematic exclusion of persons of African race and black colour held bad.)

See also *Annotation—Race Discrimination—Supreme Court Cases*: ('49) 94 Law Ed 1121 (1149).

[6] (1948) 332 U S 633 (644) : 92 Law Ed 249 (258), *Oyama* v. *California*. (California Alien Land Law—*Held* that as applied in this case the statute unconstitutionally discriminated against the son because of his parents' country of origin by saddling him with an onerous burden of proof not generally borne by California children for whom parents purchase property.)

Article 15 — Note 13

[1] 1951 Bom 470 (Prs 4, 5) [AIR V 38 C 103] : I L R (1952) Bom 449 : 1952 Cri L Jour 23 (DB), *Yusuf Abdul Aziz* v. *State*.

[1a] 1953 Madh B 147 (Pr 3) [A I R V 40 C 51] : 1953 Cri L Jour 964, *Girdhar Gopal* v. *State*. (The objection on this head is only an objection to the policy of the law in not creating a particular offence and not as to infringement of Art. 14 of the Constitution — The section is not open to objection on the ground of discrimination as to the sex of the offender—Even a woman may be guilty under the section.)

[2] 1951 Cal 563 (Prs 28, 29) [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen*.

Even if it be held that personal laws fall within ART. 13 (1), (as to which question see NOTE 17), the provisions of personal laws permitting polygamy do not amount to discrimination against women *only* on the ground of sex.[3]

Under cl. (3) of this article, special provision for the benefit of women and children may be made by the State and any such special provision will not be liable to be attacked as contravening cl. (1).[4]

Section 10 of the Divorce Act, as it stands, is not *prima facie* repugnant to the Constitution although under it a husband is entitled to divorce merely on proof of adultery, while a wife is entitled to divorce only on proof of adultery and cruelty. The differentiation seems to be based on a sensible classification after taking into consideration the abilities of man and woman and the results of their acts and not merely on ground of sex.[5]

Women of mature age, *sui juris*, cannot constitutionally be subjected to restrictions upon their liberty of contract which cannot be lawfully imposed upon men in similar circumstances.[6]

A prohibition in a Court of Wards Act that a woman may be declared incapable of managing her estate, by the State Government, without assigning any reasons and without being given an opportunity to contest the position, while in the case of men they can be declared incapable of managing their estates only on certain grounds and after being given an opportunity to contest the proposed declaration, is unconstitutional under this article.[7]

Discrimination as to admission into educational institutions

Under Article 29 (2), it is provided that no citizen shall be denied admission into any educational institution, maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Sex is not mentioned as a forbidden ground of discrimination under this provision. Article 29 (2) being a *special* provision applying particularly to admission to educational institutions, ART. 29 (2) and not ART. 15 (1) would, on the principle of *generalia specialibus non derogant*, appear to be the governing provision for determining whether refusal of admission to a college on the ground of sex is constitutional. It has been held by the Madras High Court in *University of Madras* v. *Shantha Bai*[7a] that the omission of "sex" in Art. 29 (2) is a deliberate departure from the language of Art. 15 (1) and its object is to leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an *obligation* to admit women.

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[3] 1952 Bom 84 (Prs 24, 25) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.

[4] *See* (1908) 208 U S 412 (422) : 52 Law Ed 551 (556), *Muller* v. *Oregon*. (Rights under 14th Amendment not infringed by limitation of hours of labour of women employed in laundries to ten hours daily, although like legislation affecting male employees may be invalid—The inherent difference between the two sexes which requires that woman should be specially protected is plain.)

[5] 1953 Mad 792 (Pr 30) [AIR V 40 C 302], *Dr. Dwaraka Bai* v. *Prof. Nainan*.

[6] (1923) 261 U S 525 (559, 562):67 Law Ed 785 (797, 798), *Adkins* v. *Children's Hospital*.

[7] 1952 All 746 (Pr 11) [A I R V 39] : I L R (1953) 1 All 29 (DB), *Cracknell* v. *State of Uttar Pradesh*. (U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b) is void.)

[7a] 1954 Mad 67 (70) (Prs 8, 9) [AIR V 41 C 13] (DB).

In *Anjali* v. *State of West Bengal*,[8] Chakravartti, Acting Chief Justice, although he did not express a final opinion on the point, was inclined to the view that discrimination in regard to the admission of students into educational institutions on the ground of sex might not be unconstitutional. He observed as follows :

> "The framers of the Constitution may have thought that because of the physical and mental differences between men and women and considerations incidental thereto, exclusion of men from certain institutions serving women only and *vice versa* would not be hostile or unreasonable discrimination."

But, apart from the above consideration, where the admission of girls into a mixed college is restricted not merely on the ground of sex but on various other considerations, such as the existence of a scheme of better organization of both male and female education at the centre, the development of a women's college as a step towards the advancement of female education and the relief of pressure on the mixed college, there is no violation of this article.[9]

(See also Notes 10, 20 and Art. 14, Note 29.)

14. Discrimination on ground of place of birth. — Under S. 27 (2A) of the City of Bombay Police Act, a person can be externed from Bombay if he has been convicted of the offences specified in the section, in case he was born outside Greater Bombay. But action on the same ground cannot be taken against a person convicted for the same offences if he was born within the limits of Greater Bombay. This provision discriminates against persons solely on the ground of their place of birth and as such is repugnant to cl. (1) of this article.[1] The West Bengal Foodgrains (Movement Control) Order, 1951, Paragraph 3, requiring permit for removal of grains outside the cordoned area is not repugnant to cl. (1) of this article, because the delimitation of the cordoned area is not based *merely* on the fact that a person is born in a certain area.[2] It has been held that S. 49 of the Rewa Land Revenue and Tenancy Code, which prohibits non-Rewa residents from acquiring a Pattadari tenancy within the Rewa State, makes a discrimination solely on the ground of *residence* and as such it is void under cl. (1) of this article.[3] It is submitted that place of residence is not a forbidden ground of discrimination under this article though it is one under ART. 16 (2).

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[8] 1952 Cal 825 (831) (Pr 22) [AIR V 39] (DB). (His Lordship was not willing to accept without further consideration the view of Bose J. in the lower Court (AIR 1952 Cal 822) that Art. 15 (1) controls Art. 29 (2) and that discrimination on ground of sex alone in the matter of admission to educational institution is unconstitutional though sex is not mentioned as a forbidden ground of discrimination in Art. 29 (2).)

[9] 1952 Cal 825 (830) [A I R V 39] (DB), *Anjali* v. *State of West Bengal.* (On appeal from 1952 Cal 822 [AIR V 39], *Anjali* v. *State of West Bengal.*)
[*See also* 1954 Mad 67 (71) (Pr 11) [AIR V 41 C 13](DB), *University of Madras* v. *Shantha Bai.* (University regulations requiring that colleges should provide certain facilities for women before they can be admitted cannot be said to be discriminatory against women on the ground of sex.)]

Article 15 — Note 14

[1] 1951 Bom 285 (Prs 4, 6) [A I R V 38 C 58] : I L R (1951) Bom 175 : 52 Cri L Jour 458 (DB), *In re S. K. Husein Shaik Mahomed.* (Consequently any order passed under that sub-section is also void and of no effect.)

15. "Or any of them." — The words "or any of them" are intended to show emphatically that none of the grounds mentioned in the article can be made the sole basis of discrimination.[1] The clause means that the State cannot discriminate (solely) on the specified grounds either cumulatively or separately with reference to any of the grounds.

16. Customary law. — Punjab customary law governing and limiting powers of alienation of a male proprietor does not infringe cl. (1) of this article on the ground of discrimination based on race or caste. The limitations which it imposes are not exclusively based on race or caste and are applicable to any person who is living in Punjab irrespective of all these considerations.[1]

17. Personal law. — It has been held by the Bombay High Court that personal law is not covered by ART. 13, cl. (1) and so its validity does not fall to be decided with reference to the provisions of this Part.[1] See also NOTE 11. The correctness of this view, however, is debatable. (See ART. 13, NOTE 2).

Under S. 23 of the Mysore Hindu Law Women's Rights Act (10 of 1933), a Hindu woman governed by the Mitakshara is entitled to claim separate maintenance from her husband on the ground of his keeping a concubine. This does not amount to an unconstitutional discrimination in favour of Hindu women governed by the Mitakshara.[2]

17a. Admission into educational institutions.—Article 29, cl. (2) runs as follows :—"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of

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[2] 1952 Cal 61 (Pr 6) [A I R V 39 C 19-20], *Indra Narayan* v. *State of West Bengal.*

[3] 1952 Vind Pra 17 (Pr 5) [AIR V 39 C 10], *Jangi Lal* v. *Baijnath Singh.* [*See also* 1952 Vind Pra 19 (Pr 3) [A I R V 39 C 12], *Baijnath Singh* v. *Jangi Lal.*]

Article 15 — Note 15

[1] 1951 Mad 120 (Pr 37) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB), *Champakam Dorairajan* v. *State of Madras.* (Per *Viswanatha Sastri J.*)

Article 15 — Note 16

[1] 1951 Punj 445 (Prs 5, 6, 7) [AIR V 38 C 142], *Nathu* v. *Ralla.*

Article 15 — Note 17

[1] 1952 Bom 84 (Pr 13) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *State of Bombay* v. *Narasu Appa.*

[2] 1953 Mys 136 (136) [AIR V 40 C 66] : I L R (1953) Mys 41 (DB), *Chennamma* v. *Dyana Setty.*

State funds on grounds only of religion, race, caste, language or any of them." It will be seen that while ART. 29 (2) mentions "language" as a prohibited ground of discrimination, "language" is not included in ART. 15 (1). On the other hand, ART. 29 (2) does not refer to "sex" and "place of birth" which are included as prohibited grounds of discrimination in ART. 15 (1). Article 29 (2) is a *special* provision relating to admission to educational institutions, hence on the principle of *generalia specialibus non derogant*, ART. 29 (2), and not ART. 15 (1), would be the governing provision for determining the constitutionality of refusal of admission to an educational institution, on the ground of sex or place of birth[1] and as these are not mentioned in ART. 29 (2) a refusal of admission on such a ground will not be unconstitutional.[2]

See also NOTES 10, 12, 13, 20 and 21, and also ART. 29 (2) and notes thereon.

17b. Electoral law. — In *Nain Sukh Das* v. *U. P. State*[1] the Supreme Court has held that any law providing for elections on the basis of separate electorates for members of different religious communities offends against cl. (1) of this article and any election held in pursuance of this law, subject to cl. (4), must be held void as being repugnant to the Constitution. This case related to an election to a municipal board under a State law. In *Dattatraya* v. *State of Bombay*,[2] which was also a case of municipal election, it was held by the Bombay High Court that the Constitution only provided for the constitution of the Parliament and the State Legislatures, and did not deal with the constitution of local authorities like municipalities, which subject was within the exclusive jurisdiction of the State Legislature. Hence, it was held that unless there was some provision in the Constitution itself which prohibits the State Legislature from providing for separate representation for women, the mere fact that the Constitution has not provided for any reservation for women in Parliament or State Legislatures cannot be used as an argument against the competency of the State Legislature to provide for reservation for women in municipal boards and other local authorities. As regards the argument against such reservation, based on cl. (1) of this

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Article 15 — Note 17a

[1] 1954 Mad 67 (70) (Prs 8, 9) [AIR V 41 C 13] (DB), *University of Madras* v. *Shantha Bai.*
1952 Cal 825 (831) (Pr 22) [AIR V 39] (DB), *Anjali* v. *State of West Bengal.*
[*See also* 1951 S C 226 (228) [AIR V 38 C 40] : 1951 S C R 525 (S C), *State of Madras* v. *Champakam Dorairajan.* (In this case in which admission was refused on the ground of *caste* alone of the candidate, the Supreme Court held that the rule on which such refusal was based was unconstitutional under Art. 29 (2) and did not find it necessary to consider effect of Art. 14 or Art. 15.)]

[2] 1954 Mad 67 (70) (Prs 8, 9) [AIR V 41 C 13] (DB), *University of Madras* v. *Shantha Bai.*
1952 Cal 825 (831) (Pr 22) [AIR V 39] (DB), *Anjali* v. *State of West Bengal.* (Refusal of admission to girls as such in mixed college is not unconstitutional.)

Article 15 — Note 17b

[1] 1953 S C 384 (385) [AIR V 40 C 86] (SC).

[2] 1953 Bom 311 (313) (Pr 5) [AIR V 40 C 98].

article the Bombay High Court held that such reservation was justified under cl. (3). In the absence of cl. (3), it is clear that on the principle of the above decision of the Supreme Court in *Nain Sukh Das* v. *U. P. State*,[3] reservation of seats for women in municipalities will be unconstitutional.

18. Clause (2).—See NOTE 3.

19. Dedicated to the use of general public.—Under cl. (2) of this article, every citizen is given an equal right to the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. What amounts to the dedication to the use of the general public is a matter that would be found discussed in the text-books on the law of easements, etc., and also in books on Hindu Law in the chapters relating to charitable endowments. 'Dedication' itself, apart from the use of the words "for the use of the general public," means dedication to the general public. There cannot be 'dedication' to a section of the public like the inhabitants of a village or a town. The right of the inhabitants of a village or town or mohalla to use a certain property for a certain common purpose may, however, be based on *custom*.[1] The dedication to the use of the general public may be complete or partial. A complete dedication is not necessary for a bathing ghat, though it may be presumed in the case of tanks.[2]

20. Clause (3). — Under cl. (3) of this article, special power is given to the State to create exceptions to the provisions contained in cl. (1) if it is necessary to do so in any case or class of cases for the benefit of women and children.

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[3] 1953 S C 384 (385) [AIR V 40 C 86] (SC). (Election on basis of communal electorates is void.)

Article 15 — Note 19

[1] 1950 P C 56 (Pr 5) [AIR V 37 C 23] : 76 Ind App 271 : I L R 29 Pat 1 (PC), *Lakshmidhar Misra* v. *Rangalal.* (Dedication is only known to English law as something equivalent to an irrevocable licence granted by the owner of soil to the use of the public—Dedication of a piece of land to a limited section of the public, such as the inhabitants of a village, is a claim unknown in law, and evidence limited to such special use would not justify a finding of dedication — Claim of inhabitants of village to use of certain area as cremation ground of village can only be supported on ground of custom and not dedication or lost grant : 1945 Pat 92 [AIR V 32], *Ranglal* v. *Lakshmidhar Misra*, Reversed; *Poole* v. *Huskinson*, (1843) 11 M & W 827 : 152 E R 1039 and other cases cited.)

(1843) 152 E R 1039 (1041) : 11 M & W 827, *Poole* v. *Huskinson.* (There may be a dedication of a way to the public, for a limited purpose, as for a footway, etc , but there cannot be a dedication to a limited part of the public, as to a parish. Such a partial dedication is simply void and will not operate in law as dedication to the public—In order to constitute a dedication of a way to the public by the owner of the soil, there must be an intention to dedicate, of which the user by the public is evidence, subjected to be rebutted by contrary evidence of interruption by the owner.)

[2] 1941 P C 38 (41) [AIR V 28] (PC), *Hemanta Kumari* v. *Gauri Shankar.* (Bathing ghat at Benaras—Dedication may be complete or partial — Difference between complete and partial dedication explained — Complete dedication not necessary for bathing ghat (though it may be presumed in case of tanks)—Practice of public bathing acquiesced in by owner is enough and partial dedication to allow of the usual acts being done is enough.)

The inherent differences between man and woman places her at a disadvantage and in order to secure a real equality of right between the sexes, special legislation to protect woman is often necessary. In this connection the following observations of Justice Brewer in *Muller* v. *Oregon*[1] may be quoted :

> "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious .... History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the Courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother .... She will still be where some legislation to protect her seems necessary to secure a real equality of right ..... The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labour, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her ...."

It has been held by the Calcutta High Court that this clause only relates to the future and can operate only from and after the commencement of the Constitution. So it cannot be relied upon for justifying any provision already in existence if it is otherwise open to attack under cl. (1).[2] But the Bombay High Court has held a contrary view.[3] The reason given by the Bombay High Court is that the Fundamental Right under this article is not only that under cl. (1) but under cl. (1) read with cl. (3).

Article 15 — Note 20

[1] (1908) 52 Law Ed 551 (556) : 208 U S 412.

[2] 1951 Cal 563 (Pr 32) [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen.* (Civil Procedure Code, O. 25, R. 1 (3), is not repugnant to clause (1). But if it were, it could not be saved under cl. 3, as cl. (3) refers to the future and further it is not a provision in favour of women.)

[3] 1953 Bom 311 (314) (Pr 8) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay.* (Reservation of seats in favour of women in municipal election in accordance with pre-Constitution law is justified under cl. (3) — NOTE : 1951 Cal 563 [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen*, was not referred to in the judgment.)

"Special provision for women and children" means a special provision which is to the advantage of women and children and not a special provision merely relating to women and children. A special provision which is not to their advantage but to their disadvantage, will not be covered by this clause.[4] For instance, the provision in Order 25, Rule 1 (3), Civil P. C., providing for security for costs being taken from a woman plaintiff would not be a special provision in *favour* of women and so even if cl. (3) were applicable to rules already in existence at the coming into force of the Constitution, it would not cover this provision.[5] The meaning of cl. (3) is that a special provision in favour of women or children will be valid even though necessarily it implies a discrimination against those who are not women and children.[6] The reason is that cls. (3) and (4) are exceptions to the general provisions of cl. (1) of this article, as the words "nothing in this article shall prevent the State" show.[7]

In *Anjali* v. *State of West Bengal*,[8] a girl student was refused admission into a mixed college. Bose, J., of the Calcutta High Court, while proceeding on the basis that cl. (3) of this article only referred to a provision in *favour* of women, held on the facts that what had been done was that a special provision for the benefit of women students had been made in the shape of establishing a special college for them, and that it was in furtherance of the scheme of developing that college into a well-established and self-sufficient organization that the order, which had affected the girl student in question, had been made. The learned Judge held further that the women's college provided reasonably sufficient facilities to its students and as it was thus a suitable substitute for the mixed college, a good special provision within the meaning of cl. (3) had been made, and therefore the operation of cl. (1) was "ousted". This line of reasoning, however, did not commend itself to Chakravartti, Acting Chief Justice, in the appellate Court.[9] His Lordship pointed out that the question was not about the justifiability of a special women's college in which case cl. (3) would have applied, but the refusal of admission to the girl in the mixed college, which could not be held to be a provision in her *favour*.

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[4] 1952 Cal 825 (830, 831) (Pr 20) [AIR V 39] (DB), *Anjali* v. *State of West Bengal*. (Article 15 (3) really contemplates provision in favour of women, although grammatically and etymologically, 'for' may mean 'concerning' and although, theoretically, it is possible to think of reasonable discrimination against women and children such as that they shall not be admitted to certain sections of a public museum or an art gallery where exhibits of a certain kind are to be seen. But the ordinary meaning of 'provision for' is certainly 'provision in favour of'. On appeal from 1952 Cal 822 [A I R V 39], *Anjali* v. *State of West Bengal*—In the lower Court Bose, J. was inclined to take a different view but for the purpose of the case accepted the view of P. B. Mukherji J., in 1951 Cal 563 [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen*, that 'for' means 'in favour of'.)

[5] 1951 Cal 563 (Pr 33) [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen*. (Nevertheless Civil Procedure Code, O. 25, R. 1 (3) is not *ultra vires* as it does not discriminate against women on ground of sex.)

[6] 1953 Bom 311 (314) (Pr 7) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay*. (Real meaning of cl. (1) and cl. (3) read together is that discrimination in favour of men is prohibited but discrimination in favour of women is allowed —Discrimination in favour of women is allowed though it may involve discrimination against men.)

1951 Cal 563 (Pr 33) [AIR V 38 C 165], *Mahadeb Jiew* v. *B. B. Sen*.

[7] 1953 Bom 311 (314) (Pr 7) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay*.

1952 Cal 825 (830) [AIR V 39] (DB), *Anjali* v. *State of West Bengal*.

[8] 1952 Cal 822 (825) (Pr 17) [AIR V 39].

The true scope of Art. 15 (3), in regard to admission to educational institutions, is that notwithstanding Art. 15 (1), it will be lawful for the State to establish educational institutions *solely* for women and that the exclusion of men students from such institutions would not contravene Art. 15 (1). But as regards educational institutions which are not of this type, the authorities may be clothed with the power to admit or exclude women students from them. In other words, while men students can in *no* case be admitted into women's colleges, the right of women to admission in other colleges is a matter within the regulation of the authorities of these colleges.[10]

The provision for reservation of seats for women in municipal elections can be justified under cl. (3).[11]

It has been pointed out that as there is nothing in cl. (1) or cl. (2) of this article which affects children as such, because age is not one of the forbidden grounds of discrimination mentioned in the article, the authorization in cl. (3) of special provision for children, notwithstanding anything contained in the article, is pointless.[12]

21. Clause (4). — It has been seen in Note 12 that the Supreme Court in the case of *State of Madras* v. *Sm. Champakam Dorairajan*[1] held, confirming in appeal the judgment of the Madras High Court, that the Communal G. O. of the Madras Government, fixing the proportion of students of each community that could be admitted into State educational institutions, was *ultra vires* under Art. 29 (2) and was not saved by the provisions of Art. 46 of the Constitution. Clause (4) of this article was enacted and introduced into the Constitution by the Constitution (First Amendment) Act, 1951, to ensure that any special provision which the State may make for promoting the ideal expressed in Art. 46 might not be questioned as discriminatory under cl. (1) of this article.[1a] We give below extracts from "Objects and Reasons" and the Report of the Select Committee bearing upon this amendment:

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[9] 1952 Cal 825 (830) [AIR V 39] (DB), *Anjali* v. *State of West Bengal*. (At the same time, it was held, in the circumstances of the case, that there was no discrimination against girl students on ground of sex *alone*.)

[10] 1954 Mad 67 (70) (Pr 9) [AIR V 41 C 13] (DB), *University of Madras* v. *Shantha Bai*.

[11] 1953 Bom 311 (313) (Pr 5) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay*.

[12] 1952 Cal 825 (Pr 21) [AIR V 39] (DB), *Anjali* v. *State of West Bengal*.

Article 15 — Note 21

[1] 1951 S C 226 (Prs 8, 11) [AIR V 38 C 40] : 1951 S C R 525 (SC).

[1a] *See* 1952 Bom 461 (462) (Pr 4) [AIR V 39] : I L R (1953) Bom 44 (DB), *Jagwant Kaur* v. *State of Bombay*. (Before introduction of clause (4), special provisions for benefit of Scheduled Castes was unconstitutional. Hence requisi-

> "It is laid down in ART. 46 as a Directive Principle of State policy that the State should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. In order that any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminatory, it is proposed that ART. 15 (3) should be suitably amplified."—See *Statement of Objects and Reasons*, Gazette of India, 1951, Part II, S. 2, page 357.
>
> "We agree with the principle underlying the amendment of ART. 15 (3) proposed. . . . We consider, however, that, for the sake of clarification, the scope of the amendment should be extended to cover ART. 29 (2) as well as ART. 15. . . . In this clause, instead of referring to 'the educational, economic or social advancement of any backward class of citizens', we think it preferable to refer to 'the advancement of any socially and educationally backward classes of citizens' following the language used in ART. 340 (1).
>
> "Some apprehensions have been expressed in respect to this amendment. The Select Committee is of the view that this provision is not likely to be, and cannot indeed be, misused by any Government for perpetuating any class discrimination against the spirit of the Constitution, or for treating non-backward classes as backward for the purpose of conferring privileges on them." See *Report of the Select Committee*, Gazette of India, 1951, Part II, S. 2, page 379.

The validity of the Constitution (First Amendment) Act, 1951, was questioned in a case before the Supreme Court but was affirmed by that Court.[2]

Under this clause, read with ART. 340, the President has passed the Constitution (Scheduled Castes) Order, 1950, providing for special treatment for certain communities in the Punjab. The validity of this Order has been judicially affirmed.[3] The clause serves as an exception not only to cl. (1) of this article but also to cl. (2) of ART. 29 which is a specific provision relating to the admission into educational institutions maintained by the State or receiving aid out of State funds. It may be noted in this connection that while the Madras High Court in the *Communal G. O. case*,[3a] already referred to, based its decision on cl. (1) of this article and ART. 29 (2), the Supreme Court based its

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tioning land for construction of colony exclusively for Harijans was unconstitutional.)

[2] 1951 S C 458 (Prs 1, 16) [AIR V 38 C 60] : 1952 S C R 89 : ILR 30 Pat 1176 (SC), *Shankari Prasad* v. *Union of India.*

[3] 1952 Punj 143 (Prs 6, 7) [AIR V 39 C 52] : I L R (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.*

[3a] 1951 Mad 120 (Prs 15, 42) [AIR V 38 C 14] : I L R (1951) Mad 149 (FB), *Sm. Champakam Dorairajan* v. *State of Madras.*

decision on ART. 29 (2) exclusively. The Supreme Court also pointed out that this article or ART. 29 did not contain a provision analogous to cl. (4) of ART. 16 which empowers the State to make special provisions in favour of backward classes. So, this cl. (4) has now been inserted into the Constitution so as to serve as an exception to both ART. 15 (1) and ART. 29 (2).

The words "the State" in this clause include, as already seen in NOTE 7, the President of the Union acting in his official capacity. It will be no objection to a provision made under this clause that it discriminates in favour of certain persons solely on the ground of caste or race, etc.[4] The reason is that this clause and ART. 341 should be treated as exceptions to the rule that the State should not discriminate against any one solely on the ground of religion, race, etc.[5]

It can only be hoped, as the Select Committee did, that the provisions of this clause will not be abused by the State Governments for the perpetuation of class distinction.

Although under ART. 46, one of the Directive Principles of State Policy is that the State shall promote, with special care, the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and Scheduled Tribes, this provision is not enforceable by any Court and does not create any right in favour of any one.[6] Hence, where Government makes rules for allowing fee concessions to Harijan children and extends the concession to a certain class of Harijan converts to Christianity, Harijan converts who do not fall within the class indicated by the rules cannot claim the concession as of right or complain of discrimination being made against them.[7]

For the definition of Scheduled Castes and Scheduled Tribes, see ART. 366 (24) and (25).

Equality of opportunity in matter of public employment

16. *(1)* There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

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[4] 1952 Punj 143 (Pr 5) [AIR V 39 C 52] : I L R (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.*

[5] 1952 Punj 143 (Pr 6) [AIR V 39 C 52] : I L R (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.*

[6] 1953 Mad 21 (22) (Pr 3) [AIR V 40 C 8] (DB), *In re M. Thomas.* (No right to fee concession in schools.)

[7] 1953 Mad 21 (Pr 5) [AIR V 40 C 8] (DB), *In re M. Thomas.* (After all the State was granting an indulgence and it was for the State entirely to decide how far the indulgence would go. There is also no discrimination on ground of religion.)

Article 16
Note 1

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. ✓

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. ✓

Government of India Act, 1935

Note. — Sections 275 and 298 (1) of the Government of India Act, 1935, correspond to this article. For text of these sections, see Note 1 of this article.

COGNATE PROVISIONS

The State—Interpretation of—See ART. 12.

Clause (3)—Power to make laws under, is in Parliament and not in the Legislature of a State with respect to any matter under Art. 16 (3)—See ART. 35 (a) (i).

Clause (4)—"Provision for the reservation of appointments or posts"—Manner in which such provision is to be made—Public Service Commission whether need be consulted—See ART. 320 (4).

Synopsis

1. Analogous law.
2. Scope and applicability of the article.
3. Equality of opportunity.
   - Equality of opportunity for employment under State.
4. Clause (2).
5. "Discriminate against."
6. Clause (3).
7. Clause (4).

1. Analogous law. — Section 298 (1) of the Government of India Act, 1935, contained a provision similar to that in this article prohibiting discrimination against any one on the ground of religion, place of birth and so on in matters of appointment to public office in India. The material portion of S. 298 (1) ran as follows :

> "No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India."

There was a similar provision in S. 96 of the Government of India Act, 1915, also and in S. 87 of the Act of 1833, so that the provision as to capacity to hold office has been on the statute book for nearly a century and a quarter.

Section 275 of the Government of India Act, 1935, ran as follows :

> "275. A person shall not be disqualified by sex for being appointed to any civil service of, or civil post under, the Crown in India other than such a service or post as may be specified by any general or special order made :
>
> (a) by the Governor-General in the case of services and posts in connection with the affairs of the Federation;
>
> (b) by the Governor of a Province in the case of services and posts in connection with the affairs of the Province;
>
> (c) by the Secretary of State in relation to appointments made by him :
>
> Provided that any such agreement with respect to joint services and posts as is mentioned in Chap. II of this Part of this Act may provide for the powers conferred by this section on the Governor-General and the Governor of a Province being exercised, with respect to the services or posts to which the agreement applies, by the Governor-General or a specified Governor."

2. Scope and applicability of the article. — This article is a specific application of the general principle of equality contained in ART. 14. The object of the article is to ensure equality of opportunity for all citizens in matters relating to appointment to public offices. The article also makes provision for exceptions being made in appropriate cases.

The admission of students to a professional college like an Engineering College is not a matter relating to employment under the State and hence this article will not apply where certain students are refused admission into a State professional educational institution.[1]

Like ARTICLE 15 this article also only applies to citizens. As to the meaning of 'citizen', see ARTS. 5 to 11 and notes thereon.

The article does not apply to an election to a local authority, like a municipality. The reason is that the article refers to employment or

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Article 16 — Note 2

[1] 1951 Punjab 93 (Pr 16) [A I R V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab*. (The argument that unless the students were allowed admission into the State College of Engineering they would not be able to get employment as engineers in State service is far-fetched.)

appointment to an office *under the State*, while a member of a Municipal Board (which is included in the term 'State' as defined in ART. 12) is not a person employed *under* the Board but is a *part* of the Board. Hence, reservation of seats under a State law for women in a municipal election is not repugnant to this article.[2]

The marginal note to the article may be looked at in order to understand the drift of the article and to help the Court in construing the article.[3] The marginal note indicates that the article relates to offices which are filled by employment or appointment *by the State* and not to elective offices like membership of local authorities, etc.[4]

This article deals with a limited subject, namely, the subject of appointment or employment by the State. The term "State" is used in the wide sense in which it is defined in ART. 12. This article emphasizes that the State in this wide sense in appointing or in employing persons shall give equal protection to all citizens and will not make any person ineligible to hold an office or discriminate against him in respect of that office on ground of religion, race, caste, sex, or place of birth. Article 15 is more general in its application and it deals with all cases of discrimination which do not fall under ART. 16. Hence, even though ART. 16 may not apply to discriminatory laws relating to elections to local authorities, ART. 15 will apply and such discriminations will be constitutional only within the limits permitted by ART. 15.[5]

Equality of opportunity for employment under State

3. Equality of opportunity. — The principle of equality of opportunity enunciated in clause (1) of this article cannot be regarded as violated by a process of selection according to the merits of candidates offering themselves for employment under the State, where all the candidates are subjected to the same tests.[1]

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[2] 1953 Bom 311 (315) (Pr 11) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay*. (The provision made in S. 10 (1) (c) of the Bombay Municipal Boroughs Act for reservation of seats for women and the rules made by Government with regard to the reservation of seats for their election to the Jalgaon Municipality are *intra vires* and they do not offend against any provision of Arts. 14, 15 and 16 of the Constitution.)

[3] 1953 Bom 311 (Pr 3) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay*.

[4] 1953 Bom 311 (Pr 3) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay*.

[5] 1953 Bom 311 (315) [AIR V 40 C 98] (DB), *Dattatraya* v. *State of Bombay*.

Article 16 — Note 3

[1] 1952 Trav. Co. 7 (Pr 7) [AIR V 39 C 3], *Vishnukrishnan* v. *K. N. Kripal*. (Discrimination as between those 'acceptable' and those 'unacceptable' is inevitable in any process of selection and grading and there can be nothing wrong in such a discrimination. Thus, where all officers of certain Part B State Forces were subjected to the screening by the Selection Board, and those who were graded as acceptable were given Commission as Officers in the regular Indian Army, and as between Officers similarly situated there had been no discrimination in the matter of being subjected to 'screening', the Officers who were graded as unacceptable as the result of such screening cannot complain that there was any discrimination violating the Fundamental Right guaranteed by Art. 16 of the Constitution.)

Article 16
Notes 3–4

Where a civil servant is employed on a special contract and his services are terminated in accordance with the terms of such contract, he is not entitled to be dealt with under ART. 311 of the Constitution, which does not apply to him. Hence, non-compliance with the provisions of ART. 311 in his case will not amount to discrimination against him in respect of employment under the State. In such a case, there is also no denial of equality of opportunity in regard to employment under the State. There can be no grievance merely because a person is offered an appointment on special terms on a temporary basis which he accepts, and not permanent employment. There is no compulsion to accept such temporary employment and there is no discrimination when the State deals with the employees according to the terms of the special contract of service entered into by them.[2]

4. **Clause (2).**—Under ART. 15 (1) the State is prohibited from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (2) of this article re-enacts in a slightly extended form the same provision with special reference to employment under the State. Article 15 (1) in enumerating the grounds on which discrimination is forbidden does not include descent and place of residence. These two grounds are added in ART. 16 (2) to the grounds mentioned in ART. 15 (1). The separate mention of residence in ART. 16 (2) indicates that place of birth and that of residence are distinct matters and a law which discriminates on the ground of residence against any citizen will not be repugnant to ART. 15 (1), although possibly it may be affected by ART. 14 in case it amounts to an infringement of the principle of equality before the law enunciated in that article. But in a matter of employment under the State, discrimination against a citizen even on the ground of the place of residence will be repugnant to the Constitution under this article.

The word 'only' after the word 'grounds' should be noted. That shows that cl. (2) only applies where a citizen is held as ineligible for a certain public appointment solely on the ground of his religion, race, etc., and not where his religion or race, etc., constitutes but one of the factors that decide his eligibility for public appointment. A similar interpretation has been placed upon ART. 15 (1). (See ART. 15, NOTE 10.)

The words "or any of them" corresponding to the same words in ART. 15 (1), indicate that the grounds of discrimination enumerated should not be made the basis of discrimination either cumulatively or separately. In other words, whether all the grounds mentioned exist together in a case or only one of them exists, no discrimination should be based solely upon them.

For the meaning of the words "the State", see ART. 12 and notes thereon and also ART. 15, NOTE 7.

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[2] 1953 S C 250 (Pr 10) [AIR V 40 C 61] (SC), *Satish Chandra* v. *Union of India.*

This clause applies not only where a citizen is held ineligible for a public appointment solely on the ground of any of the factors mentioned but also where a citizen is discriminated against solely on such a ground in matters of appointment to public office. As to the meaning of the words "discriminate against", see NOTE 8 on ART. 15 and also NOTE 5 on this article. "Discrimination" comes in when there are two persons or two classes of persons and one of them is treated with favour and the other is not treated with the same favour or when one is treated with disfavour whereas the other is spared that disfavour. Thus, holding a citizen as ineligible for public appointment is not the same thing as discriminating against him in regard to public appointment.

A glaring example of discrimination against citizens in matters of public appointment was contained in a certain Order of the Madras Government generally known as the Communal G. O. This Order came up for consideration of its validity in an appeal before the Supreme Court and it was declared to be repugnant to cl. (2) of this article. According to that Order the proportion of posts open to each community was fixed in a certain manner. The communities for whom the proportion was fixed were not all of them backward communities within the meaning of cl. (4). The result of fixing the proportion was that a candidate belonging to a particular community could not be eligible for a certain vacancy even though he might be better qualified than other candidates, if the number of posts reserved for his community had already been filled up. It was held by the Supreme Court that, inasmuch as caste and community were the sole grounds for the ineligibility, the Government Order abovementioned was repugnant to this clause and therefore was void.[1]

Under cls. (3), (4) and (5) of this article provision has been made for exceptions to the general rule enacted in cls. (1) and (2). Clause (3) refers to special provisions being made by way of reserving provincial appointments to natives of the particular province. Clause (4) gives power to the State to make special provision for backward classes and cl. (5) relates to religious or denominational institutions.

5. **"Discriminate against."**—The phrase "discriminate against" bears the same meaning in this article as in ART. 15. As pointed out by Patanjali Sastri, C. J., it implies differentiation with a bias against a particular class or individual. If the differentiation and the bias are based upon any of the grounds specified in the article the law or the action taken by the State becomes *ipso facto* repugnant to the Constitution. In this matter there is a difference between this article and ART. 15 on the one hand and ART. 14 on the other. Where mere infringement of equality before the law under ART. 14 is alleged, the Court will appraise the question with a presumption that the alleged

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Article 16 — Note 4

[1] 1951 S C 229 (Pr 4) [A I R V 38 C 41] (SC), *Venkataramana* v. *State of Madras.*

breach of equality is justified by reason of the State's plenary powers of classification according to the needs and circumstances of the situation; but where discrimination in respect of any of the matters under Art. 15, or this article is established, the impugned law will, without anything more, be condemnable as unconstitutional.[1]

For further discussion of the meaning of discrimination see Note 8 on Art. 15.

Where a selection of candidates is made on merits there is no question of discrimination.[2]

6. Clause (3). — This clause is by way of an exception to the main provisions of the article which prohibit discrimination against any citizen in the matter of appointment to public office solely on the grounds enumerated in cl. (2) which include place of birth and residence. Under this clause it is provided that in regard to certain appointments in any *State* (as distinct from an appointment under the Union) the Parliament can make residence within the State a necessary qualification for appointment. It will be noticed that it is only Parliament that can make such a law and such a restriction can only be made in regard to State appointments and not the Union appointments. And lastly, restriction can only relate to residence of the proposed appointee and not to any other factors such as religion, or even place of birth.

Article 35 (a) (i) again provides that it is only the Parliament that can make a law under clause (3) of this article and the State Legislature has no power in the matter.

7. Clause (4). — Clause (4) is another exception to the general provisions of the article. The clause is intended to enable the State to make such provision as it may deem necessary for the benefit of backward classes of citizens. The conditions for the applicability of the clause are that the community or class for which the State makes special provision must be a backward class of citizens. Secondly, it must be a class which in the opinion of the State is not adequately represented in the services under the State. The special provision contemplated is by the reservation of posts in favour of any backward class. Where reservation of appointments is made in favour of classes which are not backward, such a reservation is not saved under the clause and is repugnant to cls. (1) and (2) of Art. 16. A glaring example of a reservation of posts for classes which were not backward and therefore which was repugnant to this clause was seen in the Communal G. O. of the Madras Government which fixed the proportion of appointments for each community and included in the Order not only backward communities but also communities which were not backward. It was held by the Supreme Court that the G. O. was

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Article 16 — Note 5

[1] 1952 S C 123 (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra*.

[2] 1952 Trav. Co. 7 (Pr 7) [AIR V 39 C 3], *Vishnukrishnan* v. *K. N. Kripal*.

repugnant to the article in so far as it related to the classes which were not backward.[1]

The words "backward class" have not been defined anywhere but they do not seem to be identical with Scheduled Castes and Scheduled Tribes, as ART. 15 (4) mentions socially and educationally backward classes of citizens and Scheduled Castes and Scheduled Tribes as separate categories. In the Communal G. O. case, already referred to, the Supreme Court was not inclined to treat Muslims, non-Brahmin Hindus, Christians and Brahmins as backward classes..

Article 15 (4) refers only to socially and educationally backward classes of citizens while Article 16 (4) does not qualify the word "backward" which therefore is wide enough to include any kind of backwardness social, educational or any other kind.

Under the clause it is necessary not only that the class must be backward but that in the opinion of the State it must not be adequately represented in the services of the State.

In the Communal G. O. case of Madras, above referred to, the Supreme Court was inclined to treat Harijans and backward Hindus as backward classes. But in view of the specific mention of backward Hindus in the G. O., the Supreme Court did not accept the contention that all the communities which were mentioned in SCH. III to Part I of the Madras Provincial and Subordinate Service Rules should be treated as a backward class. Although ART. 15 (4) specifies Scheduled Castes and Scheduled Tribes and socially and educationally backward classes separately, in view of the decision of the Supreme Court, above referred to, holding Harijans to be a backward class, it would appear that Scheduled Castes and Scheduled Tribes would be backward classes within the meaning of cl. (4), although there is no definition of backward class anywhere in the Constitution. As regards the meaning of Scheduled Castes and Scheduled Tribes, see ART. 366, cls. (24) and (25).

17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

Abolition of untouchability

COGNATE PROVISION

Power to make laws is in Parliament, and not in the Legislature of a State, for prescribing punishment for an offence under this article — See ART. 35 (a) (ii).

1. Scope.— This article formally declares that untouchability is abolished and its practice in any form is forbidden. This constitutes an authoritative declaration that in law there is no such thing as untouchability and the practice of untouchability in any form is

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Article 16 — Note 7

[1] 1951 S C 229 (Pr 4) [AIR V 38 C 41] (SC), *Venkataramana* v. *State of Madras.*

Article 17 Note 1

constitutionally forbidden. It is not clear, however, what will constitute the practice of untouchability and what sanction is contemplated for the enforcement of the prohibition against the practice of untouchability in any form. A question may be asked whether a suit for injunction or damages will lie for the enforcement of the right declared by this article. The provisions of ART. 15 (2) seem to enact whatever is reasonably possible for the suppression of the evil known as untouchability. That clause, by providing that no citizen shall, on grounds only of religion, race, caste, etc., be subjected to any disabilities in regard to access to shops, public restaurants, hotels, and places of public entertainment and with regard to the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public,enacts all that is reasonably possible to give effect to the ideal involved in the abolition of untouchability. It is not clear what further purpose is served by the formal provision contained in the first sentence of Article 17. The question naturally arises whether the practice of untouchability in the privacy of one's own home or in a social matter is also legally forbidden so as to be actionable at law, as being an infringement of a legal right conferred by the Constitution.

The provision in the second part of the article that the enforcement of any disabilities arising out of untouchability shall be an offence punishable in accordance with law does not make such enforcement *ipso facto* punishable under the article itself but contemplates a law making such enforcement punishable as an offence. Hence, in the absence of such law, the observance of untouchability will not become a criminal offence.

As instances of laws making the enforcement of disability arising out of untouchability a punishable offence, see West Bengal Hindu Social Disabilities Removal Act, 1948, referred to in the notes on Article 14 and the U. P. Removal of Social Disabilities Act, 1947. Under ART. 35, such laws can be made by Parliament and not by State Legislatures.

The law referred to in this article includes law passed before the coming into force of the Constitution.[1]

Even assuming otherwise however, and even on the supposition that the article contemplates a law to be made after the coming into force of the Constitution making the enforcement of disabilities arising out of untouchability a punishable offence, it is only an *enabling* provision which does not affect the validity of laws already made prior to the Constitution.[2]

The law which makes it an offence to refuse one's professional services to another merely on the ground of the low caste of the latter does not amount to subjecting a person to forced labour or *begar*

Article 17 — Note 1

[1] 1951 All 615 (Pr 5) [AIR V 38 C 162] : 52 Cri L Jour 899, *State* v. *Banwari.*

[2] 1951 All 615 (Pr 5) [AIR V 38 C 162] : 52 Cri L Jour 899, *State* v. *Banwari.*

which are forbidden under ART. 23 and so such a law cannot be questioned as being in violation of ART. 23.[3]

Abolition of titles

18. *(1)* No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

COGNATE PROVISIONS

The State—Interpretation of—See Art. 12.
Foreign State—Interpretation of—See Art. 367 (3).

1. **Military or academic distinction.**— Although this article abolishes the system of award of titles by Government, it makes an exception in the case of military and academic distinctions.

2. **"The State"—Meaning.**—See ART. 12 and notes thereon.

3. **"Citizen"**—See ARTS. 5 to 11 and notes thereon.

4. **Foreign State—Meaning.**—See ART. 367 (3).

Right to Freedom

Protection of certain rights regarding freedom of speech, etc.

19. *(1)* All citizens shall have the right —

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

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[3] 1951 All.615 (Pr 5) [AIR V 38 C 162] : 52 Cri L Jour 899, *State* v. *Banwari*. (U. P. Removal of Social Disabilities Act, 14 of 1947, not void under Art. 23.)

Article 19

(*g*) to practise any profession, or to carry on any occupation, trade or business.

[a][(*2*) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.]

(*3*) Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(*4*) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(*5*) Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(*6*) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [b][nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.]

a. Clause (2) is *substituted* by the Constitution (First Amendment) Act, 1951, S. 3 (1) (a). The said clause is to be deemed always to have been enacted in the form given above. Before its substitution the clause was as follows :— "(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State".

b. *Substituted* by the Constitution (First Amendment) Act, 1951, S. 3 (1) (b) [18-6-1951] for "nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business".

OBJECTS AND REASONS

The main objects of the Constitution (First Amendment) Act, 1951, are to amend ART. 19 for the purposes indicated as follows :

"During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on Fundamental Rights. The citizen's right to freedom of speech and expression guaranteed by ART. 19 (1) (a) has been held by some Courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom. The citizen's right to practise any profession or to carry on any occupation, trade or business conferred by ART. 19 (1) (g) is subject to reasonable restrictions which the laws of the State may impose "in the interests of the general public". While the words cited are comprehensive enough to cover any scheme of nationalisation which the State may undertake, it is desirable to place the matter beyond doubt by a clarificatory addition to ART. 19 (6)." — See *Statement of Objects and Reasons, Gazette of India, 1951, Part II—Sec. 2, page 357.*

AMENDMENT MADE IN ART. 19—NOTE ON

Article 19 of the Constitution is amended by S. 3 of the Constitution (First Amendment) Act, 1951. Sub-section (2) of S. 3 of this amending Act is as follows:

"(2) No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of ART. 19 of the Constitution as amended by sub-section (1) of this section shall be deemed to be void, on the ground only that, being the law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article, its operation was not saved by clause (2) of that article as originally enacted.

Explanation. — In this sub-section, the expression 'law in force' has the same meaning as in clause (1) of ART. 13 of the Constitution."

GOVERNMENT OF INDIA ACT, 1935

Note. — Section 298 (1) of the Government of India Act, 1935, corresponds to this article. For text of that section, see NOTE 1 on ART. 15.

COGNATE PROVISIONS

The State—For interpretation of, see Art. 12.

Proclamation of Emergency in operation—Suspension of provisions of ART. 19 during emergencies—See ART. 358.

Scheduled Tribe—For interpretation of, see ART. 366 (25).

Existing law—For interpretation of, see ART. 366 (10).

Foreign State—For interpretation of, see ART. 367 (3).

Offence—Definition of—See ART. 367 (1) read with the General Clauses Act, 1897, S. 3 (38).

Synopsis

1. Amendment.
2. Scope and applicability of the article.
3. Analogous law.
    - (a) English law.
    - (b) The Constitution of the United States of America.
    - (c) Government of India Act, 1935, S. 298.
4. Meaning of "liberty" under the Constitution of the United States of America and under this Constitution.
5. Due process of law clause in the Constitution of the United States of America.
6. "Police Power."
7. This article and Art. 21.
8. This article and Art. 31.
9. Rights which are not fundamental.
10. Conflicting rights.
11. Contracting out of Fundamental Rights.
12. Infringement of right by private individuals.
13. Construction of laws restricting Fundamental Rights.
    - (a) Statutory rules and bye-laws.
14. Principles for determining if an Act is ultra vires.
15. Citizens.
16. "Right."
17. Who can raise question of unconstitutionality.
18. Retrospective effect.
19. Onus.
20. Restrictions on the Fundamental Rights under this article — General.
    - (a) Introductory.
        - "Restriction," meaning of — See Note 24.
        - "Existing law," meaning of.
        - "Law" and order under "law" —Distinction.
    - (b) Court's power to enquire into reasonableness of restrictions.
        - Objective standard.
    - (c) Tests of reasonableness.

  - General.
  - Both substantive and procedural aspects to be considered.
  - Presumption of reasonableness.
  - Excessive restriction.
  - Principles of natural justice — Right to be heard.
  - Vagueness and uncertainty.
  - Provision excluding judicial inquiry.
  - Vesting of discretionary authority in executive officers.
  - Safeguards against abuse.
  - Ultra vires laws.
  - (d) Power of taxation and Fundamental Rights.

21. "Interests of the general public."
22. "For the protection of the interests of any Scheduled Tribe."
23. "Public order."
24. "Restriction"—Meaning of.
25. "Existing law."
26. Clause (1) (a)—(General).
    - (a) Effect of amendment of cl. (2).
    - (b) Importance of freedom of speech.
    - (c) Freedom of speech under American Constitution—Rule of "clear and present danger".
27. Freedom of the press.
28. Pre-censorship.
29. Demanding security from the press.
30. Security of the State.
31. Sedition.
31a. Promoting enmity between classes.
32. Friendly relations with foreign States.
33. Decency or morality.
34. Contempt of Court.
35. Defamation.
36. Incitement to offence.
37. The film as a medium of expression.
38. Revolutionary movements.
39. Distribution of handbills, etc., in public streets.
40. Restriction of canvassing, solicitation of business, etc.
41. Loudspeakers, ban of.
42. Picketing, prohibition of.
43. Restrictions on freedom of speech and expression—Miscellaneous examples.
44. Clause (1) (b)—(General).
45. Right to take procession along highway.
46. Clause (1) (c)—(General).
47. Nationalisation of industry—See Note 79.
48. Labour and trade unions.
49. Right of businessmen to form combinations.
50. Supersession of local board, municipality, etc.
51. Secret society.
52. Clause (1) (d).
53. "Throughout the territory of India"—Clause (1) (d).
54. Externment and internment orders.
55. Restrictions on entry into India.
56. Clause (1) (d)—Illustrative examples.
57. Clause (1) (e).
58. Clause (1) (f).
59. "Property."
60. "Acquire."
61. "Hold."
62. Taking away right of management of property, etc.
63. Control of accommodation and rents.
64. Tenancy laws.
65. Law of pre-emption.
66. Acquisition of lands.
67. Restriction on alienation.
68. Evacuee property legislation.
69. Clause (1) (f)—Illustrative examples—Valid restrictions.
70. Clause (1) (f)—Illustrative examples—Invalid restrictions.
71. Prohibition law.
72. Clause (1) (g)—(General).
73. "Any" profession, etc.
74. "Carry on" any occupation, etc.
75. Legal profession — Restrictions as to.
76. Licence, requirement of.
    - (a) Distinction between permit and licence.
    - (b) Distinction between income-tax, profession-tax, and licence fee.
77. Trade restrictions.
78. Price control.
79. Monopolies.
80. Labour laws.
81. Industrial Disputes Act.
82. Clause (1) (g) — Illustrative examples of valid and invalid restrictions.

83. Clause (6) (i) — Professional or technical qualifications.
84. Clause (6) (ii).
85. Taxation powers of the State and Fundamental Rights.
86. Stamp duty — Levy of.
87. Right to strike.
88. Franchise.
89. Right to stand for election.
90. Preventive detention.
91. Freedom of contract.
92. Compulsory vaccination.
93. Compulsory military training.

1. **Amendment.**—This article has been amended by the Constitution (First Amendment) Act, 1951, S. 3. The amendments relate to cls. (2) and (6). The article as printed above incorporates the amendments. But the amendments are pointed out and explained in the notes given immediately below the text of the article. The relative parts of the article as they stood before the amendment have also been reproduced above. The objects and reasons for the amendment have also been given in the notes following the text of the article. The scope of the concerned clauses as amended and before amendment has been more fully discussed in NOTES 26 and 36. See also NOTE 18.

2. **Scope and applicability of the article.** — This article enumerates seven rights which may be said to epitomise the essential hall-marks of freedom of the citizens of any free country.

In Halsbury's LAWS OF ENGLAND, 2nd End., Vol. VI, p. 391, are enumerated the most important liberties of the subject under the British Crown. These are :

(1) The right of personal freedom or immunity from wrongful detention or confinement ;
(2) the right of security of property ;
(3) freedom of speech ;
(4) the right of public meeting ;
(5) right of association ;
(6) the right of the subject to have any case affecting him tried in accordance with the principles of natural justice; and
(7) the right of the subject to withhold his labour, so long as he commits no breach of contract, or tort, or crime.

(See also Part III-General.)

It must be noted that there being no written constitution in England containing a chapter corresponding to Part III of this Constitution guaranteeing certain rights as Fundamental Rights, the liberties of the subject in England can be affected by a simple law passed by the Parliament and where such a law is made, the Courts cannot question the validity of the law on the ground of their affecting any rights or liberties of the subject.

The rights guaranteed by this article are the rights of a *free* citizen. They assume as their basis that the citizen to whom they relate is not under detention either by way of punishment for crime or as a matter of preventive precautionary action taken by the State or otherwise. The question of the citizen's personal or bodily freedom has been dealt with in ARTS. 21 and 22 and it is only in cases in which the personal or bodily freedom of a citizen has not been taken away in accordance with a valid law under those articles that the question of applying Art. 19 to him will arise. As observed by Patanjali Sastri J., (as he then was), in the case of *Gopalan* v. *State of Madras*,[1] Art. 19 presupposes that "the citizen to whom the possession of these Fundamental Rights is secured, retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests". But where, as penalty for committing a crime or otherwise, a citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to in cl. (1) of this article. Deprivation of personal liberty in such a situation is not within the purview of Art. 19 at all but is dealt with by the succeeding Arts. 20, 21 and 22. In other words, Art. 19 guarantees to the citizens the enjoyment of certain civil liberties *while they are free*, while Arts. 20 to 22 secure to all persons, citizens and non-citizens, certain constitutional guarantees in regard to punishment and prevention of crime.

In *Ram Singh* v. *State of Delhi*[2], the same learned Judge observed as follows :

> "Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in Art. 19 (1), and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct Fundamental Rights and made separate provisions in Art. 19 and Arts. 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged. The interpretation of these articles and their correlation were elaborately dealt with by the full Court in *Gopalan's case*[3]. . . . It was decided by a majority of 5 to 1 that a law which authorises deprivation of personal liberty did not fall within the purview of Art. 19 and its validity was not to be judged by the criteria indicated in that article but depended on its compliance with the requirements of Arts. 21 and 22 and as S. 3 of the Preventive Detention Act, 1950, satisfied those requirements, it was constitutional."

See also Notes 7 and 8.

The next point to note about this article is, it is not an exhaustive enumeration of all the Fundamental Rights of a citizen under the Indian Constitution. There are several other rights guaranteed by the provisions of this Part. As seen already, such a vital right as that of not being subjected to illegal detention by mere executive fiat is itself the subject-matter of an independent article, namely, Art. 21, and is not covered by this article.

Article 19 — Note 2

[1] 1950 S C 27 (Pr 102) [AIR V 37 C 6]:1950 S C R 88:51 Cri L Jour 1383 (SC).

[2] 1951 S C 270 (Prs 5, 6) [AIR V 38 C 45]:1951 SCR 451:52 Cri L Jour 904 (SC).

[3] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *ate of Madras.*

Article 19
Note 2

Even in regard to the rights of a *free* citizen this article is not exhaustive in its enumeration. It only protects some of the important attributes of personal liberty, even of a free citizen. A free man has far more and wider rights than those enumerated in cl. (1) of this article. As pointed out by Das J., in *Gopalan's case*,[4] besides the several rights mentioned in the several sub-clauses of ART. 19 (1), there are many other personal liberties which a free man, that is, a man who has the freedom of his person, may exercise. Das J. expressed his complete agreement with the observations of Harries C. J. in an unreported case[5] which Das J. quoted. Harries C. J. had observed as follows :

> "It must be remembered that a free man has far more and wider rights than those stated in ART. 19 (1) of the Constitution. For example, a free man can eat what he likes subject to rationing laws, work as much as he likes, or idle as much as he likes. He can drink anything he likes subject to the licensing laws, and smoke and do a hundred and one things which are not included in ART. 19. If the freedom of person was a result of ART. 19, then a free man would only have the seven rights mentioned in that article. But obviously the free man in India has far greater rights."

As pointed out by Das, J., if the position were otherwise than as stated above, the citizen's right to eat what he likes will be liable to be taken away by the executive fiat of the Civil Supplies Department without any necessity of any rationing laws and the Government may enforce prohibition without prohibition laws, or licensing laws, etc. It cannot be that the Constitution intended to give no protection to the bundle of rights of a citizen which, together with the rights mentioned in sub-cls. (a) to (e) and (g), make up personal liberty.[6]

According to Das, J., in *Gopalan's case*,[7] the several rights which together constitute the free status of man but which have not been specifically enumerated in ART. 19, are covered by the expression "personal liberty" in ART. 21, which guarantees that no person shall be deprived of his personal liberty except according to procedure established by law. His Lordship observed as follows :

> "In my judgment, ART. 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in ART. 21 as a compendious term, including within its meaning all the varieties of rights which go to make up the personal liberties of men."

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[4] 1950 S C 27 (Prs 219, 220) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[5] Misc Case No. 166 of 1950 (Full Bench Ref. No. 1 of 1950), D/- 6-4-1950 (FB), *Kshitindra Narayan* v. *Chief Secretary Government of West Bengal.*

[6] 1950 S C 27 (110) (Pr 218) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *Das J.*)

[7] 1950 S C 27 (111) (Pr 220) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

It has been established in *Gopalan's case*[8] that "law" in ART. 21 refers to positive State-made law and not principles of natural justice. Hence, the attributes of personal freedom which are not enumerated in ART. 19 but which, according to Das, J'.s view, above referred to, may be taken as constitutionally guaranteed by ART. 21, are not immune from *legislative* interference. In this respect such rights lack that characteristic of a Fundamental Right which consists in its being paramount to ordinary State-made laws.[9] (See Part III-General). But the rights cannot be affected by mere *executive* action without the sanction of *law*. The position with regard to these rights will be the same as the position with regard to the liberty of the subject under the English law, under which the executive cannot interfere with such liberty except when it is according to law. It was observed by Lord Atkin in *Eshugbayi* v. *Government of Nigeria*[10]:

> "In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject, except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

Where a Fundamental Right, which is beyond the competence of a Legislature to affect, is involved, the proceedings of a statutory body can be questioned in a Court of law, even though such body may be acting within the limits of its statutory powers. But where no such Fundamental Right is involved, the proceedings of the statutory body cannot be questioned so long as it acts within the limits of its statutory powers.[11] (See also Part III-General.)

The next characteristic of the rights under this article is that none of them is an *absolute* right.[12] Each of the sub-cls. (a) to (g) in cl. (1) is saddled with a restrictive provision enacted in cls. (3) to (6) of the article. The liberty contemplated by the Constitution is *ordered* liberty and the Constitution has provided for securing the validity of such laws as it may be found necessary to make in the interests of good government, although they may involve a limitation *pro tanto* of any of the Fundamental Rights enumerated in sub-cls. (a) to (g) of cl. (1).

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[8] 1950 S C 27 (60, 61) (Pr 77) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[9] 1950 S C 27 (74) (Pr 115) [AIR V 37 C 6] : 1950 S C R 88 :51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (*Patanjali Sastry J.*)

[10] 1931 P C 248 (252) [AIR V 18] (PC).

[11] 1953 Mad 279 (295) (Pr 51) [AIR V 40 C 102] : I L R (1953) Mad 304 (DB), *C. S. S. Motor Service* v. *Madras State.* (In AIR 1952 S C 192, no Fundamental Right was involved; in A I R 1950 S C 163 a Fundamental Right was involved—Hence the difference in the approach in the two cases.)

[12] 1950 S C 27 (Pr 216) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1951 All 746 (Pr 88) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.* (In the U. S. A. the Courts had to invent the doctrine of Police Powers to enable the State to control them.)

1952 Him Pra & B 41 (42) (Pr 5) [AIR V 39], *Sihnu* v. *Lachman Dass.*

Hence, in determining the extent of a right guaranteed under any of the above sub-clauses, the particular sub-clause must be taken along with the corresponding provision in cls. (2) to (6) of the article.

In *Gopalan* v. *State of Madras*,[13] Patanjali Sastri J. (as he then was) observed as follows :

> "'Liberty', says John Stuart Mill, 'consists in doing what one desires. But the liberty of the individual must be thus far limited—he must not make himself a nuisance to others.' Man as a rational being desires to do many things. But in a civil society, his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed. Accordingly, ART. 19, while guaranteeing some of the most valued phases or elements of liberty to every citizen as civil rights, provides for their regulation for the common good by the State imposing certain restrictions on their exercise."

In *State of Bihar* v. *Kameshwar Singh*,[14] Das J., of the Supreme Court, observed as follows:

> "Whatever furthers the general interest of the community as opposed to the particular interest of the individual must be regarded as a public purpose. With the onward march of civilization our notions as to the scope of the general interest of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interest of the community. The emphasis is unmistakably shifting from the individual to the community. This modern trend in social and political philosophy is well reflected and given expression to in our Constitution.
>
> "Our Constitution, as I understand it, has not ignored the individual but has endeavoured to harmonise the individual interest with the paramount interest of the community .... It is thus quite clear that a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution."

Under the Constitution of the United States of America also, it is an accepted principle that none of the freedoms guaranteed by the Constitution is absolute and that equally fundamental with the rights of the individual citizen is a right of the public to regulate his rights in the common interest, subject to constitutional restraint.[15] As Samuel

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[13] 1950 S C 27 (69) (Pr 102) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[14] 1952 S C 252 (290) (Pr 106) [AIR V 39]: 1952 S C R 889, 1020 & 1056: ILR Pat 565 (SC).

[15] (1934) 291 U S 502 (523) : 78 Law Ed 940 (948, 949), *Nebbia* v. *New York*. (1936) 300 U S 379 (391) : 81 Law Ed 703 (708), *West Coast Hotel Company* v. *Parrish*. (The due process clause does not mean an absolute and uncontrollable

Griffith C. J. has observed :

> "The word 'free' does not mean *extra legem*, any more than freedom means anarchy. We boast of being an absolutely free people but that does not mean that we are not subject to law."[16]

In this connection the following passage about the balancing of social interests from CONSTITUTIONAL LAW[17] by Prof. Willis may be quoted :

> "*Balancing Social Interests*:—Undoubtedly there is a social interest in personal liberty. This, however, is only one of many social interests. There are other social interests just as important as the social interest in personal liberty. The great problem—perhaps the greatest problem of constitutional law—is to determine when the social interest in personal liberty is more important than other social interests and when other social interests are more important than personal liberty. Protection should be given to whichever social interest in a particular case is of greater importance.
>
> "Individual or personal liberty has immemorially been limited by the social ideal. This limitation is found not only in constitutions but also in the common law itself. This is illustrated by illegality in contracts. Here the personal liberty of individuals is delimited so as

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liberty, the liberty safeguarded being the liberty in a social organization which requires the protection of law against evils which menace the health, safety, morals and welfare of the people.)

(1905) 197 U S 11 (26) : 49 Law Ed 643 (649, 650), *Jacobson* v. *Massachusetts.* (It has been recognized as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legisla ture to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned: *Hannibal & St. J. R. Co.* v. *Husen*, 95 U S 465 (471) : 24 Law Ed 527 (530); *Missouri K. & T. R. Co.* v. *Haber*, 169 U S 613 (628, 629) : 42 Law Ed 878 (883); *Thorpe* v. *Rutland & B. R. Co.*, 27 Vt 148 : 62 Am Dec 625, Rel. on.)

(1890) 137 U S 86 (89):34 Law Ed 620 (621), *Crowley* v. *Christensen.* (The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.)

7 Cush 84, *Com.* v. *Alger.* (In the Constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good", and that government is instituted "for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honour, or private interests of any one man, family, or class of men". The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the Police Power rests in Massachusetts : Cited in *Jacobson* v. *Massachusetts*, (1905) 197 U S 11 (27) : 49 Law Ed 643 (650).)

[16] (1916) 22 C L R 556 (573), *Duncan* v. *State of Queensland.* (Quoted in *Commonwealth of Australia* v. *Bank of New Southwales*, (1949) 2 All E R 755 (771)· 1950 App Cas 235.)

[17] Constitutional Law of the United States by Prof. Willis, 1936, page 644.

Article 19
Notes 2–3

to prevent their making contracts. Another illustration is found in the law of public callings. The rule of reasonableness which has been developed by the Courts for various public calling duties is a limitation upon the personal liberty of those engaged in public callings. The common law has imposed limitations upon personal liberty wherever it has created a right *in rem* or a right *in personam*, antecedent or remedial. Equity has also created a great many limitations upon the personal liberty of individuals. It has delimited the right of people to hold others to contracts when the former have practised fraud or duress or undue influence upon the latter. It has imposed constructive trusts upon those who if given personal liberty would take unjust advantage. The constitutional limitation of due process is only another expression of the social ideal."

But in considering the validity of restrictions imposed under the law by the State on Fundamental Rights, it must be remembered, as pointed out by Bose J. of the Supreme Court, that it is the *right* which is fundamental and not the *limitations*.[18] (See also NOTE 20.)

We have already seen above that where a person loses his freedom by being put in jail or under detention and ceases to be a free man, this article has no application. The fact that as a result of the loss of the freedom, the citizen loses all the freedoms enumerated in this article, will not amount to a contravention of this article. So, looking at the matter from another point of view, this article only applies where the Fundamental Rights conferred by it are hit directly and not indirectly as a consequence of the invasion of some other Fundamental Rights which may be covered by some other provision of the Constitution.[19]

(a) English Law

3. Analogous law.—We have already seen in NOTE 2 the comparable provisions of English law.

(b) The Constitution of the United States of America

The comparable provisions of the Constitution of the United States are contained in the following Amendments to the Constitution:

(i) *The 1st Amendment.*—Under this Amendment it is provided that the Congress (the Legislature of the United States) shall make no law, *inter alia*, abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances. It will be seen that this provision corresponds to sub-cls. (a) and (b) of cl. (1).

(ii) *The 5th Amendment.*—This amendment provides, *inter alia*, that no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. It will be seen that this provision corresponds broadly to this article, ART. 21 and ART. 31 of our Constitution.

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18. 1951 S C 270 (Pr 22) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi*.

19. 1950 S C 27 (Pr 7) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Kania C. J.)
1951 S C 270 (Prs 5, 6) [AIR V 38 C 45]:1951 S C R 451 : 52 Cri L Jour 904 (SC) *Ram Singh* v. *State of Delhi*.
1951 Cal 97 (Pr 16) [AIR V 38 C 28], *Md. Safi* v. *State of West Bengal.*

(iii) *Section 1 of the 14th Amendment.* — This Amendment provides, *inter alia*, that no State (meaning the members of the Union) shall deprive any person of life, liberty, or property without due process of law. It will be seen that this provision is directed against the States forming the Federation and not against the United States as a whole, while the provision in the 5th Amendment quoted above and that in the 1st Amendment refer to the United States as a whole. Thus, in regard to the United States as a whole, the freedom of speech and press and assembly have been specifically provided for in the 1st Amendment. But there is no similar specific provision with regard to the States. Nonetheless, it is the consensus of view in the United States that the due process clause contained in the 14th Amendment of the Constitution is wide enough to include all the attributes of personal liberty, including that of free speech and free press.

It will be seen from the above that the American Constitution does not contain a specific provision similar to ART. 21, nor any specific provision about the several Fundamental Rights guaranteed under this article. Excepting the right of free speech and free assembly guaranteed with reference to the United States as a whole under the 1st Amendment, the general provision contained in the 5th Amendment and the 14th Amendment about a person not being deprived of his life, liberty or property without due process of law, forms the foundation for the civil rights of American citizens.

This fundamental difference between the scheme of our Constitution and that of the United States must be remembered in studying or trying to apply American decisions to questions arising under our Constitution. This difference has led to the position that while in America the term "liberty" has been given a wide connotation so as to include all the attributes of personal liberty and give them the character of Fundamental Rights, immune from *legislative* interference, under the Indian Constitution, it is not *all* personal liberties that are embraced in Fundamental Rights *of this character*. Even assuming that the aspects of personal liberty not covered by ART. 19 are covered by ART. 21, and that ART. 21 applies not only to the *total* deprivation of personal liberty but also to all other invasions of personal liberty not specifically covered by ART. 19, the immunity from being affected by the ordinary law belongs only to the special aspects of liberty covered by ART. 19 and does not apply to those covered by ART. 21. (See Part III-General and also Notes on ART. 21. See also NOTE 4.)

The next point of difference which may be noticed is that while our Constitution in this article makes detailed provisions in cls. (2) to (6) about the limitations which may be imposed by law on the Fundamental Rights declared by this article, the American Constitution practically leaves the limits of legislative interference to be determined by the Courts by reference to the phrase "due process of law". But still, broadly speaking, the restrictions on personal freedoms permitted by the several clauses of this article are required to be reasonable and in the interests of the general public, or public order, &c. As, generally speaking, the Supreme Court of America has also applied the test of reasonableness and of being required in public interest in the various cases that have come before the Supreme Court, the decisions of the Supreme Court are to that extent likely to be useful guides in solving questions under our Constitution.

(c) Government of India Act, 1935, S. 298

It has already been seen in the Notes on ART. 16 that under S. 298, sub-section (1) of the Government of India Act, 1935, contained a provision similar to ART. 16 forbidding discrimination against any one purely on the ground of religion, place of birth, descent, colour or any of them, in regard to eligibility for public office in India.

The latter part of S. 298 (1) provided that no subject of His Majesty shall be prohibited on any such grounds, namely, religion, place of birth etc., referred to above, from acquiring, holding, or disposing of property, or carrying on any occupation, trade, business or profession in British India. It will be seen that these provisions corresponded to sub-cls. (f) and (g) of cl. (1) of this article, subject to this that the provision is specifically confined to one class of grounds on which the right may be affected, viz., religion, birth, &c., while this article is absolutely general and is not confined to any particular type of grounds. But the principle in the provision in question in S. 298 of the Government of India Act, 1935, may be regarded as being covered by ART. 15 (1) of the Constitution. Sub-sections (2) and (3) of S. 298 of the Government of India Act, 1935, provide for certain exceptions to the general provisions contained in sub-section (1). For text of S. 298 of the Government of India Act, 1935, see ART. 15, NOTE 1. Some of the decided points on S. 298 are given below.[1]

Article 19 — Note 3

[1] 1946 P C 66 (71) [AIR V 33 C 25] : 73 Ind App 59 : 1946 F C R 1 : I L R (1946) Kar (PC) 74 (PC), *Punjab Province* v. *Daulat Singh.* (The provisions of S. 13A, Punjab Alienation of Land Act (13 of 1900 as amended by Act 10 of 1938), involve a contravention of S. 298 (1), Government of India Act, 1935. The impugned Act is, however, authorised and protected from being *ultra vires* as regards future transactions by S. 298 (2) (a), but the benefit of sub-s. (2) (a) cannot be claimed for the impugned Act so far as it purports to operate retrospectively: AIR 1942 F C 38 (FC), Affirmed.)

1946 Bom 216 (235) [AIR V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.* (What was sought to be enacted by the sections in Part XII, commencing with S. 292, was not a restriction on the powers of the Legislature but was certain fundamental principles of British jurisprudence, international law, His Majesty's prerogative to grant pardons, remissions of punishments and the like which should not be in any manner whatsoever affected or departed from in the exercise of the legislative powers invested in the Indian Legislature under the terms of the Act. Examples of this are to be found, *inter alia*, in the provisions of S. 298 (1) and S. 299 (1) and (2), which are not merely restrictions on the legislative powers of the Indian Legislature but are in reality the statutory recognition of the fundamental principles of British jurisprudence enacted therein.)

1944 Pesh 37 (39, 40) [AIR V 31] (DB), *Amiruddin* v. *Mohd. Ghufran.* (Section 298 (1), Government of India Act, abrogates S. 3 of Punjab Alienation of Land Act with regard to exchanges between agriculturists and non-agriculturists, and such exchanges are valid and enforceable.)

4. Meaning of "liberty" under the Constitution of the United States of America and under this Constitution. — We have already seen in NOTE 3, that under the American Constitution there is no specific provision enumerating the categories of personal freedom, corresponding to this article, and that broadly speaking, the personal freedoms mentioned in this article are regarded as covered by the provision in the 5th Amendment and the 14th Amendment that no one should be deprived of his life, liberty or property without due process of law, although so far as the Central Legislature of the United States, namely, the Congress, is concerned there is a provision in the 1st Amendment to the effect that the Congress shall make no law abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the Government for a redress of grievances, which provision in the 1st Amendment may be regarded as corresponding to sub-cls. (a) and (b) of cl. (1) of this Article. Thus, the term "liberty" under the Constitution of the United States of America has a wide connotation so as to embrace not only freedom from restraint of person as by incarceration, but also the right of the citizen to be free in the enjoyment of all his faculties.[1] As was held in *Meyer* v. *Nebraska*,[2] the liberty guaranteed by the 14th Amendment to the Federal Constitution denotes

> "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges, long recognised, at common law as essential to the orderly pursuit of happiness by free men."

In *Allgeyer* v. *The State of Louisiana*,[3] the Supreme Court of the United States observed as follows:

> "The liberty mentioned in that Amendment (14th Amendment) means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes abovementioned."

Article 19 — Note 4

[1] (1936) 297 U S 233 (244) : 80 Law Ed 660 (665), *Grosjean* v. *American Press Co.*

(1921) 16 A L R 703 (707) : 131 N E 809, *People of the State of Illinois* v. *Lucius J. Love*. (Profession or occupation also is involved in liberty in 14th Amendment.)

(1901) 180 U S 452 (467) : 45 Law Ed 619 (626), *W. W. Cargill Co.* v. *Minnesota*.

[2] (1923) 262 U S 390 (399) : 67 Law Ed 1042 (1045).

[3] (1897) 165 U S 578 (589) : 41 Law Ed 832 (835, 836).

Thus, for example (as will be seen in NOTE 27), the term "liberty" in the 14th Amendment has been regarded as including the right of free speech and freedom of the press.[4] So also among the civil rights intended to be protected from discriminatory State action by the 14th Amendment are the rights to acquire, enjoy, own and dispose of property.[5] (Compare sub-cl. (f) of cl. (1) of this article.)

It will be noted that under the Indian Constitution, the word "liberty" *simpliciter* has not been used. In ART. 21 the expression "personal liberty" has been used. This expression undoubtedly refers to freedom from bodily restraint or confinement in a place of incarceration. But it has been held that it is also wide enough to cover all the attributes of personal freedom. In other words, the expression "personal liberty" in ART. 21 does not mean only liberty of the person but it means liberty or the rights attached to the person *(jus personarum)*. But ART. 19 protects some of the important attributes of personal liberty as independent rights. Where the right in question is covered by ART. 19, it is that article that will apply. In other cases, ART. 21 will apply, which uses the expression "personal liberty" as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men.[6] See also NOTES 2 and 3, Part III-General.)

5. Due process of law clause in the Constitution of the United States of America. — It has been seen in NOTES 3 and 4 that broadly speaking, under the Constitution of the United States, the constitutional basis for the civil rights corresponding to those enumerated in this article is supplied by the provision that no one should be deprived of his life, liberty or property without due process of law. The expression "due process of law" thus corresponds to the reasonable restrictions in the interest of the general public or for the other considerations mentioned in cls. (2) to (6) of this article which the State is empowered by law to impose. Thus, even under the Constitution of the United States of America, the liberties of the citizens can be restricted by "due process of law". Therefore, the words "due process of law" have come to play a very crucial part in the constitutional law of the United States in regard to the rights and liberties of the people. The requirement of the due process embodies the fundamental conceptions of justice which lie at the base of the civil and political institutions of the United States of America.[1]

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[4] (1937) 81 Law Ed 278 (283) : 299 U S 353, *De Jonge* v. *Oregon*.
[*See* (1934) 293 U S 245 (262) : 79 Law Ed 343 (352), *Hamilton* v. *University of California*. ('Liberty' includes the liberty of believing and teaching certain doctrines, viz., that war-training for war and military training are immoral, wrong and contrary to precepts of Christianity.)]

[5] (1948) 334 U S 1 (10) : 92 Law Ed 1161 (1179), *Shelley* v. *Kraemer*.

[6] 1950 S C 27 (110, 111) (Prs 219, 220) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (Per *Das J.*)

Article 19 — Note 5

[1] (1934) 294 U S 103 (112) : 79 Law Ed 791 (794), *Mooney* v. *Holohan*.

The due process clause does not prohibit Government regulations for public welfare, but merely requires that the end shall be accomplished by methods consistent with due process.[2] The provision demands only that the law shall not be arbitrary, unreasonable or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained.[3] The demands of natural justice should be duly complied with.[4]

A provision of law, in order to fall within the due process clause, must not be too vague and uncertain.[5] (See also NOTES 20 and 26.) But what is vague or indefinite or uncertain cannot be categorically defined so as to make the definition applicable to the requirements of each and every case that may arise. The matter is one for the Court to decide in each case. For instance, when a law was made prohibiting loud, raucous noises being produced in the public street by means of loudspeakers, etc., it was held that the words "loud" and "raucous" have through daily use, acquired the content that conveys to any interested person a sufficiently accurate concept of what is forbidden.[6]

The expression "due process of law" is wide enough to permit the Government to adopt any statutory measure which may be required in public interest and which is reasonable, and the State is entitled to adopt any economic policy it thinks fit in the exercise of its powers under the due process clause.[7] Thus, it may promote free competition by laws aimed against monopolies or curb harmful competition by fixing minimum prices.[8] (See also Part III-General and notes on ART. 21.)

6. "Police Power." — Under the Constitution of the United States of America the provision in the 14th Amendment that no one should be deprived of his life, liberty, or property without due process of law, does not affect what is known as the "Police Power" of the State, the same being saved by the expression "without due process of law".[1] At the time when the Federation of the United States was

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[2] (1934) 291 U S 502 (525) : 78 Law Ed 940 (950), *Nebbia* v. *New York*.

[3] (1934) 291 U S 502 (525) : 78 Law Ed 940 (950), *Nebbia* v. *New York*.

[4] (1923) 28 A L R 610 (615) : 138 N E 155, *People of the State of Illinois* v. *Chicago M. & St. P. R. Co.* (Police Power should not override demands of natural justice.)

[5] (1949) 336 U S 77 (79) : 93 Law Ed 513 (518), *Kovacs* v. *Cooper*.
(1927) 274 U S 357 (371, 372) : 71 Law Ed 1095 (1104), *Whitney* v. *California*. (Statute against "criminal syndicalism"—Defining the expression and making punishable organizing teaching etc., criminal syndicalism held not too vague.)

[6] (1949) 336 U S 77 (80) : 93 Law Ed 513 (519), *Kovacs* v. *Cooper*.

[7] (1934) 291 U S 502 (537) : 78 Law Ed 940 (957), *Nebbia* v. *New York*.

[8] (1934) 291 U S 502 (537) : 78 Law Ed 940 (957), *Nebbia* v. *New York*.

Article 19 — Note 6

[1] (1923) 263 U S 197 (217) : 68 Law Ed 255 (275), *Terrace* v. *Thompson*. (The 14th Amendment does not take away from the States those powers of police that were reserved at the time of the adoption of the Constitution.)
[*See also* (1887) 123 U S 623 (657, 658, 660, 661) : 31 Law Ed 205 (209, 210), *Mugler* v. *Kansas*.]

Article 19
Notes 6–7

constituted and the Constitution was adopted, various powers were conferred upon the United States, that is on the Central Legislature and Government, and the residuary powers were reserved to the member States. The powers conferred upon the Congress of the United States (Central Legislature) did not include the *general* Police Powers which therefore remained reserved for the member States, though the 'United States' as a whole had Police Power in connection with the powers given to it. It is these "Police Powers" of the Federal Government and the various State Governments that are said to be unaffected by the due process provision in the Constitution of the United States of America. These "Police Powers" may be regarded as corresponding to the reasonable restrictions by law on liberty in public interest, which are permissible under this article.[2]

This "Police Power" in the United States of America was originally given a narrow meaning as including only public health, public morals and public safety.[3] But now a broader meaning is given to the phrase so as to include general convenience, welfare and prosperity of the people and so as to extend to all great public needs.[4] Thus, "Police Power" has been defined as that plenary power in the State to *prohibit* all things harmful to the comfort, welfare, and safety of society.[5]

7. This article and Art. 21. — The scope of this article as compared with ART. 21 has already been referred to in NOTES 2 and 4. It has been seen there that this article refers to the rights of citizens in their *free state* and is not concerned with the question of taking away that *basic* freedom itself and putting a citizen in confinement. This latter question is the subject-matter of ARTS. 20, 21 and 22.[1] Thus, this article is not applicable to the question of detention of a person, preventive, punitive or otherwise.[2] In other words, where a person is totally deprived of his personal liberty and detained in confinement, ART. 21, and not this article, will apply.[3] In such a case, the criteria, enumerated in the several clauses of this article for determining whether his right of speech and various other rights mentioned in cl. (1) of the article have been validly restricted, will not apply. Thus, it is conceived, the validity of various provisions of the Penal Code, imposing imprisonment as a punishment, cannot be questioned on the ground of infringement of this article. As already noticed in NOTE 2 of this article, the criteria mentioned in this article will only apply where the legislation hits a citizen's liberties as enumerated in this article, *directly* and not where the restriction on or the deprivation of those liberties results from the application of some other law.[4] Conversely, where a person's personal liberty is not *totally*

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[2] 1952 Orissa 42 (Pr 14) [AIR V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.*

[3] *See* (1896) 169 U S 366 (395) : 42 Law Ed 780 (792), *Holden* v. *Hardy.* (The protection of the health and morals, as well as of the lives of citizens, is within the Police Power of State Legislature.)
(1894) 152 U S 133 (136) : 38 Law Ed 385 (388), *Lawton* v. *Steele.*
(1885) 113 U S 27 (31) : 28 Law Ed 923 (925), *Barbier* v. *Connolly.* (Health, peace, morals, education and good order—Promotion of these is included in Police Power.)]

[4] 1952 Orissa 42 (Pr 14) [AIR V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.*
[*See also* (1949) 336 U S 77 (83) : 93 Law Ed 513, *Kovacs* v. *Cooper.*
(1931) 283 U S 697 (707) : 75 Law Ed 1357 (1363), *Near* v. *Minnesota, Ex. Rel. Olson.* (The limits of the power must always be determined with appropriate regard to the particular subject of its exercise.)]

[5] (1923) 28 A L R 610 (615) : 138 N E 155, *People of the State of Illinois* v. *Chicago M. & St. P. R. Co.*

Article 19 — Note 7

[1] 1950 S C 27 (Prs 102, 225) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1388 (SC), *Gopalan* v. *State of Madras.*
('50) I L R 29 Pat 502 (509, 533, 543) (FB), *L. K. Burman* v. *The State.*

[2] 1951 S C 270 (Prs 5, 6) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.*

1950 S C 27 (Prs 8, 176, 225) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1950 Pat 332 (Pr 9) [AIR V 37 C 88] : ILR 29 Pat 410 : 51 Cri L Jour 1251 (DB). [But see 1950 Cal 274 (Prs 6, 14, 16) [AIR V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government.* (The Bengal Criminal Law Amendment Act, 1930, even if it is an Act providing for preventive detention is void under Art. 13 (1) of the Constitution of India. The detention which may be imposed upon a citizen by the Act amounts to a restriction on the right of free movement guaranteed as one of the Fundamental Rights by Art. 19 (1) (d) of the Constitution and the restriction is neither reasonable nor in the interests of the general public considering the fact that the Act is not an emergency measure—This view must be regarded as overruled by the Supreme Court decision in AIR 1950 S C 27.)]

[3] 1953 S C 10 (16) (Pr 23) [AIR V 40 C 4] : 1953 S C R 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*

1952 Punj 309 (316) (Prs 20, 21) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.* (A citizen of India who is detained in a camp under S. 4, Abducted Persons (Recovery and Restoration) Act (1949), cannot complain that he has been deprived of the rights guaranteed by Art. 19.)

1953 All 613 (616) (Pr 13) [AIR V 40 C 306] : 1953 Cri L Jour 1384 (DB), *Bimla Devi* v. *Chaturvedi.*

[4] 1951 S C 270 (Prs 5, 6) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.* (Order of detention under S. 3 of the Preventive Detention Act, 1950, preventing certain person from making speeches prejudicial to the maintenance of the public order is valid even though it has the result of abridging his right under Art. 19 (1) (a) by such detention—A I R 1950 S C 27, Foll.; AIR 1950 S C 124 and AIR 1950 S C 129, Ref.)

1950 S C 27 (Prs 8, 46, 59, 65, 174, 222) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *Kania C. J., Mukherjea J. and Das J.*—Per *Fazl Ali J. Contra*)—The words "throughout the territory of India" in Art. 19 (1) (d) indicate that free movement from one State to another within the Union is protected so that Parliament may not by a law made under Entry 81 in List I of Sch. VII curtail it beyond the limits prescribed by cl. (5) of Art. 19. It is a protection against provincialism. It has nothing to do with the freedom of the person as such.)

1951 Assam 106 (Pr 93) [AIR V 38 C 54] : I L R (1951) 3 Assam 181 : 52 Cri L Jour 966 (DB), *Israil Khan* v. *The State.* (Person sentenced to imprisonment on conviction of crime cannot complain of the loss of his liberties under subcls. (d) and (e) of cl. (1).)

1951 Orissa 251 (Prs 13, 14) [AIR V 38 C 59] : I L R (1951) Cut 387 : 52 Cri L Jour 679 (DB), *T. V. Narasimhamurty* v. *The State.*

taken away by his being kept in confinement, and only certain restrictions are placed upon the freedom of his movement, &c., as for instance, by means of an externment order, this article will apply and not ART. 21, although the freedom of movement is necessarily an incident and part of that larger freedom which is contemplated by ART. 21, the reason being that there being a special provision contained in this article relating to this specific category of limitation of personal liberty, the special provision will apply and not the general provision in ART. 21.[5] Hence, unless the law under which the externment is ordered satisfies the requirements of cl. (5) of this article, it will not be valid and the provisions of ART. 21 cannot be invoked to uphold such a law.

It will be clear from the above that this article does not contain the entire substantive law on the question of personal liberty and that ART. 21 does not deal merely with procedure and is not merely complementary to this article. Article 21 itself is a substantive provision with a distinct and individual scope.[6]

It has been seen in NOTE 2 that under this article it is the *rights* that are fundamental and not the *restrictions* and that this consideration must be borne in mind in construing the article. Comparing this article with ARTS. 21 and 22, we find that while this article enacts that a citizen shall have the various rights enumerated and proceeds to lay down the extent to which these rights may be curtailed by the State by means of laws, ARTS. 21 and 22 are couched in a negative form and purport to enact restrictions on the power of the *State.*[7]

8. This article and Article 31. — Under this article in sub-cl. (f) of cl. (1), there is a provision guaranteeing the right of a citizen to acquire, hold and dispose of property. Under ART. 31 it is provided that no person shall be deprived of his property save by authority of law and the article goes on to impose certain conditions for the acquisition, or taking possession of any property for public purposes. Thus, while this article broadly guarantees the right of the citizen to acquire, hold and dispose of property, ART. 31 contains a specific provision in regard to certain aspects of that right. Where a case falls within the specific provision, it will not be covered by the general provision, according to the well-known principle of *generalia specialibus non derogant.* Hence, the question of depriving a person entirely of his property, or of acquiring or taking possession of it for public purposes must be treated as falling exclusively within the purview of ART. 31 *et seq.*, and not within this article.[1] It follows that where a person has been deprived of property under ART. 31 or his property has been taken possession of or acquired for a public purpose, the validity of the proceeding can be only tested with reference to ART. 31 and not with reference to this article.[2] In other words, this article

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[5] 1950 S C 27 (111) (Pr 220) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1951 Assam 106 (Pr 68) [AIR V 38 C 54] : I L R (1951) 3 Assam 181 : 52 Cri L Jour 966 (DB), *Israil Khan* v. *The State.* (Assuming that the case of externment under S. 17 of the Assam Opium Prohibition Act (23 of 1947), can be brought within the scope of Art. 21, it would be open to a citizen to claim that the impugned legislation should be examined in the light of tests laid down by cl. (5) of Art. 19.—AIR 1950 Bom 363; AIR 1950 Bom 374; AIR 1950 Pat 322 and AIR 1950 S C 211, Rel. on.)

[6] 1950 S C 27 (Pr 172, 219) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1951 S C 270 (Prs 5, 6) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.*

[7] 1950 S C 27 (Pr 242) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

Article 19 — Note 8

[1] 1951 All 674 (Pr 18) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Govt.*

1952 Madh B 181 (Prs 8, 9) [A I R V 39] (DB), *Shanta Devi* v. *Custodian E. P.* (Administration of Evacuee Property Act (1950), S. 40 — If petitioner has been deprived of his property under S. 40 of the Act, then Art. 19 (1) (f) has no application.)

1952 Raj 74 (Pr 7) [A I R V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732. (DB), *Nathmal* v. *Commr., Civil Supplies.*

1951 Cal 111 (Pr 43) [AIR V 38 C 30B](DB), *W. B. S. K. Co-op. Society* v. *Bella.*

[2] 1951 S C 41 (Pr 74) [A I R V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

1950 S C 27 (35) (Pr 7) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383(SC), *Gopalan* v. *State of Madras.* (Per *Kania, C. J.*—If the legislation is not directly in respect of any of the subjects mentioned in Art. 19 but as a result of the operation of other legislation any rights guaranteed by the sub-clauses in Art. 19 (1) are abridged, the question of the application of Art. 19 does not arise.)

1951 S C 270 (272) (Pr 5) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.*

1953 Assam 84 (Pr 13) [A I R V 40 C 35] (DB), *Mahindra Mohan* v. *State of Assam.* (Eminent Domain—Act of State Legislature in exercise of power of—Act is not subject to Art. 19 (1) (f).)

1953 Cal 548 (Pr 28) [AIR V 40 C 205], *Atulya Kumar* v. *Director of Procurement & Supply.*

(1953) 91 Cal L Jour 347 (353), *Radheraman Das* v. *State of West Bengal.*

1953 Him Pra 95 (Prs 18, 19, 24) [A I R V 40 C 44], *Shiv Dutt* v. *State of Himachal Pradesh.*

1953 Madh B 236 (239) (Pr 8) [A I R V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of M. B.* (Right to acquire, hold and dispose of property is subject to Art. 31.)

1953 Mad 257 (Pr 6) [AIR V 40 C 96], *Fathima Bi* v. *State of Madras.* (Requisition of house does not come under Art. 19 (1) (f).)

1953 Mad 252(256)(Prs 11, 12) [AIR V 40 C 95], *Nataraja* v. *Madras State.* (Do.)

1953 Raj 173 (Pr 15) [A I R V 40 C 61] (DB), *Lal Singh* v. *State of Rajasthan.* (Marwar Land Revenue Act (40 of 1949), S. 231 — State takes possession of surface of land and there is no question of imposing restrictions — Case falls under Art. 31 of the Constitution and not under Art. 19 (5).)

1952 Assam 159 (165) (Pr 11) [AIR V 39] : ILR (1952) 4 Assam 275 (DB), *Union of India* v. *Mohim Chandra.* (Right to enforce the decree by execution which was allowed to the decree-holder by Art. 4, cl. (3) of the Indian Independence (Legal Proceedings) Order, 1947, has been taken away by the Indian Independence Pakistan Courts (Pending Proceedings) Act (1952) in question and if the right is property, it could be taken away by authority of law, but not otherwise, as provided by Cl. (1) of Art. 31.)

1952 Cal 912 (914) (Pr 8) [AIR V 39], *Tulsidas* v. *State of West Bengal.* (West Bengal Land Development and Planning Act (21 of 1948)—Validity of — Legislation relating to compulsory acquisition—Art. 19 (5) does not apply — Reasonableness of legislation not justiciable.)

1952 Cal 874 (876) (Pr 11) [AIR V 39], *Nurul Haqu* v. *West Bengal State.* (Do.)

**Article 19
Notes 8-9**

does not deal with the power of "Eminent Domain" which forms the subject-matter of ART. 31, but with the "Police Power" of the State to regulate the manner in which rights should be exercised by citizens.[2a] But where there is no total deprivation of property or the acquisition or taking possession of it, ART. 31 does not apply and the validity of restrictions imposed on a person's rights in regard to his property will fall to be considered with reference to this article.[3]

9. Rights which are not fundamental.—As seen in NOTE 2, every right or every attribute of personal liberty does not constitute a fundamental right, beyond the power of the Legislature to affect, although it may be a legal right. Thus, the right to strike is not

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1952 Cal 870 (874) (Pr 17) [AIR V 39], *Naba Kumar* v. *West Bengal State.*

1952 Cal 789 (796) (Prs 46, 48) [A I R V 39] : 1952 Cri L Jour 1651, *Shew Pujan Indrasan Ltd.* v. *Collector of Customs.* (Provision for confiscation under Sea Customs Act falls under Art. 31 (1).)

1952 Cal 679 (682) (Pr 5) [AIR V 39], *Aswini Kumar* v. *State of West Bengal.* (West Bengal Land Development and Planning Act (21 of 1948)—Validity.)

1952 Cal 65 (Prs 19, 21, 24) [AIR V 39 C 21] (DB), *Sudhindra Nath* v. *Sailendra Nath.*

1952 Madh B 181 (Prs 8, 9) [A I R V 39] (DB), *Shanta Devi* v. *Custodian E. P.* (If the petitioner has been deprived of his property under Section 40 of the Administration of Evacuee Property Act, 1950, then Article 19 (1) (f) has no application to his case. The applicant must then show that quite apart from Art. 19 (1) (f), the Act in question is otherwise invalid : A I R 1950 S C 27 ; AIR 1951 S C 41, Foll.; AIR 1951 Bom 440, Rel. on.)

1952 Mad 756 (Pr 4) [AIR V 39] : ILR (1952) Mad 982 (DB), *Thambiran Padayachi* v. *State of Madras.*

1951 Bom 440 (Pr 11) [A I R V 38 C 100] : I L R (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.*

1951 Bom 86 (Pr 5) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.*

1951 Cal 97 (Pr 16) [A I R V 38 C 28], *Md. Safi* v. *State of West Bengal.* (Article 19 does not apply if the right is hit not directly but as a result of an act which is valid under some other article.)

1951 Mad 979(Pr 16) [AIR V 38 C 339](DB), *Narasaraopeta Electric Corporation* v. *State of Madras.*

[*See* 1953 Nag 40 (49) (Pr 41) [A I R V 40 C 22] : I L R (1952) Nag 736 (DB), *Bhaskar* v. *Mohd. Alimulla Khan.* (Mere fact that by reason of restrictions, a landlord is precluded from exercising certain rights in regard to his property will not attract Art. 31 (2) of the Constitution.)]

[**But see** 1952 All 836 (838) (Pr 4) [A I R V 39] : I L R (1953) 1 All 216 (DB), *Prabhabati Devi* v. *Dist. Magistrate.* (Assumed that Art. 19 (1) (f) applies to requisitioning of house—Submitted not correct.)]

[2a] 1953 Hyd 157 (159) (Pr 8) [AIR V 40 C 68]:I L R (1953) Hyd 147 (DB), *Md. Habibuddin* v. *Govt. of Hyderabad.*

[3] 1953 Him Pra 95(Prs 18, 19, 24) [AIR V 40 C 44], *Shiv Dutt* v. *State of Him. Pra.* (Government merely remaining in possession without paying rent—Owner still appearing as such in the Government records—No proceedings by State for acquisition or requisition—Mere fact that land was required for public purpose is no ground for taking it without paying compensation, and without appropriate steps—Owner's right under Art. 19 (1) (f) is infringed.)

1953 Madh B 236 (239) (Prs 8, 9, 10) [A I R V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of M. B.*

a Fundamental Right.[1] The freedom of contract is not a Fundamental Right under our Constitution, although it is one under the Constitution of the United States of America.[2] The right of franchise is not a Fundamental Right.[3] Similarly, the right to stand as a candidate for election to the Legislature is not a Fundamental Right.[4] Such rights can be taken away or abridged by an ordinary law and if they are so taken away or abridged, the law cannot be questioned as being unconstitutional, although so long as such a law has not been passed, the right cannot be attacked by *executive* action. It must be noted in this connection that even the rights under ARTS. 21 and 31 are not paramount to ordinary State-made laws, and still they are clearly regarded as *Fundamental* Rights. (See also NOTE 2. See notes on ARTS. 21 and 31. See also Part III-General.)

10. Conflicting rights. — It is a principle recognised in the United States of America that a State may, when exercising its "Police Power," consider the relation of rights, and accommodate their co-existence, and, in the interests of the community, limit one right that others may be enjoyed.[1] A similar principle will also apply with reference to the Fundamental Rights under this article.[2] (See NOTE 42.)

Article 19 — Note 9

[1] 1951 Bom 105 (Pr 23) [AIR V 38 C 22] : ILR (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay*.

[2] 1952 S C 64 (71) (Pr 18) [AIR V 39 C 16]: 1952 S C R 218 (S C), *N. P. Ponnuswami* v. *Returning Officer, Namakkal*. (Right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law, and must be subject to the limitations imposed by it.)
See also cases cited under Note 91 F N (1).

[3] 1952 S C 64 (71) (Pr 18) [AIR V 39 C 16]: 1952 S C R 218 (S C), *N. P. Ponnuswami* v. *Returning Officer, Namakkal*.
1952 Cal 901 (Pr 27) [AIR V 39], *Bidhu Bhusan* v. *State of West Bengal*.
[*See also* (1875) 23 Law Ed 588 (592) : 92 U S 542, *United States* v. *Cruikshank*. (Right of suffrage is not a necessary attribute of national citizenship in U. S. A.)]
[Compare (1949) 1949 Bur L R (S C) 170 (183), *Bo Thein Swe* v. *The Union of Burma*. (Burma Constitution—Right to franchise is Fundamental Right though not expressly included.)]

[4] 1952 S C 64 (71) (Pr 18) [AIR V 39 C 16] : 1952 S C R 218 (S C), *N. P. Ponnuswami* v. *Returning Officer, Namakkal*. (The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.)
1952 Trav-Co 1 (4) (Pr 12) [AIR V 39 C 1] : ILR (1951) T C 808 (DB), *In re Dr. John Matthai*.
1951 Pepsu 141 (147) (Pr 14) [AIR V 38 C 55] (DB), *Kartar Singh* v. *State of Patiala & E. P.*
[*See* 1952 Cal 901 (Pr 26) [AIR V 39], *Bidhu Bhusan* v. *State of West Bengal*.]

Article 19 — Note 10

[1] (1920) 254 U S 300 (315) : 65 Law Ed 276 (283), *Walls* v. *Midland Carbon Co.*

[2] 1952 Mad 95 (Prs 5, 6, 8, 10) [AIR V 39 C 47] : ILR (1952) Mad 553, *In re Vengan*. (E.g., picketing of North Indian Shops in Madras — Here there is a conflict between the freedom of speech of the picketers and the freedom of the merchants under cls. (d), (e) and (g). Hence law which prohibits such picketing is valid.)
1951 Bom 459 (Prs 9, 11, 12) [AIR V 38 C 101]: 1952 Cri L Jour 37 (DB), *Damodar Ganesh* v. *State*. (Just as a person has a right of freedom of movement and

Article 19
Notes 11–12

11. Contracting out of Fundamental Rights. — Where a person's legal status and responsibility as also his obligations arise out of a contract entered into between him and the Government, it is futile for him to avoid the restrictions imposed upon him under the clauses and rules of his contract by saying that they offend the Constitution of India, which recognises Fundamental Rights in favour of citizens. Such restrictions, far from being infringements of any Fundamental Right, are a fundamental obligation arising out of a formal contract entered into by a person with the Government.[1]

12. Infringement of right by private individuals. — The article does not contain any guarantee against infringement of rights by *private* individuals. The article was intended to protect the fundamental freedoms assured to the citizen by cl. (1) against *State* action other than the legitimate exercise of its powers to regulate private rights in the public interests.[1] Thus, the violation of rights of property by individuals is not within the purview of sub-cl. (f) of cl. (1) of this article or of ART. 31. These provisions are great constitutional safeguards against State aggression on private property and are not directed against the infringement by private individuals for which remedies should be sought under the ordinary law.[2] Thus, the remedy under ART. 32 was held not to be applicable to an alleged infringement by the Central Bank of India, of the applicant's right of acquiring, holding and disposing of property under cl. (1) (f).[3]

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freedom of speech in exercise of which he wants to carry on a peaceful picketing at the gate of a mill, the employees who wish to go to the mill and pursue their occupations have also the right to move freely and to carry on their occupation, trade or business. Section 7 (1) of the Criminal Law Amendment Act restricts the right of freedom of movement of the person who wants to carry on the peaceful picketing. But taking into consideration the conflict between the rights indicated above, such a restriction can be said to have been imposed in the interest of the general public. Hence, S. 7 is not void: A I R 1950 S C 27; A I R 1951 S C 118; AIR 1951 All 257 (FB), *Ref*; (1939) 310 U S R 1093 and 1104, *Disting.*)

1951 Pepsu 59 (Pr 5) [AIR V 38 C 22] : 2 Pepsu L R 506 : 52 Cri L Jour 403, *Jang Bahadur Sant Lal* v. *Principal, Mohindra College.* (Apart from the qualifications enumerated in cls. (2) to (6) of the article, the rights are also subject to the qualification that the exercise of these rights by a citizen should not infringe the rights of others—Abusive handbill by student of College attacking College authorities—Rustication of student was justified.)

Article 19 — Note 11

[1] 1952 Trav-Co 287 (Pr 8) [AIR V 39] (DB), *Krishnan* v. *State of Trav-Co.* (It is not the object of the Constitution of India to enable the citizens of India to break obligations arising under formal contracts entered into by them under the guise of that obligation being something that is repugnant to the recognition of a Fundamental Right. Such an idea is foreign to the Constitution of India.)

Article 19 — Note 12

[1] 1952 S C 59 (Pr 3) [AIR V 39 C 14]: 1952 S C R 391 (S C), *P. D. Shamdasani* v. *Central Bank of India.*

[2] 1952 S C 59 (Pr 7) [AIR V 39 C 14] : 1952 S C R 391 (S C), *P. D. Shamdasani* v. *Central Bank of India.*

1952 Him Pra & B 41 (Pr 5) [AIR V 39], *Sihnu* v. *Lachman Dass.*

[3] 1952 S C 59(Prs 5, 7) [AIR V 39 C 14] : 1952 S C R 391 (S C), *P. D. Shamdasani* v. *Central Bank of India.*

13. Construction of laws restricting Fundamental Rights. — In *Tan Bug Taim* v. *Collector of Bombay*,[1] Bhagwati, J., of the Bombay High Court, observed as follows in regard to the construction of the Government of India Act, 1935 :

> "I am of opinion that the canon of construction which warrants a large and liberal construction to be put upon the various provisions of the Government of India Act, should be modified by the canon of construction which lays down that a strict construction should be put upon those provisions which go to curtail the liberties of the subject or impose burdens and obligations upon him. If this principle of interpretation be adopted, it is abundantly clear that the items in the lists of SCH. VII, Government of India Act, should not be so construed as to deprive the subject of his liberties or to impose burdens or obligations upon him beyond those which are warranted by the words used therein, in spite of the items contained in those lists being read as extending to all ancillary or subsidiary matters which can clearly and reasonably be said to be comprehended in the same."

The above principles will equally hold good in the case of laws which are impeached as violating Fundamental Rights guaranteed by our Constitution. (See also notes on Preamble and Part III-General.)

(a) Statutory Rules and bye-laws

The bye-laws of municipalities and other local authorities must receive a benevolent interpretation in favour of their validity.[2] In *Kruse* v. *Johnson*,[3] Lord Russel of Killowen, C. J., observed as follows :

> "When the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think Courts of Justice ought to be slow to condemn as invalid any bye-law, so made under such conditions, on the ground of supposed unreasonableness."

In *Hathras Municipality* v. *Narain Dutt*,[4] the question was

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Article 19 — Note 13

[1] 1946 Bom 216 (234) [AIR V 33 C 59] : ILR (1946) Bom 517: 47 Cri L Jour 594.

[2] 1952 All 753 (757) (Pr 12) [AIR V 39] (FB), *Buddhu* v. *Allahabad Municipality*. (AIR 1948 All 1, Foll.)

[3] (1898) 2 Q B 91 (99) : 67 L J Q B 782.

[4] 1948 All 1 (6) (Pr 16) [AIR V 35 C 1] : ILR (1947) All 355 (DB).

whether certain bye-laws made by the municipality for the regulation and control of flour mills were valid or not. It was held :

> "Courts of justice are slow to condemn municipal bye-laws, as invalid, on the supposed ground of unreasonableness, and support them, if possible, by a benevolent interpretation crediting those who have to administer them with an intention to do so in a reasonable manner and with being the best judges whether a particular bye-law is required in that district or not.".

There is a distinction between the power of the Court to consider the validity of statutory rules and the Court's power in regard to bye-laws. Statutory rules cannot be challenged on the ground of *unreasonableness* as they are on the same footing as the statute. But as regards bye-laws, the position is different. Bye-laws are usually framed by corporations under their inherent powers in order to carry out the purposes of the corporation or they are framed by public authorities set up by Parliament and as it is left to the corporations or public authorities to frame these bye-laws and carry out their purposes, the Courts have retained a certain amount of control over the bye-laws by considering their reasonableness.[5] But since the advent of the Constitution, Courts have power under this article to consider the reasonableness or otherwise of statutory provisions restricting the Fundamental Rights guaranteed by this article. See NOTE 20.

14. Principles for determining if an Act is ultra vires.—These principles have already been considered in the notes on ART. 13. For further discussion, see notes on ART. 245. While a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it may not be conclusive on a question of *vires* where the Legislature concerned has powers to legislate on certain specified matters only. The Court must still see in such cases whether the subject-matter of the impugned legislation is really within those powers.[1] (See also notes on Preamble and Part III-General.)

15. Citizens.—This article only applies to the rights of *citizens*, unlike some other articles, as for instance ARTS. 20, 21 and 22, which apply to any *person*. As to who is a citizen of India, reference should be made to ARTS. 5 to 11 and the notes thereunder. As seen in those notes, a corporation is not a citizen for the purpose of this Constitution and therefore cannot claim the rights mentioned in this article, for instance, the right to acquire, hold and dispose of property or to carry on a trade or business, *as Fundamental Rights*, although such rights might belong to a corporation as ordinary non-fundamental rights.[1] A person who has migrated to Pakistan after 1-3-1947 is not entitled to Indian citizenship, unless he has come back to India after complying with the provisions of ARTS. 6 and 7,[2] and such a person cannot claim rights under this article. But an Indian citizen, who, in spite of his migration to Pakistan after 1-3-47, has, by virtue of the provisions of ARTS. 6 and 7, continued to be an Indian citizen or regained his Indian citizenship, will be entitled to the rights under this article in spite of his having migrated to Pakistan once. Thus, in the case of such a citizen, a provision for his deportation from India will be unconstitutional.[3] And similar restrictions on his movements within the limits of India will be unconstitutional under sub-cl. (d).[4] A citizen of India although coming within the definition of an "evacuee" is entitled to the full rights of citizenship under this article.[5] But the

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[5] 1952 Bom 296 (Pr 2) [AIR V 39] : ILR (1952) Bom 766 (DB), *Mulchand* v. *Mukund*.

Article 19 — Note 14

[1] 1950 F C 67 (Pr 8) [AIR V 37 C 6] : 1949 F C R 657: 51 Cri L Jour 1011 (FC), *Rex* v. *Basudeva*.

Article 19 — Note 15

1. 1952 Punj 9 (Prs 54, 55, 104) [AIR V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.* (The companies against whom notice under S. 52A of the Insurance Act has been served cannot raise the question that the impugned legislation takes away or abridges the rights conferred by Art. 19 (1) (f) and (g).)

1951 Mad 979 (Pr 16) [AIR V 38 C 339] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras.* (Article 19 (1) (f) applies only to "citizens" and a company incorporated under the Companies Act does not satisfy the requirements of the definition of citizen in Art. 5—C. M. P. No. 4652 of 1951, Rel. on.)

[*See also* 1951 Mad 974 (Pr 8) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.* (It was doubted if a company is a citizen.)]

[But see 1953 Him Pra 8 (10) (Pr 12) [AIR V 40 C 5], *C. V. Transport Ltd.* v *State of H. P.* (Incorporated company held entitled to Fundamental Right under cl. (1) (g) of this article—Submitted decision is not correct.)]

2. 1951 Kutch 38 (Pr 3) [AIR V 38 C 25] : 52 Cri L Jour 585, *Mandhara Jakab* v. *Kutch Govt.* (Migration within the meaning of Art. 7 has no reference to *domicile.* It merely means departure from India to Pakistan for the purpose of residence, employment or labour. Where therefore a person went to Pakistan for a living he has migrated into Pakistan and cannot question the validity of the Influx from West Pakistan (Control) Act as being inconsistent with his Fundamental Right under Art. 19 (1) (d) and therefore void under Art. 13.)

1951 Mad 930 (Pr 12) [AIR V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.*

1951 Nag 38 (Pr 23) [AIR V 38 C 12] : I L R (1951) Nag 523 (DB), *Mohammad Ibrahim* v. *High Commr. for India in Pak.* (Where the permit for permanent return to India granted to a person is cancelled before Art. 19 came into force, the person becomes subject to Art. 7 and is disentitled from claiming Fundamental Rights.)

3. 1952 All 257 (Prs 34a, 35, 35a, 77, 85) [AIR V 39 C 90 (8)] : 1952 Cri L Jour 553 : ILR (1952) 1 All 513 (DB), *Shabbir Husain* v. *U. P. State.*

4. 1952 All 257 (Pr 77) [AIR V 39 C 90 (8)] : I L R (1952) 1 All 513 : 1952 Cri L Jour 553 (DB), *Shabbir Husain* v. *U. P. State.* (Rule 19 of the Permit System Rules, 1949, and S. 7 of the Influx from Pakistan (Control) Act (1949) and the order of the Central Government issued thereunder, in so far as they are applicable to the citizens of India and are inconsistent with the Fundamental Rights guaranteed to them under Art. 19 (1) (d) and (e) of the Constitution have after the commencement of the Constitution become void in view of the provisions contained in Art. 13 (1) of the Constitution.)

5. *See* 1951 Pat 434 (Pr 4) [AIR V 38 C 112] : I L R 30 Pat 21 (DB), *Sayeedah Khatoon* v. *State of Bihar.* (A woman born in India and married to a citizen in India taking up temporary residence in Pakistan for medical treatment does

permit system for entering India from Pakistan was held to be a reasonable restriction even with regard to citizens and therefore was not *ultra vires*.[6]

In the United States, the freedom of speech and press is given also to *aliens* residing in the country.[7] It may be noted in this connection that the relevant provisions of the Constitution of the United States of America do not make use of the term "citizen".

16. **"Right."** — This article says that all citizens shall have the *right* to do the various things mentioned in cl. (1). The article does not say that the right implies a *duty* to do the various things mentioned. So a person cannot be compelled by law to *continue* to carry on a business, if he does not wish to do so, although the right to carry on a business is guaranteed to him as a Fundamental Right under sub-cl. (g). Thus, if a mill or factory closes down its business either permanently or temporarily, it cannot be ordered to continue the business by any authority under the Industrial Disputes legislation and if the Industrial Disputes Act contains a provision authorising the Industrial Court to make such an order, that would be *prima facie ultra vires* under this article.[1] But if a lock-out is declared, the Industrial Court would be within its rights if it ordered the lock-out to be terminated,[2] because declaring a lock-out and closing a business even temporarily are two different things. The one pertains to the *mode* of carrying on the business; the other concerns the question of carrying on the business itself and is outside the purview of legislative interference.

But requiring a barber or dhobi not to refuse his services to any person on the ground of his low caste does not amount to compelling him to *carry on* his business and a law under which such a require-

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neither fall under the definition of "evacuee" contained in Section 2 (c) (i), Bihar Administration of Evacuee Property Ordinance, 1949, nor under cl. (ii). Even if that person comes within the definition of "evacuee" in the Ordinance, nevertheless, she is also a citizen of India and as such is entitled to remain in India. If, while in Pakistan, her conduct was such as to create suspicions as to her loyalty to the Indian Union, she may, on her return to India, be subjected to such restrictions on her movements as Parliament may consider advisable and not be deported.)

[6] 1951 Nag 38 (Pr 23) [AIR V 38 C 12] : ILR (1951) Nag 523 (DB), *Mohammad Ibrahim* v. *High Commr. for India in Pakistan.*
[*See also* 1950 Cal 274 (Pr 6) [AIR V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government.* (Clause 1 (d) guarantees only freedom of movement "throughout the territory of India" which means that there is no guarantee of the right of entering India from outside.)]

[7] (1945) 326 U S 135 (148) : 89 Law Ed 2103 (2112), *Bridges* v. *Wixon.*

Article 19 — Note 16

[1] 1953 Mad 98 (101, 102) (Prs 12, 13) [AIR V 40 C 33] (DB), *Indian Metal and Metallurgical Corporation* v. *Industrial Tribunal, Madras.* (*Wolff Packing Company Case* : (1923) 262 U S 522 : 67 Law Ed 1103, Foll. The industry concerned was a business which was not a public utility service and which had not received any special consideration from the Government.)

[2] 1953 Mad 98 (102) (Pr 15) [AIR V 40 C 33] (DB), *India Metal and Metallurgical Corporation* v. *Industrial Tribunal, Madras.*

ment can be imposed will be a valid law. At any rate, such a requirement will be treated as covered by the provision as to reasonable restriction in public interest[3] and will be upheld by the Courts. It will be noted also that in such a case the barber or dhobi, etc., is not being deprived of his freedom to carry on his profession at all.

In *Ananthakrishnan* v. *The State of Madras*,[4] the question arose as to whether the stamp duty prescribed for enrolment of an advocate by the Stamp Act amounts to an abridgment of the Fundamental Right of a citizen to practise any profession under cl. (1) (g) of this article. In holding that there was no deprivation or abridgment of a Fundamental Right by virtue of the imposition of the stamp duty, it was observed by Rajamannar, C. J., that

> "the right to plead and act on behalf of suitors in a Court is not a right flowing from citizenship..... It is not only a citizen who is entitled to be enrolled as an advocate .... Even a foreigner, if he fulfils the prescribed qualifications and requirements, can be enrolled as such. The exclusive right to represent suitors in Court which an advocate possesses is really in the nature of a *privilege*, though the fact that it is a privilege does not imply that on the conferment of the privilege there can be discrimination. Article 14 is a sufficient safeguard against any unequal treatment. The charge of a fee by way of levy of stamp duty for such privilege cannot be invalid as unconstitutional."

His Lordship also observed :

> "Besides acting and pleading in Courts there are many ways in which a lawyer can pursue his profession and he is free to so practise his profession. If any one wants the additional privilege of being entitled as of right to act and plead in the High Court, he has got to be enrolled in the rolls of that Court."

Thus, a distinction should be made between what is a matter of *right* and what is merely a matter of *privilege* and it is only in the former case that this article is applicable.

But it is submitted with respect that it is doubtful whether the right to plead and act on behalf of suitors in Court can be treated as not being a professional *right* but only a privilege. It is also not clear how a person who has not been enrolled as an advocate or a member of any other recognised class of legal practitioners can be regarded as entitled to practise the legal *profession* at all. Hence, the significance of his Lordship's observation that "besides acting and pleading in Courts there are many ways in which a lawyer can pursue his profession" is far from clear in the context. But the imposition of stamp duty on the enrolment of an advocate can be held valid as being an exercise of the *taxing power* of the State. The decision of the Madras

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[3] 1951 Cal 167 (Prs 9, 10) [AIR V 38 C 30R] : 52 Cri L Jour 1399 (DB), *Banamali Das* v. *Pakhu Bhandari*.

[4] 1952 Mad 395 (403) [AIR V 39 C 105 (35)] : ILR (1952) Mad 933 (DB).

High Court in the above case upholding the validity of the stamp duty was also based on this ground.[5] (See also NOTE 85.)

17. Who can raise question of unconstitutionality. — This question has already been discussed under ARTS. 13, 14 and 15. No one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law. Thus, where the right of a company to hold property is affected, the company and the shareholders being in the eye of the law distinct entities, it would be for the company to come forward to assert its rights and the shareholders as such will have no right to do so.[1] But it has been seen in notes on ART. 15 that, although a person may not be directly hit by a law and, therefore, may not be entitled to *enforce* a Fundamental Right, it will be open to him to plead the unconstitutionality of a law, if he is being sought to be penalised under that law. Thus, he could say that although a law is not discriminatory as against him personally, still it is void as being based upon an unwarranted discrimination under ARTS. 14 to 16, and that, therefore, proceedings against him under that law are void.

A person who does not challenge the validity of an Act cannot question the validity of an order passed under and covered by that Act.[2]

18. Retrospective effect. — As seen in the notes on ART. 13, where anything has been done already before the coming into force of the Constitution under the law then in force, such thing is not nullified merely because the law under which it was done ceases to be valid after the coming into force of the Constitution as being inconsistent with the provisions of Part III of the Constitution. This principle is also applicable to cases falling under this article.[1]

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[5] The judgment of Rajamannar C. J., also regards the matter as covered by clause (6).
[*See also* 1952 Mad 764 (765) (Prs 3, 4) [AIR V 39] : ILR (1953) Mad 217 (DB), *Varadachari* v. *State of Madras*. (Distinction between tax and licence-fee explained—Tax need not be reasonable.)]
See also the distinction between Taxation, Police Power and Eminent Domain, explained in Constitutional Law of the U. S. by Prof. Willis, 1936, pp. 716-717.

Article 19 — Note 17

[1] 1951 S C 41 (Prs 7, 43) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*. (Per *Fazl Ali, Das and Mukherjea JJ.* — It is an elementary principle that in order to justify the granting of this extra ordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because some one else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial interference : Per *Hughes J.* in *McCabe* v. *Atchison*, (1914) 235 U S 151 : 59 Law Ed 169 (174), Foll.—*Note.*—As seen in Note 15, a company is not a 'citizen' though this does not mean that it cannot have a *legal* right as distinguished from a fundamental right. Hence even the company will not be entitled to agitate it as a *Fundamental* Right but only as an *ordinary* legal right.)

[2] 1951 Bhopal 5 (Prs 15, 19, 20) [AIR V 38 C 3] : 1952 Cri L Jour 57 *Jagannath Nathmal* v. *State of Bhopal*.

Retrospective effect given by express provision to legislation restrictive of Fundamental Rights will be valid if such provision is reasonable and in public interest.[1a]

Clause (2) of this article was amended by S. 3 (1) (a) of the Constitution (First Amendment) Act, 1951. Section 3 (1)(a) of the above Act expressly provides that cl. (2) as amended shall be deemed to have always been in the amended form. In view of this, it must be held that the amended cl. (2) is expressly given retrospective effect. The observations of Harries C. J. in *Dr. Suresh Chandra* v. *Punit Goala*[2] that the amendment of cl. (2) cannot be retrospective in its effect and cannot affect pending proceedings seem obviously to be due to an oversight. Besides, the observations were *obiter.*

Retrospective taxation is not necessarily bad. Thus, the imposition of additional duty on goods on which duty has already been paid is not *ultra vires.*[3]

19. Onus. — As seen in the notes on the Preamble, the onus of proving the unconstitutionality of an Act is on the person who

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Article 19 — Note 18

[1] 1952 S C 339 (342) (Pr 14) [AIR V 39] : 1952 S C R 744 : I L R (1953) Mys 142 (SC), *D. K. Nabhirajiah* v. *State of Mysore.*

1951 Pat 75 (Prs 29, 30) [AIR V 38 C 10] : 52 Cri L Jour 799 (SB), *Chanderdeo Sharma* v. *State of Bihar.* (Where the order under S. 19, Press (Emergency Powers) Act, was notified in the Bihar Gazette before the Constitution of India came into force, the validity of the order cannot be called into question with reference to a higher right granted to a citizen of the Indian Union by the Constitution : AIR 1951 S C 128, *Foll.*)

1951 Raj 113 (Pr 16) [AIR V 38 C 46] : 52 Cri L Jour 600 (SB), *Premi Khem Raj* v. *Chief Secy., Jaipur Govt.* (When the order of proscription under S. 99A, Criminal P. C., was made long before the Constitution came into force it cannot be interfered with by virtue of Art. 19 of the Constitution.)

1952 Raj 79 (Pr 10) [A I R V 39] : I L R (1951) 1 Raj 692, *Firm Udaraj* v. *Commr. Civil Supplies.* (Order freezing stock of applicant passed in March 1949 under Marwar Foodgrains Release Order (1946)—But order to sell freezed stock at certain rate per maund to certain person passed on 3-1-1951 — Order for sale of the grain must be deemed to be an order under Clause 25 of the Rajasthan Foodgrains Control Order, 1949 — Articles 14 and 19 (1) (f) of the Constitution held had no application, for the freezing took place before the Constitution came into force — But that part of Cl. 25 of the Rajasthan Foodgrains Control Order, 1949, which provided that freezed stocks shall be liable to be requisitioned or disposed of under orders of the appropriate authority at the rate fixed for purposes of Government procurement was void in view of Art. 19 (1) (g) of the Constitution — Further, this part of Cl. 25 was also void under Art. 31 (2) of the Constitution; AIR 1952 Raj 74, *Foll.*)

[1a] 1952 Cal 273 (Prs 29, 31) [A I R V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.* (W. B. Premises Rent Control (Temporary Provisions) Act, 17 of 1950 (as amended by Amendment Act 62 of 1950), S. 18 (1)—Reasonable to give provisions of S. 18 (1) retrospective effect by amending Act—Provisions restricting rights of landlord to eject tenants are not therefore *ultra vires.*)

[2] 1951 Cal 176 (Pr 25) [AIR V 38 C 30 (T)] : 52 Cri L Jour 1422 (DB).

[3] 1952 Nag 139 (Prs 29, 31) [AIR V 39] : ILR (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

questions the validity of the Act[1] but, as already seen in NOTE 2, it is the rights under this article that are fundamental and the power of the State to impose restrictions by means of laws on those rights is not fundamental and this consideration must be borne in mind in determining the constitutionality of any law which is impeached as violating the provisions of this article. Hence, when, it is shown that *prima facie* one of the Fundamental Rights under this article is violated by a law, it is for the State to show how the provisions of the law are reasonable and otherwise satisfy the conditions which would make it valid under cls. (2) to (6).[2]

(a) Introductory

20. Restrictions on the Fundamental Rights under this article — General. — As seen in NOTE 2, none of the Fundamental Rights guaranteed by this article is absolute. Each of them is liable to be restricted by legal provisions under cls. (2) to (6) of this article. The scheme of the article is that in cl. (1), sub-cls. (a) to (g), the various personal freedoms guaranteed under this article are enumerated and then the restrictions that can be imposed upon them by the State are dealt with in cls. (2) to (6). Clause (2) relates to sub-cl. (a), cl. (3) to sub-cl. (b), cl. (4) to sub-cl. (c), cl. (5) to sub-cls. (d), (e) and (f) and cl. (6) to sub-cl. (g). When considering the question of any particular kind of freedom mentioned in this article the relevant sub-clause of cl. (1) has to be taken along with the corresponding clause among the cls. (2) to (6).

It will be seen that there is one fundamental common feature of all these cls. (2) to (6) and that is, the restrictions are to be imposed by *law*. No restriction by mere executive action is contemplated. Any restriction by executive action alone without a law to back it will therefore be *ultra vires*.

The next point to be noted about these restrictions is that all the clauses require them to be *reasonable* restrictions. Hence, the question of what is a reasonable restriction upon a particular kind of personal freedom guaranteed under this article assumes the highest importance under this article.

The reasonable restriction contemplated by each clause has to be for a particular purpose or purposes mentioned in the respective sub-clauses. So there is always a double test : (i) the reasonableness of the restriction, and (ii) the restriction being for a particular purpose mentioned in the clause permitting the restriction.[1]

Article 19 — Note 19

1. 1951 Cal 85 (88) (Pr 34) [AIR V 38 C 25] (DB), *Subhodh Gopal* v. *Behari Lal*.
2. 1950 Pat 322 (Pr 8) [A I R V 37 C 87] : I L R 29 Pat 461 : 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar*.

Article 19 — Note 20

1. 1952 Pat 376 (Prs 5, 6) [AIR V 39] : 1952 Cri L Jour 1361 (DB), *Bodi Alam* v. *State of Bihar*.

1952 Pat 166 (Pr 22) [AIR V 39 C 55 (12)] : ILR 30 Pat 1085 (DB), *Bankey Singh* *Jhingan Singh*.

[*See* 1952 Cal 679 (682) (Pr 5) [A I R V 39], *Aswini Kumar* v. *State of West Bengal*. (The observations in this case seem to suggest that if the legislation

Thus, in cl. (2), the reasonable restriction must be in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality or must be in relation to contempt of Court, defamation or incitement to an offence. In clause (3) the reasonable restriction has to be in the interests of public order. Under cl. (4), the reasonable restriction has to be in the interests of public order or morality. Under cl. (5), the reasonable restriction has to be in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Under cl. (6), the reasonable restriction has to be in the interests of the general public.

The above will show that the phrases "public order" and "interests of the general public" occur more than once in the course of cls. (2) to (6) of this article. The phrase "public order" occurs in cls. (2), (3) and (4). The phrase "in the interests of the general public" occurs in cls. (5) and (6). It will be seen that the phrase "interests of the general public" is a much wider phrase than "public order" and is capable of including public order even though 'public order' may not be specifically mentioned, while "public order" is not wide enough to include everything that can be conveyed by the expression "in the interests of the general public". For instance, under cl. (2), a restriction imposed on the freedom of speech merely in the interests of general public will not be valid unless the restriction is required in the interests of public order or for any other purpose specified in that clause. But restrictions on the right of free movement or on the right of practising a profession or carrying on a trade may be imposed for the general purposes of public interests and will be valid though they are not required for public order. In each case the relevant clause of the article in relation to the particular personal freedom that is in question has to be seen and the purpose for which alone restrictions can be imposed under that clause has to be ascertained and it must be determined whether the restriction imposed by the State by means of a law is reasonable for achieving that particular purpose.

Restriction, meaning of—See Note 24.

There is an exception to the rule that the restrictions have to be *reasonable* under this article and that exception is contained in cl. (6). The exception is with regard to professional or technical qualifications for practising a profession or carrying on a trade and in regard to the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service. In such cases under cl. (6), sub-cls. (i) and (ii), the State may impose any restriction by means of law and it is expressly provided that nothing in sub-cl. (g) of cl. (1) shall affect the power of the State in regard to this.

Clauses (2) to (6) save not only the power of the State to make laws imposing reasonable restrictions on the fundamental freedoms conferred by this article but also save the validity of all existing laws to the extent to which they may impose reasonable restrictions upon

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is in the interest of the general public, the question of its validity is concluded under cl. (5). This is not correct as the legislation has also to be *reasonable*.)]

the respective fundamental freedoms for the purposes mentioned in the several clauses. Under ART. 13 not only laws which are made after the coming into force of the Constitution but also laws which were made previously but are continued by the Constitution will be void if they are repugnant to the Fundamental Rights guaranteed by the Constitution. Hence the importance of the provisions in these clauses which save the validity of the previous laws also to the extent mentioned.

It must be remembered that the power of the Court to inquire into the validity of laws imposing restrictions on the Fundamental Rights under this article does not apply to laws which relate to the total deprivation of liberty or property. Thus, for instance, "sedition" *per se* is no ground for restriction of freedom of speech under cl. (2).[2] But this only means that "sedition" as such cannot be made a basis for *directly restricting* the freedom of speech of a citizen. It does not mean that the provision in the Penal Code (S. 124-A), which imposes the punishment of *imprisonment* for sedition is void. (See Notes 7 and 8.)

"Existing law" meaning of

The phrase "existing law" has been defined in ART. 366 (10) as *meaning* any law, ordinance, order, bye-law, rule, regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such law, ordinance, order, bye-law, rule or regulation. The definitions in ART. 366 are expressly made subject to the condition embodied in the phrase "unless the context otherwise requires." Taking the context in which the phrase "existing law" occurs in cls. (2) to (6) of this article, it would be repugnant to exclude from its purview non-statutory law and personal law. For instance, in cl. (2) the law of *defamation* is expressly saved as also the law of contempt of Court. The civil law of defamation at least is not a matter of statutory law and if the phrase "existing law" were to be given the restricted meaning of including only statutory law the result will be that practically the whole of the civil law of defamation will become void—a result which could not have been intended at all by the Constituent Assembly. Hence, in the context of ART. 19 and cls. (2) to (6) of that article, the phrase "existing law" has to be taken in a broad and general sense of including both statutory and non-statutory law.

'Law' and order under 'law'—Distinction

As stated above, the reasonable restrictions refer to the *law*. Hence, an *order* passed under a law cannot be the subject-matter of examination from the point of view of the reasonable restrictions permitted under cls. (2) to (6). If the law is not reasonable and hence *ultra vires*, the reasonableness of the order under the law will not save it and the order itself will be *ultra vires*.[3] On the other hand, if the law is reasonable and valid, the reasonableness or otherwise of the

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[2] 1950 S C 124 (128) (Pr 11) [A I R V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras*.

[3] 1950 Pat 322 (Pr 4) [A I R V 37 C 87] : I L R 29 Pat 461 : 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar*.

1951 All 718 (Pr 32) [A I R V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jou 1251 (DB), *Deodat Rai* v. *State*.

order under the law becomes immaterial so long as the order can be sustained under the law and is not open to attack for want of *bona fides*. The reason is that if the law is valid, orders under the law also must be valid unless they are not *bona fide*.[4]

The test in all such cases is not what is *actually done* under the law but what the law *enables to be done*.[5]

(b) Court's power to enquire into reasonableness of restrictions

From the above, it will be seen that laws restrictive of the fundamental freedoms conferred by this article are an exception to the general principle that Courts are not concerned with the reasonableness of the policy of the Legislature in making a law but are only concerned with the interpretation of the law and its application and with its constitutionality or legality.[6] (See notes on Preamble.) In the case of a law permitted under cls. (2) to (6), the Constitution expressly requires them to be reasonable with reference to the various purposes mentioned. This necessarily implies that the Constitution endows the Courts with power to consider and determine whether a particular law imposing restriction on one of the Fundamental Rights under this article is reasonable or not with reference to the particular purpose which is permitted. The principle is that, unless there is such an express provision authorising the Courts to consider the reasonableness or the wisdom underlying the legislative measure, the Courts have no jurisdiction to question the policy of the Legislature.[7]

In *Chicago, B. & Q. R. Co.* v. *McGuire*,[8] the Supreme Court of America observed as follows :

> "The Legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judi-

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[4] 1950 Pat 322 (Pr 4) [A I R V 37 C 87] : I L R 29 Pat 461 : 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar*.

[5] 1950 Pat 322 (Pr 9) [A I R V 37 C 87] : I L R 29 Pat 461 : 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar*.

[6] 1952 Cal 870 (874) (Pr 17) [AIR V 39], *Naba Kumar* v. *West Bengal State*. [*See* (1934) 78 Law Ed 940 (957) : 291 U S 502, *Nebbia* v. *New York*. (Court cannot deal with wisdom or policy of Legislature with adequacy or practicability of the law where the law is not arbitrary.)]

[7] 1951 Nag 33 (Pr 18) [AIR V 38 C 11] : I L R (1951) Nag 791 (DB), *Manohar Ramkrishna* v. *G. G. Desai*.

(1945) 328 U S 80 (82) : 90 Law Ed 1096 (1098), *Queenside Hills Realty Co.* v. *Saxl*.

(1944) 323 U S 18 (29) : 89 Law Ed 15 (23), *Carolene Products Co.* v. *United States*.

(1941) 314 U S 160 (173) : 86 Law Ed 119 (125), *Edwards* v. *California*. (It is not the function of the Courts to pass upon the wisdom, need or appropriateness of legislation.)

(1940) 310 U S 381 (394): 84 Law Ed 1263 (1272), *Sunshine Anthracite Coal Co.* v. *Adkins*.

(1925) 268 U S 652 (668, 669) : 69 Law Ed 1138 (1147), *Gitlow* v. *New York*.

[8] (1910) 55 Law Ed 328 (339) : 219 U S 549.

Article 19
Note 20

cial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

Even when an Act of the Legislature contravenes a fundamental principle of jurisprudence, the Courts are not entitled to question the wisdom underlying the policy of the Legislature which passed the Act. Thus, S. 298 of the Government of India Act, 1935, although enacting into law a fundamental principle of British jurisprudence,[9] does not authorise the Courts to enquire into the reasonableness or otherwise of any legislative provision. And hence, in considering the validity of any enactment with reference to S. 298, Government of India Act, the Courts have no power to consider the wisdom of the policy of the Legislature.[10] In this connection, the well-known case of *Gopalan* v. *the State of Madras*[11] may also be referred to, which shows that even when an Act of the Legislature affects a Fundamental Right, the Courts are not free to consider the reasonableness of the measure if the Constitution does not contemplate that the Courts should have this power.

When, as in cases covered by cls. (2) to (6) of this article, the law is required by the Constitution to be reasonable, the reasonableness of its provisions is a matter for the Courts to decide.[12] As observed by the Supreme Court, the determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision of the Court. In the matter of Fundamental Rights the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its functions it has the power to set aside an Act of the Legislature if it is in violation of the freedoms guaranteed by the Constitution.[13]

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[9] 1946 Bom 216 (235) [AIR V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.*

[10] 1942 F C 38 (41) [AIR V 29] (FC), *Punjab Province* v. *Daulat Singh.*

[11] 1950 S C 27 (Pr 26) [AIR V 37 C 6] : 1950 SCR 88 : 51 Cri L Jour 1383 (SC).

[12] 1951 S C 118 (Prs 7, 9) [AIR V 38 C 17] : 1950 S C R 759 : I L R (1951) Hyd 221 (SC), *Chintamanrao* v. *State of Madhya Pradesh.*

1950 S C 211 (Pr 26) [AIR V 37 C 16] : 1950 S C R 519 : 52 Cri L Jour 550 (SC), *N. B. Khare* v. *State of Delhi.*

1952 Trav-Co 217 (223) (Pr 14) [A I R V 39] : I L R (1952) T C 1 : 1952 Cri L Jour 1066 (FB), *G. Chadayammury* v. *State.*

1950 Pat 322 (Prs 7, 15) [AIR V 37 C 87]: ILR 29 Pat 461: 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar.* (Per *Meredith, C. J., Shearer J. Contra.*)

1953 Raj 162 (166) (Pr 17) [AIR V 40 C 57] : 1953 Cri L Jour 1283 (DB), *Madan Lal* v. *State of Rajasthan.*

1952 Mad 395 (Pr 26) [AIR V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.* (Imposition of stamp duty for enrolment as Advocate not unreasonable.)

1952 Orissa 42 (Pr 10) [AIR V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.* (It is primarily the function of the Legislature to decide what type of control in the field of business is reasonable in public interests. But the Court has to see that under the guise of imposing reasonable restrictions as permitted by cl. (6) of Art. 19, the freedom guaranteed by sub-cl. (g) of cl. (1) of Art. 19 is not taken away.)

(1924) 264 U. S. 504 (512, 517) : 68 Law Ed. 813, *Burns Baking Co.* v. *Bryan.* (Statute requiring bread to maintain specified weight 24 hours after baking with limit of variation so narrow that it could be maintained only by wrapping the bread or other artificial means—Court can determine whether or not the provision has reasonable relation to protection of purchasers of bread against fraud by short weight and really tends to accomplish purpose for which it was intended—Statute held unreasonable and void.)

(1894) 152 U S 133 (137) : 38 Law Ed 385 (389), *Lawton* v. *Steele.* (The determination by the Legislature as to what is a proper exercise of its Police Powers under the American Constitution is not final or conclusive, but is subject to the supervision of the Courts.)

In the *State of Madras* v. *V. G. Row*,[14] Patanjali Sastri, C. J., delivering the judgment of the Supreme Court, observed as follows:

> "Our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted due process clause in the Fifth and Fourteenth Amendments. If, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'Fundamental Rights', as to which this Court has been assigned the role of a sentinel on the *qui vive*. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

(See also Part III-General.)

But it is for the Legislature to scrutinize the needs for restrictions and also in the first instance to decide upon their reasonableness. As to the need for restrictions, the judgment of the Legislature must be regarded as final. The question of their reasonableness is justiciable.[15]

The Court's power in examining the question of reasonableness is unlimited. In *Jeshing Bhai* v. *Emperor*,[16] Chagla, C. J., of the Bombay High Court, observed as follows:

> "It is not for the Legislature to determine whether the restrictions are reasonable or not. It is for the court of law to consider the reasonableness of the restrictions imposed upon the rights. 'Reasonable' is an objective expression and its objectivity is to be determined judicially by the court of law. There is no limit placed upon the power of the court to consider the nature of the restrictions. The Court must look upon the restrictions from every point of view. It being the duty of the Court to safeguard Fundamental

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[13] **1951 S C 118** (Prs 7, 9) [AIR V 38 C 17] : 1950 S C R 759 : I L R (1951) Hyd 221 (SC), *Chintamanrao* v. *State of Madhya Pradesh.*

[14] **1952 S C 196** (199) (Pr 13) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (SC).

[15] **1953 Nag 40** (Prs 40, 41) [AIR V 40 C 22] : I L R (1952) Nag 736 (DB), *Bhaskar* v. *Mohd. Alimulla Khan.*

[16] **1950 Bom 363** (366) (Pr 7) [A I R V 37 C 107] : I L R (1950) Bom 539 : 52 Cri L Jour 120 (FB).

Rights, the greater is the obligation upon the Court to scrutinise the restrictions placed by the Legislature as carefully as possible."

Objective standard

In examining the reasonableness of legislative restrictions on Fundamental Rights the Court will apply an objective standard and not a subjective one. An objective standard is the standard of the average prudent man. Such a standard is sometimes described as the external yard stick.[17] In other words, the Courts do not ask themselves whether they, as individuals, feel satisfied that the restrictions are reasonable but whether the normal average reasonable man would regard the restrictions as reasonable.[18]

(c) Tests of reasonableness
General

The general principles as to the tests of reasonableness are fairly well established and form the subject of an authoritative pronouncement by their Lordships of the Supreme Court in *Chintaman Rao* v. *State of Madhya Pradesh.*[19] Mahajan, J., delivering the judgment observed as follows :

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in ART. 19 (1) (g) and the social control permitted by cl. (6) of ART. 19, it must be held to be wanting in that quality."

The observations of his Lordship are applicable *mutatis mutandis* to all the clauses (2) to (6) of this article. For similar general observations see also the cases noted below.[20]

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17. 1950 S C 211 (Pr 26) [AIR V 37 C 16] : 1950 S C R 519 : 52 Cri L Jour 550 (SC), *N. B. Khare* v. *State of Delhi.*

1950 Bom 363 (Pr 7) [AIR V 37 C 107] : I L R (1950) Bom 539 : 52 Cri L Jour 120 (FB), *Jeshingbhai* v. *Emperor.*

1951 All 718 (Pr 32) [AIR V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.*

18. 1950 Pat 322 (Pr 7) [AIR V 37 C 87] : ILR 29 Pat 461 : 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar.* (AIR 1946 P C 123, Rel. on.)

19. 1951 S C 118 (Prs 7, 9) [AIR V 38 C 17] : 1950 S C R 759 : I L R (1951) Hyd 221 (SC).

20. 1952 Cal 273 (Pr 34) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.* (AIR 1951 S C 118, Foll.)

1950 Bom 363 (Pr 7) [AIR V 37 C 107] : I L R (1950) Bom 539 : 52 Cri L Jour 120 (FB), *Jeshingbhai* v. *Emperor.* (In order to decide whether a restriction is reasonable or not, the Court must look at the nature of the restriction, the manner in which it is imposed, its extent both territorial and temporal, and if after considering all this the Court comes to the conclusion that the restriction is unreasonable, then the restriction is not justified and will not be upheld by the Court.)

1953 Mad 476 (478) [AIR V 40 C 182] : 1953 Cri L Jour 917, *Narasimha* v. *District Magistrate.* (Reasonable restrictions—No hard and fast rule—Depends

In the *State of Madras* v. *V. G. Row*,[21] Patanjali Sastri, C. J., in delivering the judgment of the Supreme Court, observed as follows:

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions considered them to be reasonable."

But there can be no absolute standard about what will be a reasonable restriction upon Fundamental Rights. In deciding about the reasonableness of the restrictions it is not possible to think only in the abstract. Several circumstances must be taken into consideration, in particular the purpose of the Act, the conditions prevailing in the country at the time, the duration of the restriction, its extent and nature.[22] Hence, in considering the reasonableness of any legal

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upon the nature of the right claimed, object to be achieved, means employed, and limitations imposed—They should be fair and commensurate with the purposes aimed at.)

1953 Nag 40 (Prs 40, 41) [AIR V 40 C 22] : I L R (1952) Nag 736 (DB), *Bhaskar* v. *Mohammed Alimulla Khan.* (Restriction under cl. (5) should not be greater than the mischief it is intended to prevent and it should be in the interest of the general public.)

1953 Trav.Co 327 (Pr 24) [AIR V 40 C 122] : I L R (1952) Trav-Co 670 (DB), *Vishnu* v. *Paulo.* (In determining reasonableness or otherwise of restrictions in regard to right under sub-cl. (f), important factors that should be taken into account are the nature, extent and duration of the restriction in relation to the interest of the general public that is sought to be served by the legislation.)

1952 Mad 11 (Pr 26) [AIR V 39 C 2] : I L R (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran.*

[21] 1952 S C 196 (200) (Pr 15) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (SC).

[22] 1952 Cal 273 (Pr 7) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.* (Drastic remedies may be necessary to meet conditions giving rise to serious and urgent problems and a piece of legislation which may well impose unreasonable restrictions in one set of circumstances may be eminently reasonable in a different set of circumstances.)

1951 All 247 (Pr 90) [AIR V 38 C 33] : I L R (1952) 1 All 149 (FB), *Abdul Hakim* v. *Jan Mohammed.*

provision restricting Fundamental Rights, the Court must take a broad view of all the circumstances existing when the legislation was passed.[23]

A restriction cannot be regarded as unreasonable merely because it is more drastic than that imposed by the Legislature of another State.[24] In considering the reasonableness of legislative provisions restricting the exercise of Fundamental Rights under this article, the Directive Principles of State Policy may be taken into consideration.[25]

Both substantive and procedural aspects to be considered

In considering the reasonableness of a restrictive piece of legislation, Courts should consider both the substantive and the procedural aspects of the impugned law.[26] In other words, the Court should

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1951 Mad 147 (Pr 90) [AIR V 38 C 16] : 52 Cri L Jour 515 (FB), *V. G. Row* v. *State of Madras.*

1953 Madh B 236 (239) (Pr 8) [A I R V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of Madhya Bharat.* (The reasonableness of restrictions should be decided in the context of social, economic and political conditions.)

1952 Cal 184 (Pr 10) [AIR V 39 C 67], *Ramhari* v. *Nilmoni Das.* (Unreasonableness of restriction on right to hold property should be judged in relation to the social, economic and political context in which the restriction is imposed.)

1952 Orissa 42 (Pr 10) [AIR V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.* (Per *Narasimham, J.*—The expressions 'reasonable' and 'the interests of the general public' are both elastic terms and a discussion about the full import of these expressions necessarily involves a discussion of the political, social, and economic problems of the present day not only in this country but all over the world.)

(1936) 300 U S 379 (390) : 81 Law Ed 703 (707), *West Coast Hotel Company* v. *Parrish.* (Minimum wage legislation—Reasonableness of exercise of Police Power must be considered in the light of current economic conditions.)

(1921) 256 U S 135 (155, 156, 158) : 65 Law Ed 865 (870, 871, 872), *Block* v. *Hirsh.*

[23] 1952 Cal 273 (Pr 34) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.*

[24] 1953 Pat 259 (264) [AIR V 40 C 92] : ILR 31 Pat 963 (DB), *Jugal Prasad* v. *Bhadai Das.* (It is within the province of the Legislature to decide what would be the proper penalty for a failure to comply with the requirements of the law. The penalty cannot be regarded as imposing an unreasonable restriction merely because it is more drastic than that prescribed by another Legislature. Bihar Money-lenders Act, 1939, makes a suit wholly barred while the Bengal Act allows a suit to be filed after the money-lender has paid a prescribed penalty.)

[25] 1952 All 753 (758) (Prs 15 to 18) [AIR V 39] (FB), *Budhu* v. *Allahabad Municipality.* (Municipal bye-law prohibiting slaughter of cows, bulls etc., upheld—Art. 48 relied on.)

[26] 1950 S C 211 (Prs 4, 24) [AIR V 37 C 16] : 1950 S C R 519 : 52 Cri L Jour 550 (SC), *N. B. Khare* v. *State of Delhi.*

1952 S C 221 (Pr 7) [AIR V 39] : 1952 S C R 737 : 1952 Cri L Jour 1147 (SC), *Gurbachan Singh* v. *State of Bombay.*

1952 S C 196 (199, 200) (Pr 15) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (SC), *The State of Madras* v. *V. G. Row.*

1952 Trav-Co 217 (223) (Pr 15) [AIR V 39] : I L R (1952) T C 1 : 1952 Cri L Jour 1066 (FB), *G. Chadayammury* v. *State.*

1951 Mad 147 (Pr 90) [AIR V 38 C 16] : 52 Cri L Jour 515 (FB), *V. G. Row* v. *State of Madras.*

1953 Madh B 236 (239) (Pr 8) [AIR V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of Madhya Bharat.*

1953 Raj 162 (166) (Pr 17) [AIR V 40 C 57] : 1953 Cri L Jour 1283 (DB), *Madanlal* v. *State of Rajasthan.*

consider not only factors such as the duration and extent of the restrictions but also the circumstances under which and the manner in which their imposition has been authorised.[27] The failure to provide a reasonable procedure (while imposing restrictions), as for instance by providing for notice, opportunity to make representation and an authority or a tribunal to consider the reasonableness of the restrictions will be ground for holding the restrictions unreasonable.[28] Although there may be a provision for making rules of procedure, so long as such rules are not made providing a reasonable procedure, the restrictions imposed will be bad.[29]

Presumption of reasonableness

It should not be too readily assumed that the members of the Legislature, who are elected representatives of the people, have any

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1952 Madh B 114 (Pr 18, 19) [AIR V 39] : I L R (1952) Madh B 364 : 1952 Cri L Jour 1058 (DB), *State* v. *Motilal.*

1951 Assam 106 (Pr 70) [AIR V 38 C 54] : I L R (1951) 3 Assam 181 : 52 Cri L Jour 966 (DB), *Israil Khan* v. *The State.* (It is also open to the Court to examine the procedure to be followed before any restrictions on the right to move freely throughout the territory of India can be imposed: AIR 1950 S C 211, Foll.)

1951 Cal 322 (Pr 11) [AIR V 38 C 76 A] : 52 Cri L Jour 327 (DB), *Tozammal* v. *Government of West Bengal.*

1951 Cal 111 (Pr 48) [AIR V 38 C 30 B] (DB), *W. B. S. K. Co-operative Society* v. *Bella.* (Reasonable substantive provisions might well be rendered wholly unreasonable by the procedure which an Act prescribes: A I R 1950 S C 211, Foll.)

[*See* 1953 Punj 52 (55) [AIR V 40 C 19] : I L R (1952) Punj 362 & 495 : 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi.* (There are in the Criminal Procedure Code certain principles laying down the nature of the defence which is open to a person against whom criminal proceedings are being taken, which have stood for a very long time and which may well be taken to furnish a general standard of reasonableness when the nature of the right of defence allowed in an impugned Act is to be considered.)]

[27] 1952 S C 221 (224) (Pr 7) [AIR V 39] : 1952 S C R 737 : 1952 Cri L Jour 1147 (S C), *Gurbachan Singh* v. *State of Bombay.*

1952 S C 196 (200) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (S C), *The State of Madras* v. *V. G. Row.*

[28] 1953 S C 373 (374, 375) [AIR V 40 C 84] (S C), *Raghubir Singh* v. *Court of Wards, Ajmer.* (Ajmer Tenancy and Land Records Act, S. 112, is repugnant to sub-cl. (f). It does not provide machinery for determining if a person has been *habitually* infringing rights of tenants so as to incur liability to have his estate taken over by Court of Wards.)

1953 Raj 162 (167) (Pr 20) [AIR V 40 C 57] : 1953 Cri L Jour 1283 (DB), *Madanlal* v. *State of Rajasthan.* (Rajasthan Dramatic Performances and Entertainments Ordinance (29 of 1949), Ss. 3, 4, 6 and 8 are not enforceable. So long as no procedure is prescribed by rules under S. 11 of the Ordinance regarding issue of notice, an opportunity of making a representation and an authority or a tribunal to consider it, the provisions of Ss. 3, 4, 6 and 8 of the Ordinance cannot be regarded as enforceable, because they do not come within the limits of reasonableness of cl. (6) of Art. 19 of the Constitution. Section 3 of the Ordinance, as it now stands, imposes an unreasonable restriction on the right of a citizen guaranteed by Art. 19 (1) (g) of the Constitution, not because of any unreasonableness relating to its substantive provisions, but because no reasonable procedure has yet been laid down by the Government under its rule-making powers.)

[29] 1953 Raj 162 (167) (Pr 20) [AIR V 40 C 57] : 1953 Cri L Jour 1283 (DB), *Madanlal* v. *State of Rajasthan.*

desire to impose any restrictions which are more than reasonable in the public interest.[30]

Excessive restriction

A restriction will not be regarded as reasonable if it is excessive, that is, greater than required by the circumstances, for the purpose in view and for the protection of the public.[31] Further, the restriction should not be such as to be destructive of the right.[32]

Principles of natural justice: right to be heard

The question whether the provisions of the impugned law are repugnant to the principles of natural justice should also be considered. For instance, the question whether the principle of *audi alteram partem* (hear the other side) has been violated and if so, to what extent, is one of the common tests. There is, however, no hard and fast rule that a law will be considered as unreasonable and *ultra vires* if the executive is not required to give an opportunity to be heard before passing any order to the prejudice of any person. The question depends upon the circumstances of each case as to how far it is necessary to allow an opportunity to a party beforehand while passing an order to his prejudice.[33] Thus, a legislation providing for an emergency like a sudden outburst of an epidemic or a natural calamity like an earthquake or flood may defeat its purpose if it lays down an elaborate enquiry with an opportunity of being heard as a pre-requisite to taking action in the interests of the general public. On the other hand, where there is no compelling necessity to act emergently the legislation should ordinarily prescribe a procedure observing the principles of natural justice which require that a person should not be condemned or deprived of his rights without an opportunity of being heard.[34]

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[30] 1952 Cal 273 (Pr 35) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.* [*See* 1953 Mad 664 (Pr 16) [AIR V 40 C 254] : I L R (1953) Mad 937 : 1953 Cri L Jour 1174 (DB), *P. Arumugham* v. *State of Madras.* (The expression "reasonable" is so wide and elastic that a Court should not ordinarily strike down any restrictive provision as void as being not reasonable, unless it appears to the Court that a different view could not be taken with any justification.)

[31] 1952 Cal 273 (Pr 11) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.*
1952 Mad 11 (Pr 26) [AIR V 39 C 2] : I L R (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran.*
1951 Bom 440 (Pr 17) [AIR V 38 C 100] : I L R (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.* (A I R 1951 S C 118 (S C), Foll.)
1951 Cal 85 (Pr 33) [AIR V 38 C 25] (DB), *Subodh Gopal* v. *Behari Lal.*
1951 Orissa 86 (Prs 14, 15) [AIR V 38 C 28] (DB), *Ismail* v. *State of Orissa.*

[32] 1952 Mad 395 (Pr 33) [AIR V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.* (Stamp duty on enrolment as Advocate is not *ultra vires.*)

[33] 1952 Sau 59 (Pr 13) [AIR V 39] (S B), *Jayantilal* v. *State of Saurashtra.*

[34] 1952 Sau 59 (Pr 13) [AIR V 39] (SB), *Jayantilal* v. *State of Saurashtra.*
1952 Bom 296 (297) (Pr 2) [AIR V 39] : I L R (1952) Bom 766 (DB), *Mulchand* v. *Mukund.* (A citizen has a Fundamental Right to be heard before a judicial tribunal and not to have any decision given against him or affecting his rights without his being permitted to show cause in his defence.)
1951 Orissa 86 (Pr 7) [AIR V 38 C 28] (DB), *Ismail* v. *State of Orissa.* (The provisions of S. 2 (1) (b) and S. 3 of the Orissa Maintenance of Public Order Act of 1950, cannot be held to authorise the imposition of reasonable restrictions on

But there is no Fundamental Right to be heard through an advocate or a lawyer.[35]

Vagueness and uncertainty

A provision of law in restriction of Fundamental Rights will be void if it is too vague and uncertain.[36] (See also NOTES 5 and 26).

Provision excluding judicial enquiry

The question whether the law says that the restriction is not open to examination by the Court is also regarded as an important matter and Courts are inclined to treat a restriction as unreasonable if the law forbids its being tested in a court of law.[37]

In *State of Madras* v. *V. G. Row*,[38] Patanjali Sastri, C. J., delivering the judgment of the Supreme Court, observed as follows :

> "The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive Government to impose

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the Fundamental Rights guaranteed to a citizen under Art. 19 (1) (d) and (e) of the Constitution, as no provision has been made for giving the party affected reasonable opportunity of putting forward his case before impartial tribunal.)

[*See also* 1950 Bom 363 (Pr 11) [AIR V 37 C 107] : I L R (1950) Bom 539 : 52 Cri L Jour 120 (FB), *Jeshingbhai* v. *Emperor*. (Bombay Public Security Measures Act (6 of 1947) is bad because it made no provision for externee being heard by authority externing him.)

1951 All 718 (Pr 32) [AIR V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State*. (A restriction is unreasonable if no right to be heard is allowed.)

1951 Bom 337 (Prs 3, 5) [AIR V 38 C 72] : I L R (1951) Bom 621 : 52 Cri L Jour 897 (DB), *In re Shantabai*. (Section 9 (1), Bombay Prevention of Prostitution Act, imposes an unreasonable restriction on the Fundamental Rights of the citizen under Art. 19 (1) (d) and (e) of the Constitution and it is void inasmuch as it fails to provide for a reasonable opportunity being given to the person affected by S. 9 (1) to be heard in his defence.)

1951 Cal 90 (Pr 10) [AIR V 38 C 26], *Anumathi Sadhukhan* v. *A. K. Chatterjee*. (W. B. Rice Mills Control Order, 1949, held *ultra vires* on grounds, *inter alia*, that no provision was made for making representation against the action taken by the authorities.)]

[35] 1952 Bom 296 (297) (Pr 2) [AIR V 39] : I L R (1952) Bom 766 (DB), *Mulchand* v. *Mukund*. (Bombay Co-operative Societies Act (7 of 1925), S. 71 (2) (4) and R. 36, prohibiting appearance through pleader in proceedings under Rules 32 to 35 is valid.)

[36] *See* (1949) 336 U S 77 (79):93 Law Ed 513 (518), *Kovacs* v. *Cooper*.(Ordinance prohibiting operation from vehicles upon city streets of sound amplifiers or other instruments emitting 'loud and raucous' noises held not vague, obscure and indefinite — "While 'loud and raucous' were abstract words, they had through daily use acquired a content that conveyed to any interested person a sufficiently accurate concept of what is forbidden.")

[37] 1953 S C 373 (375) (Pr 8) [AIR V 40 C 84] (S C), *Raghubir Singh* v. *Court of Wards, Ajmer*.

1951 All 718 (Pr 32) [AIR V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State*.

[38] 1952 S C 196 (200) (Pr 16) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (S C). (Section 15 (2) (b) as amended in Madras by the Criminal Law Amendment (Madras) Act, 1950, falls outside the scope of authorised restrictions under cl. (4) of Art. 19 and is, therefore, unconstitutional and void.)

restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed . . . . on the exercise of the Fundamental Right under ART. 19 (1) (c); for no summary and what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive Government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on Fundamental Rights."

At the same time, it has been held that merely because an order giving or refusing licence is not open to review by the Court, the provision requiring the licence must not be regarded as unreasonable, the reason given being that if the power is abused or if the discretion is arbitrarily exercised, it can always be set right by the Court, for an arbitrary exercise of discretion is no exercise at all.[39]

Vesting of discretionary authority in executive officers

The decision of the Supreme Court,[40] holding that S. 5 (1) of the West Bengal Special Courts Act is *ultra vires*, is clear authority to show that the vesting of absolute, unfettered and unregulated discretion in any executive authority including the Government is *prima facie* repugnant to principles of natural justice. Hence, in considering the reasonableness of legal provisions impugned under this article, one of the matters to be considered by the Courts will be to what extent unregulated discretionary authority is vested in executive officers and bodies to affect the lives of people. Here again, as in the case of making a provision for hearing a party before making an order to his prejudice, it is not possible to lay down a stiff rule which will hold good in all cases. But the general principle is that the exercise of any of the Fundamental Rights, like the right of free speech, right of freedom of religion or the right of freedom of association, cannot be made subject to the absolute discretionary control of an administrative or executive authority which can grant or withhold permission to exercise such right at its discretion.[41] Thus, when a law deprives a

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[39] 1952 Cal 72 (Prs 12, 13) [AIR V 39 C 24], *Ratan Chandra* v. *Adhar Biswas.*

[40] 1952 S C 75 (Pr 38) [AIR V 39 C 18] : 1952 S C R 284 : 1952 Cri L Jour 510 (S C), *State of West Bengal* v. *Anwar Ali.*

[41] 1953 Mad 279 (289) [AIR V 40 C 102] : I L R (1953) Mad 304 (DB), *C. S. S. Motor Service* v. *Madras State.*

1952 Mad 565 (Prs 38, 39) [AIR V 39] : ILR (1952) Mad 957 (DB), *Balakrishnan* v. *State of Madras.* (Arbitrary and unfettered discretion conferred on the Textile Commissioner to permit in particular cases acquisition and installation of new looms is not reasonable—Such a case is one of naked and arbitrary power.)

Article 19
Note 20

person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law is not reasonable.[42] Though this may be regarded as a general principle, the vesting of authority in a suitable officer to take prompt action in emergencies will not be unreasonable.[43] Similarly, it has been held that a rule under the Abkari Rules vesting unfettered discretion in a statutory body to approve or not to approve of a selected site for a liquor shop is not unreasonable.[44] So also, the vesting of an unfettered discretion in an official to grant or refuse permission under rent control legislation to a landlord to sue for the eviction of his tenant is valid.[45] Where a licensing system requires that the licensing authority must exercise a judicial discretion and not an arbitrary power, the provision is a reasonable one.[46] But where there is no special reason or justification for vesting executive subordinates with absolute discretion in matters affecting the lives and fortunes of the people, the vesting of such discretion will be regarded as being unreasonable. This question arises frequently when the law makes provision for the delegation of authority or power to subordinate officials. When delegation to a subordinate official, who may be unfitted to exercise the discretion, is permitted, the law is treated as unreasonable.[47] Especially when an

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1952 Mad 253 (Pr 7) [AIR V 39 C 105 (3)]: ILR (1953) Mad 57 (DB), *Ramakrishnaiah* v. *President, District Board, Nelore.* (The rules contained in (Madras) G. O. No. 416, Education, dated 24th February 1939, in so far as they empower the Director of Public Instruction to forbid the existence of, and dissolve any teachers' union not conforming to the rules and compelling teachers in Local Board or Municipal service to obtain the permission of the Board or Council concerned before forming unions and in so far they prohibit teachers in recognised elementary schools from becoming members of teachers' unions or other teachers' organisations not constituted in accordance with the orders of the Government, are void as constituting an abridgment of the right of freedom of association guaranteed by Art. 19 (1) (c) of the Constitution.)

[*See also* 1952 Madh B 114 (Prs 18, 19) [AIR V 39] : I L R (1952) Madh B 364: 1952 Cri L Jour 1058 (DB), *State* v. *Motilal.*]

[42] 1953 S C 373 (375) [AIR V 40 C 84] (SC), *Raghubir Singh* v. *Court of Wards, Ajmer.* (The failure to provide a machinery for determining whether a person was habitually infringing the rights of his tenants so as to be liable to be disqualified and treated as incapable of managing his property, and leaving the question to the subjective determination of the Court of Wards, is unreasonable.)

[43] 1950 S C 211 (Pr 26) [AIR V 37 C 16] : 1950 S C R 519 : 52 Cri L Jour 550 (S C), *N. B. Khare* v. *State of Delhi.*

[44] 1951 Trav-Co 197 (Prs 8, 9) [AIR V 38 C 80]: ILR (1951) Trav-Co 496 (DB). *Krishnankutty* v. *State of Tra-Co.*

[45] 1952 All 699 (702) (Pr 7) [AIR V 39] (DB), *Karam Chand Thapar & Bros* v. *Vijay Anand.*

[46] 1953 Mad 476 (478) [AIR V 40 C 182] : 1953 Cri L Jour 917, *Narasimha* v. *Dist. Magistrate.* (Rule 43, Arms Rules, framed under Arms Act—District Magistrate cannot arbitrarily refuse to give permit but he must exercise a judicial discretion supported by reasons subject to the scrutiny of an appellate tribunal—*W. P. No. 441 of 1951 (Mad.)* which deals with Essential Supplies (Temporary Powers) Act, 1946, *distinguished* — Cl. 11 embodies an *arbitrary power.* Rule 43 (1), Arms Rules, confers a judicial discretion.)

[47] 1951 Cal 404 (Pr 4) [AIR V 38 C 105], *Jatish Chandra* v. *B. K. Sinha.* (Power of delegation contained in S. 38 of W. B. Security Act is *ultra vires*

officer is given powers to take action to the prejudice of people without being bound to assign reasons, the law becomes unreasonable.[48] But a Division Bench of the Punjab High Court has held that the High Court will not interfere and hold a legal provision to be *ultra vires* on the ground that the powers of delegation were so wide as to be unreasonable, since the powers could be delegated by the Government to any officer however subordinate, unless it could be shown that the Government had obviously been using its power of delegation in an unreasonable manner by delegating its functions under the Act to manifestly unsuitable officers.[49] A restriction will be unreasonable if it depends on the decision of a completely amorphous body and is not open to examination by the Court.[50] (See also notes on ART. 14.)

Safeguards against abuse

When the law itself is reasonable, the question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of this article.[51]

Ultra vires laws

The question of reasonableness of an Act or of its otherwise satisfying the requirements of cls. (2) to (6) of this article will only arise on the assumption that otherwise the law is not *ultra vires*. Thus, if the provision is beyond the power of the body or authority which has

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inasmuch as the power may be delegated to an officer of the lowest rank who may be unfitted to exercise the power.)

1951 Cal 3 (Pr 26) [AIR V 38 C 3] (DB), *Khagendra Nath* v. *Dist. Magistrate*. (Law allowing delegation of passing externment order to any officer subordinate to the State Government irrespective of his fitness is unreasonable.)

[48] 1952 Raj 74 (Pr 10) [AIR V 39] : ILR (1951) 1 Raj 674 : 1952 Cri L Jour 732, *Nathmal* v. *Commr., Civil Supplies*. (Power under Rajasthan Foodgrains Control Order given to officer to freeze stock of any merchant without necessity of assigning reason is arbitrary and bad.)

[*See also* 1952 Sau 59 (Prs 8, 10, 15) [AIR V 39] (S B), *Jayantilal* v. *State of Saurashtra*. (Section 35, Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, 1949 — Absolute discretion left to Executive to deprive a person of his right of management of his property on ground of efficiency—No test of efficiency given—Act is void.)]

[49] 1952 Punj 70 (Pr 6) [AIR V 39 C 21] : ILR (1951) Punj 438 (DB), *Shyam Krishen* v. *State of Punjab*. (AIR 1951 Cal 3, Dissent.)

[50] 1951 All 718 (Pr 32) [AIR V 38 C 192] : ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State*.

[51] 1950 S C 211 (Prs 4, 24) [AIR V 37 C 16]: 1950 S C R 519 : 52 Cri L Jour 550 (S C), *N. B. Khare* v. *State of Delhi*.

1953 Madh B 236 (239) (Pr 8) [AIR V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of M. B.*

[*See also* 1950 Bom 363 (Prs 7, 21) [AIR V 37 C 107] : ILR (1950) Bom 539 : 52 Cri L Jour 120 (FB), *Jeshingbhai* v. *Emperor*. (The possibility of an abuse of provision enacted in the interest of the security of the State or in the interests of the general public cannot be a ground for holding the provision as void. The remedy lies with the Legislature to remove the lacuna, if any, which permits that abuse.)

1952 Pat 220 (Prs 7, 23) [AIR V 39 C 55 (22)] : ILR 31 Pat 203: 1952 Cri L Jour 710 (SB), *State* v. *Biswanath*. (Power to requisition foodgrains—Order requiring person to deliver such quantity of foodgrain as may be specified in the order of demand under Bihar Agricultural Levy Order—Risk of arbitrary and unreasonable action by officers does not by itself make the order bad.)]

made it, then the question of its reasonableness does not arise at all.[52]

(d) Power of taxation and Fundamental Rights

The Fundamental Rights guaranteed by this article are not exempt from the taxing power of the State. But any tax which aims at unduly abridging or destroying a Fundamental Right will be unconstitutional. If the taxation is only for legitimate revenue purposes, then it is not invalid merely because it may adversely affect any of the Fundamental Rights. Hence, a judicial review of taxation is permitted in exceptional cases.[53] In *Ananthakrishnan* v. *State of Madras*,[54] Rajamannar, C. J., observed as follows :

> "It must be admitted that the State has got power to augment its revenues by the imposition of taxes. Taxes must in great or less degree affect the full enjoyment of rights like the right of property. Let me give an instance. Article 19 (1) (f) confers on a citizen a right *inter alia* to dispose of property. But the Stamp Act imposes a duty on every disposition of property. As a citizen cannot lawfully dispose of his property by conveyance except on payment of the prescribed stamp duty, it may be said that, to that extent, there will be a restriction on the exercise of his freedom of disposition. But surely it cannot be contended that the levy of stamp duty on conveyances is unconstitutional. I am inclined to think that so long as the monetary exaction is, in the opinion of the Court, reasonable, it cannot be said that it is invalid as being unconstitutional. Suppose, for instance, the stamp duty levied on a conveyance of property amounts to 99 per cent. of its value, then it may become the duty of this Court to hold that there is an unreasonable restriction on the exercise of the right of disposition."

In the same case, Venkatarama Aiyer, J., observed as follows :

> "The power to tax is an attribute of sovereignty; it carries with it the power to determine when and how the tax shall be levied and it is no objection to its validity that it is levied before the commencement of the trade and not after. The theory of previous restraint has no application to laws of taxation . . . . The contention that the power to tax is the power to destroy has been rejected in so far as it seeks to negative any power to tax Fundamental Rights, but it does not follow that it should be rejected in so far as it seeks to impose a limitation upon that power, that it should not be exercised so as to destroy them. As already pointed out, there is a difference between profession tax and income-tax. The power of levying a tax on income is absolute and if the Legislature chooses to levy a tax of fifteen annas in the rupee on that income, Courts will have no jurisdiction to declare it unconstitutional on the ground that it is unreasonable. But a right to carry on business is a

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[52] 1952 S C 115 (Pr 8) [AIR V 39 C 22] : 1952 S C R 572 (S C), *Brij Raj Krishna* v. *Shaw & Bros.*

[53] 1952 Mad 395 (404) [AIR V 39]: ILR (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.* (Stamp duty on enrolment of advocate is not invalid.)

[54] 1952 Mad 395 (403) (Pr 27) [AIR V 39] : ILR (1952) Mad 933 (DB).

Fundamental Right protected by the Constitution and it stands to reason that a tax on such a right should not be such as to destroy it, as for example, a professional tax equal or nearly equal to the income earned in the previous year. It might well be contended that there is in such cases a limitation on the powers of taxation, implicit in the Constitution itself, that it should not be exercised in such a manner as to take away with one hand what has been given by the other. If this is the correct position, it will follow that while the levy of income-tax cannot be questioned in Courts the levy of profession tax might be challenged on the ground that it is so unreasonable and excessive as to be prohibitive of the right to carry on trade. Any question whether a tax in a particular case is so unreasonable as to amount to a destruction of the rights will, of course, be a matter for determination by Courts, in the same manner as questions of reasonableness of restrictions under ART. 19, cls. (3) to (5)."

See also NOTE 85.

21. "Interests of the general public."—As seen in NOTE 20, cls. (5) and (6) authorise the imposition of reasonable restrictions by law on the rights mentioned in sub-cls. (d), (e), (f) and (g) of cl. (1) where such restrictions are required *in the interest of the general public.* The expression "general public" is wide enough to include a section of the public.[1]

"Interests of the general public" only mean public interests.[2] As was held in *Iswari Prosad* v. *N. R. Sen,*[3] it cannot possibly be said that the words "in the interests of the general public" mean in the interests of the public of the whole of the Republic of India. The phrase means nothing more than in public interest and it may well be

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Article 19 — Note 21

[1] 1952 Cal 273 (Pr 33) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.* (Section 18 (1) of West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950 as amended by Art. 62 of 1950) is not unreasonable in the interest of the general public, though the provisions apply to comparatively small class of persons.)

1953 Nag 40 (50) (Pr 46) [AIR V 40 C 22] : ILR (1952) Nag 736 (DB), *Bhaskar* v. *Mohd. Alimulla Khan.* (Berar Land Revenue Code (Amendment) Act is in interests of general public.)

1953 Orissa 171 (Prs 15, 16) [AIR V 40 C 59] : ILR (1953) Cut 45 (DB), *Sashibhusan* v. *Mangala.* (Legislation meant for the benefit of a well-defined class of the general public will be in the interest of general public — Orissa Tenants Protection Act (3 of 1948) is in the interests of the general public though the persons primarily benefited by it are one class of tenants known as Bhag-chasis.)

1952 Cal 184 (Prs 13, 13a, 13c) [AIR V 39 C 67] (DB), *Ramhari* v. *Nilmoni Das.* (General public will include a fairly substantial section of people who constitute the class of Bargadars in West Bengal.)

1951 Cal 539 (Pr 37) [AIR V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.*

(1934) 291 U S 502 (539): 78 Law Ed 940 (958), *Nebbia* v. *New York.* (The American Constitution does not secure liberty to conduct a business as to injure the public at large or any substantial group.)

[2] 1952 Cal 273 (Pr 33) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.*

[3] 1952 Cal 273 (Pr 33) [AIR V 39 C 75 (29)] (FB).

Article 19
Note 21

that legislation affecting a limited class of persons or a limited area might well be legislation in the public interest, though the public of other parts of India might not be directly affected by such legislation. Legislation may be essential to redress some urgent grievance in a particular State though such legislation would be wholly unnecessary in any other State. Nevertheless, such legislation may be in the "interests of the general public". If the general public are indirectly affected it would be quite sufficient to make such legislation one in the public interest. The removal of some serious abuse or grievance or discontent is a matter indirectly affecting the public generally. It is not in the interests of the general public or in the public interest to allow *any class of persons* to labour under some grievance and to be genuinely discontented.

The expression "interests of the general public" is much wider than the expression "public order" which is one of the matters in the interests of which legislative restrictions may be imposed upon Fundamental Rights under cls. (2), (3) and (4). Hence, even if public *peace* is safe enough, restriction may be imposed on a Fundamental Right under cls. (5) and (6) if such restriction is required in public interest.[4] But, at the same time, it must be noted that the expression "in the interests of the general public" is wide enough to cover serious and aggravated forms of public disorder which are calculated to endanger the security of the State as also other breaches of the peace of a purely local significance which endanger the public order. Hence public order is not excluded from the purview of cls. (5) and (6) of this article.[5]

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[4] 1952 Mad 11 (Pr 25) [AIR V 39 C 2] : ILR (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran.* (The State shall be competent to impose restrictions under cls. (5) and (6) not only on grounds of public order but also on grounds of social and economic policy or on the ground of the common good, e.g., for securing the objects referred to in cls. (b) to (c) of Art. 39.)

1951 Bom 459 (Pr 10) [AIR V 38 C 101] : 1952 Cri L Jour 37 (DB), *Damodar Ganesh* v. *State.* (The restriction, therefore, on the right to move freely throughout the territory of India may be not merely for the purpose of maintaining public order but may be in the interests of the general public. The words "in the interests of the general public" used in cl. (5) of Art. 19 have been advisedly used and in contradistinction with the words "in the interests of public order" used in the earlier clauses. It is probable that the Constitution used these particular words in order to enable the State to adjust the rights given by the Constitution and to reconcile them in the interests of the general public, whether the interests of the public order were immediately affected or not by such restrictions.)

[5] 1950 Bom 363 (Pr 7) [A I R V 37 C 107] : I L R (1950) Bom 539 : 52 Cri L Jour 120 (FB), *Jeshingbhai* v. *Emperor.* (Per *Chagla, C. J.*—The expression "interests of the general public" in Art. 19 (5) of the Constitution is a very wide expression, much wider than any of the expressions used in cls. (2), (3) and (4)— The phrase embraces public security, public order and public morality, and therefore much wider power is given to the Legislature under Art. 19 (5) to restrict the right given under the Constitution under Art. 19 (1) (d) and (e).)

1952 Pat 376 (Prs 5, 6) [AIR V 39] : 1952 Cri L Jour 1361 (DB), *Bodi Alam* v. *State of Bihar.* (No provisions of the Bihar Maintenance of Public Order Act, so far as they permit the passing of an order of externment, impose reasonable restrictions in the interests of the general public on the exercise of the rights conferred by sub-clauses (d) and (e) of Art. 19 (1) of the Constitution : AIR 1950 S C 211, Foll. ; A I R 1951 Cal 322, Rel. on; A I R 1950 S C 124 (S C), Disting.)

The question whether a piece of legislation is in public interest is justiciable.[6] Public order, public health, public morality and similar purposes are included in the term "public interest."[7]

22. "For the protection of the interests of any Scheduled Tribe." — In clause (5), it is provided that legislative restrictions on the Fundamental Rights under cl. (1) sub-cls. (d), (e) and (f) may be imposed "either in the interests of the general public or for the protection of the interests of any Scheduled Tribe". Such mention of "Scheduled Tribe" does not mean that the term general public in cl. (5) is not applicable to a section of the public. (See NOTE 21.)

The expression "Scheduled Tribes" has been defined in ART. 366 cl. (25) as meaning such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under ART. 342 to be Scheduled Tribes for the purposes of this Constitution. Under ART. 342, provision is made for specifying by notification by the President or by law by Parliament as to who shall be considered Scheduled Tribes for the purposes of the Constitution.[1]

23. "Public order."—Legislative restrictions upon the Fundamental Rights granted by this article are permitted under cls. (2), (3) and (4) in the interests of "public order". The expression "public order" also occurs in Entry 1, in LIST 2 in SCH. VII (State List). The same expression occurred also in Item 1 of LIST 2 of SCH. VII to the Government of India Act, 1935. The above item also included "preventive detention for reasons connected with the maintenance of public order". It was held by the late Federal Court[1] that this expression was wide enough to include public safety or interest. It is doubtful whether the extended meaning of public order will be applicable to the expression "public order" in the context of this article, where the Constitution has expressly made use of the words "in the interests of the general public" to express the concept of "public interest".[2]

Restrictions in the interests of "public order" cannot be imposed merely for the suppression of crime unless there is an element of disorder involved. Thus, it has been held by the Patna High Court[3] that the provisions of the Bihar Maintenance of Public Order Act (5 of 1947) are *prima facie* aimed at persons who are engaged in activities which are likely to lead to public disorder or domestic violence. The persons in view were clearly, according to the Patna High Court, *not* habitual criminals convicted or suspected of committing *thefts*, though habitual criminals were not as such exempt from the provisions of the Act if their detention under the Act was justified not on the ground that they were habitual criminals but on the ground that their detention was necessary in a crisis for the prevention of public disorder.

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[6] 1952 Trav-Co 522 (527) (Pr 16a) [A I R V 39] : I L R (1952) Trav-Co 488 (DB), *Mohammad* v. *The State.*

[7] 1953 Mad 476 (478) (Pr 6) [AIR V 40 C 182]: 1953 Cri L Jour 917, *Narasimha* v. *Dist. Magistrate.*

Article 19 — Note 22

[1] *See* the Constitution (Scheduled Tribes) Order, 1950, made by the President, under Art. 342—General Rules and Orders under the Constitution.—P. 154.

Article 19 — Note 23

[1] 1943 F C 75 (83) [A I R V 30] : 45 Cri L Jour 341 (FC), *Emperor* v. *Sibnath Banerjee.*

[2] *See* 1950 S C 124 (129) (Pr 12) [A I R V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (S C), *Romesh Thappar* v. *State of Madras.* ("Public safety" or "public order" is wider than "security of State" — Law restricting freedom of speech in interests of "public safety" or "public order" was not necessarily covered by the words "matter which undermines the security or tends to overthrow the State" in cl. (2) of this article as it was before its amendment by Constitution (First Amendment) Act, 1 of 1951.)

In *Om Prakash* v. *Emperor*,[4] the Nagpur High Court expressed its opinion that public order would clearly include public safety and public tranquillity. It was held by the Nagpur High Court in that case that S. 2 (1) of the C. P. and Berar Maintenance of Public Order Act, (15 of 1946), providing for the detention of a person, if he is acting in a manner prejudicial to the public safety, order or tranquillity was covered by the expression "public order" in Sch. VII List II, Item 1 of the Government of India Act, 1935. It is submitted with respect that unless there is an element of disorder involved, merely endangering the safety of the public, as for instance by the commission of crimes, would not be a matter of public order, and the Nagpur view is to that extent in conflict with the view of the Patna High Court already referred to.

"Public order" is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have instituted.[5] Thus, the words "public order" are wider than and include the words "security of the State" used in cl. (2), though the words "security of the State" will not include "public order".[6] Hence, it was held, before the amendment of cl. (2) by the Constitution (First Amendment) Act, 1951, that while a restriction on the freedom of speech merely in the interests of public order would be *ultra vires* under cl. (2) as it stood at that time (which did not include "public order" as one of the objects for which restrictions could be imposed on freedom of speech and expression), a restriction in the interests of the security of the State would be *intra vires* under cls. (3) and (4) which authorise restrictions in the interests of "public order" and do not specify "security of the State" as one of the purposes for which restrictions could be imposed.[7] It may be noted

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[3] 1949 Pat 299 (Prs 1, 2, 3) [A I R V 36 C 85] : 50 Cri L Jour 575 (DB), *Lalu Gope* v. *The King*.

[4] 1948 Nag 199 (201) [A I R V 35 C 69] : I L R (1947) Nag 579 : 49 Cri L Jour 230 (DB).

[5] 1950 S C 124 (Pr 7) [AIR V 37 C 7]: 1950 S C R 594: 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras*.

[6] 1950 S C 124 (127) [A I R V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (S C), *Romesh Thappar* v. *State of Madras*. ("Public safety" held to have been used as part of the wider concept of "public order.")

[7] 1950 S C 124 (Pr 10) [A I R V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 514 (SC), *Romesh Thappar* v. *State of Madras*.

Article 19
Notes 23–24

that under cl. (2), as amended by the Constitution (First Amendment) Act, 1951, reasonable restrictions can be imposed by law even on the freedom of speech and expression when such restrictions are called for in the interests of "public order" and not merely in the interests of the "security of the State". As examples of such restrictions on the freedom of speech in the interests of public order, reference may be made to the powers of the police in the interests of law and order in regard to the holding of public meetings, lectures, etc.[8]

See also the undermentioned case.[9]

24. "Restriction" — Meaning of. — Clauses (2) to (6) of this article permit *restrictions* to be imposed on the Fundamental Rights mentioned in this article. The term 'restriction' is wider than the term *regulation.* Restriction may be complete or partial. So even the total prohibition of the exercise of a certain right may be valid under this article if in the circumstances of the case such total prohibition is reasonable for achieving a purpose for which the imposition of restrictions is permissible.[1]

[*See also* 1949 F C 152 (Pr 5) [A I R V 36 C 28] : 50 Cri L Jour 880 (FC), *Rex* v. *Ami Hassan* (U. P. Maintenance of Public Order (Temporary) Act (4 of 1947), S. 3 — Collection of Pakistan coins and secret funds for Hyderabad, or holding of secret meetings with agents of Hyderabad in order to prepare plans against Union of India, can form good ground for detention—Such acts and propaganda may lead to disturbances of public order.)]

[8] *See* (1936) 105 L J K B 71 (73) : (1936) 1 K B 218, *Duncan* v. *Jones.* (Public meeting in street — No actual breach of the peace — Reasonable apprehension of breach — Power of police to prohibit meeting — It is the duty of a police officer to prevent apprehended breaches of the peace.)

(1935) 104 LJKB 572 (574, 575): (1935) 2 K B 249, *Thomas* v. *Sawkins.* (A police officer has *ex virtute officii* a right to enter and remain on private premises where he has reasonable grounds for believing that an offence of breach of peace is likely to be committed—Police have preventive duties and powers.)

(1902) 1 K B 167 (177) . 71 L J K B 165, *Wise* v. *Danning.* (Lecturer may be bound over if there is apprehension of breach of peace as a result of his lectures.)

[*See also* (1949) 336 U S 77 (86) : 93 Law Ed 513, *Kovacs* v. *Cooper.* (Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism.)]

[9] 1953 All 577 (578) (Pr 3) [A I R V 40 C 285] : 1953 Cri L Jour 1358 (DB), *V. G. Deshpandey* v. *City Magistrate.* (Order under S. 144, Criminal P. C. — The question whether there was apprehension of the breach of the peace must be left to the Magistrate—Unless the order passed by a Magistrate under S. 144 is on the face of it absurd or is *mala fide*, there is no reason for the High Court to interfere.)

Article 19 — Note 24

[1] 1952 Orissa 42 (Pr 9) [A I R V 39 C 10] (DB), *Loknath Misra* v. *State of Orissa.* (1896 App Cas 88 (93), Distinguished.)

1951 All 257 (Prs 51, 52, 55, 179) [AIR V 38 C 51] : I L R (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government.* (Motor Vehicles Act not bad though the use of a highway may be prohibited for certain vehicles under it.)

1952 All 491 (Pr 14) [A I R V 39] : 1952 Cri L Jour 910 (DB), *In the matter of Phool Din.* ('Toutism' may be prohibited under the Legal Practitioners Act.)

[*See* 1951 SC 118 (Prs 6, 8) [AIR V 38 C 17]:1950 S C R 759: ILR (1951) Hyd 221 (SC), *Chintamanrao* v. *State of Madhya Pradesh.* (C. P. and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 64 of 1948, in imposing

It has been held in the *Commonwealth of Australia* v. *The Bank of New South Wales*[2] that even the power of *regulation* will include, under some circumstances, the power of prohibition. Their Lordships of the Judicial Committee of the Privy Council pointed out in that case that the power of regulation will normally not include the power of simple prohibition but that under certain circumstances even prohibition might be held to be covered by the power of regulation.

But in considering the reasonableness of a restriction on the exercise of a Fundamental Right, the *extent* of restriction is necessarily a factor and so the question whether there is a *total* prohibition of the exercise of a right is a material question in determining the validity of a restrictive law under this article.[2a]

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total prohibition of carrying on manufacture of bidis during agricultural season arbitrarily interferes with private business and is not reasonable.)]

[*See also* 1952 Nag 353 (354) (Pr 6) [A I R V 39] : I L R (1953) Nag 110 (DB), *S. T. Co.* v. *State of M. P.* (Restriction of use of public way may sometimes amount to complete prohibition or stoppage of use.)

1952 Trav-Co 274(276, 277) [AIR V 39] : ILR (1952) Trav-Co 347, *C. Philiph* v. *Tra.-Co. State.* (Do.)

(1949) 2 All E R 755 (772, 773) : 1950 App Cas 235, *Commonwealth of Australia* v. *Bank of New South Wales.* (Regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure citizens.)

(1949) 336 U S 77 (85) : 93 Law Ed 513, *Kovacs* v. *Cooper.* (All regulatory enactments are prohibitory so far as their restrictions are concerned.)]

[2] (1949) 2 All E R 755 (772-773) : 1950 App Cas 235. (*Australian National Airways Proprietary Ltd.* v. *The Commonwealth,* (1946) A L R 1 : 71 C L R 29, Quoted.)

[2a] *See* 1953 Him Pra 41 (Prs 30, 31 and 33) [A I R V 40 C 19], *Hazari Lal* v. *State of H. P.* (Validity of order directing retail dealers in cloth to carry on business through co-operative societies—*Held* (i) that as the right of doing cloth business was still capable of being exercised despite the order, there was no total deprivation of the right but only a restriction in the exercise thereof, (ii) that the restriction imposed by the order was both reasonable and in the interest of the general public within meaning of Art. 19 (6).)

1953 Nag 58 (Pr 40) [AIR V 40 C 25] : I L R (1952) Nag 770 : 1953 Cri L Jour 481 (DB), *Hiralal* v. *The State.* (Cotton Textiles (Control of Movement) Order (1948), Cl. 3 does not deprive a citizen of the right to dispose of or transport cotton textiles purchased or produced by him but only requires him to obtain a permit, general or special, from the Textile Commissioner to enable him to transport them. The requirement of a permit in this regard cannot be regarded as an unreasonable restriction on a citizen's rights under sub-cls. (f) and (g) of Art. 19 (1).)

1953 Orissa 53 (Pr 8) [AIR V 40 C 23] : 1953 Cri L Jour 544, *Sheonath* v. *State.* (Notification in Department of Supply and Transport — Validity — Object of Notification was to conserve stock of rice in Sambalpur—Notification does not completely prohibit transport of rice but merely says that a permit should be obtained from the authority concerned before any such transport can take place —Considering the nature of the evil sought to be remedied, restrictions imposed were not unreasonable.)

1953 Punj 77 (80) (Pr 8) [AIR V 40 C 26] : 1953 Cri L Jour 549 (DB), *Bishambar Nath* v. *State of Punjab.* (Punjab Intoxicating Spirituous Preparation, Import, Export, Transport, Possession and Sale Rules (1952) — Rules were valid — There is a vast distinction between the actual prohibition and regulation —

Although a law may not in *terms* restrict the exercise of a certain right under this article, if it has the *effect* of doing so, it will be open to challenge.[3]

A *punishment* is not a restriction. An enactment which prescribes a punishment or penalty for bad behaviour or for misconduct of a landlord cannot be regarded as a *restriction* on a Fundamental Right.[4]

25. "Existing law." — As seen in NOTE 20, "existing law," the operation of which is saved under cls. (2) to (6) of the article, includes not only statutory law but also non-statutory law. As applied to statutory law the expression will include any law passed by the Legislature although it may not be actually in force, but may be only partially in force, as where it is provided that a particular law shall come into force from such and such a date and that date has not yet arrived or where it is provided that a particular law shall not apply to a particular area.[1] (Compare ART. 13 (3) (b).)

Under ART. 366 (10), "existing law" includes an order and so a standing order based on custom that no foreigner can live in a certain village without the Deputy Commissioner's permission will be covered by cl. (5).[2]

1951 S C R 682, Disting; (1896) A C 88; 13 A C 446, Rel. on — *Held* that the rules in question are not *ultra vires* of the Constitution as Government was not prohibiting the possession and sale of medicinal drugs which fell within the definition of liquor under Punjab Excise Act. It was merely regulating their possession and sale in general public interest and allowed possession and sale to take place under conditions which were easily understandable and were not oppressive, by means of licences and permits issued.)

1952 Mad 565(Prs 38, 39) [AIR V 39] : ILR (1952) Mad 957 (DB), *Balakrishnan* v. *State of Madras*. (Clause 12 (4) of Cotton Textiles (Control) Order, 1948, imposes an absolute prohibition of acquisition and installation of new looms — Such total prohibition would not be valid having regard to Art. 19 (1) (f) and (g) —Total prohibition unless for a short and prescribed time will be invalid.)]

[3] 1952 S C 115 (Pr 5) [AIR V 39 C 22] : 1952 S C R 572 (SC), *Mohd. Yasin* v. *Town Area Committee, Jalalabad*. (The bye-laws of Town Area Committee do not, in terms, prohibit anybody from dealing in vegetables and fruits. But although, in form there is no prohibition against carrying on any wholesale business by anybody, in effect and in substance the bye-laws have brought about a total stoppage of the wholesale dealers' business in a commercial sense : A I R 1950 S C 163 (SC), Disting.)

[4] 1953 S C 373 (375) [AIR V 40 C 84] (SC), *Raghubir Singh* v. *Court of Wards, Ajmer*. (Provision that a landlord who habitually infringes tenants' rights should be declared "disqualified" to manage his property and that it should be taken over by Court of Wards is not a "restriction"— Further, where the question is left entirely to the subjective determination of an executive officer it is not a 'reasonable' restriction.)

Article 19 — Note 25

[1] *See* 1952 Bom 16 (Pr 19) [A I R V 39 C 2] (DB), *State of Bombay* v. *Heman Santal*. (It would not be true as far as Art. 19 is concerned that the intention of the Constituent Assembly was to save only laws actually in operation and to declare void laws only potentially in force and laws to be made in future.)

[2] 1953 Assam 61 (62) (Pr 4) [AIR V 40 C 24] : I L R (1952) 4 Assam 320 : 1953 Cri L Jour 495, *Dhan Bahadur* v. *The State*. (Longstanding custom in Garo Hills that it is in interest of people there that no Nepali or foreigner should be allowed to live in Garo village without Deputy Commissioner's permission —

(a) Effect of Amendment of cl. (2)

26. Clause (1) (a) — (General). — Sub-clause (a) of cl. (1) guarantees the freedom of speech and expression to every citizen in India. This clause has to be read with cl. (2) of the article under which restirctions may be imposed on the exercise of the right for certain purposes. Under this clause, reasonable restrictions may be imposed by law in the interests of security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. Unless the restriction is for one of the purposes mentioned in the clause and is also reasonable, it would be *ultra vires*.

This clause has been amended by the Constitution (First Amendment) Act, 1951. The provision amending the clause expressly says that the clause will be deemed to have always been in the amended form.

Before amendment, the clause saved only laws relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. Thus, it will be seen that "public order" was not one of the purposes for which the freedom of speech could be restricted under the clause as it stood prior to its amendment. Similarly, incitement to an offence was not made one of the objects in relation to which the right of free expression could be restricted. Hence, it was held in cases, decided before the amendment, that a law restricting the freedom of speech and not relating to defamation or contempt of Court and not also concerned with any offence against decency or morality, would be *ultra vires* unless it related to any matter which undermined the security of, or tended to overthrow, the State. Where the law was capable of being applied to cases where there was no question of the security of the State being jeopardised, it was held that the law was *ultra vires* even though it related to public order or incitement to an offence.[1] These decisions must be

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Deputy Commissioner after due inquiry coming to conclusion that petitioner's living in such village was not in interest of people of the village — Expulsion order passed against petitioner—Order held reasonable and covered by cl. (5) of Art. 19.)

Article 19 — Note 26

[1] 1950 S C 124 (Pr 12) [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras.* (Section 9 (1-A), Madras Maintenance of Public Order Act, 1949, which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under cl. (2), and is therefore void and unconstitutional.)

1950 S C 129 (Prs 19, 20, 25. 26) [AIR V 37 C 8] : 1950 S C R 605 : 51 Cri L Jour 1525 (SC), *Brij Bhushan* v. *State of Delhi.* (Section 7 (i) (c) of East Punjab Public Safety Act (5 of 1949) held invalid as it fell outside reservation of Art. 19 (2) — Public safety and maintenance of public order are not same as 'security of State'.)

1951 Punj 18 (Prs 8, 22, 22a) [AIR V 38 C 6] : 52 Cri L Jour 261 (SB), *Amar Nath* v. *The State.*

1952 Sau 25 (Pr 6) [AIR V 39 C 12] : 1952 Cri L Jour 506 (DB), *State* v. *Hariprasad Jethamal.* (Section 4 (1) (d) of Press (Emergency Powers) Act of 1931 is void; so also S. 4 (1) (f).)

regarded as no longer good law after the amendment *to that extent.* In this connection, reference may be made to the extract from the Statement of Objects and Reasons for the Constitution (First Amendment) Act. 1951, given immediately after the text of this article.

1951 Mad 950 (951) [AIR V 38 C 333] (DB), *Pattammal* v. *Chief Prescy. Magistrate, Egmore.* (Section 3 (1), Press (Emergency Powers) Act (1931), itself cannot obviously be an enactment relating to any matter which undermines the security of and tends to overthrow the State within the meaning of Art. 19 (2) of the Constitution.)

1951 Pat 12 (Prs 11, 12, 12a, 17, 18, 19, 30, 32, 35) [AIR V 38 C 4]: ILR 30 Pat 31: 52 Cri L Jour 309 (SB), *In re Bharati Press.* (Per *Sarjoo Prasad and Ramaswami JJ.*—Incitement to offence is not covered by cl. (2): AIR 1950 SC 124 and AIR 1950 S C 129, Rel. on. NOTE : This interpretation of the Supreme Court decisions was severely criticised as being wrong in AIR 1952 S C 329.)

1951 Punj 27 (Pr 16) [AIR V 38 C 7] : I L R (1951) Punj 193 : 52 Cri L Jour 449 (DB), *Tara Singh* v. *The State.* (Sections 124A and 153A, Penal Code, and S. 24 (a), East Punjab Public Safety Act, 5 of 1949, held void: AIR 1950 SC 129, Foll.)

1951 Sau 9 (Prs 4, 5) [AIR V 38 C 4] : 3 Sau L R 267 (DB), *Indukumar* v. *State.*

[*See* 1951 Cal 36 (Pr 4) [AIR V 38 C 11] : 52 Cri L Jour 458 (DB), *Ramesh Lal* v. *The State.* (The Press (Emergency Powers) Act deals with dangerous utterances and provision is made for demanding security from publishers who are likely to indulge in such utterances. It is a legislation touching very closely sedition and matters of that kind and S. 7 (1), Press (Emergency Powers) Act, requiring security falls within cl. (2) of Art. 19 of the Constitution and therefore is not *ultra vires.*)]

[But see 1951 Mad 70 (Prs 5, 6, 17, 27, 46, 49) [AIR V 38 C 10] (SB), *Srinivasa* v. *State of Madras.* (Per *Govinda Menon and Basheer Ahmed Sayeed JJ.*; *Panchapagesa Sastri J.* Contra.)— Sections 3(3) and 4 (1)(a), Press (Emergency Powers) Act, are not repugnant or inconsistent with the Constitution, but are saved by the reservations contained in Art. 19 (2) of the Constitution, assuming at the same time that, by reason of the exercise of the powers vested in the State Government under S. 3 (3), the right of "freedom of speech and expression" guaranteed by Art. 19 (1) (a) is sought to be curtailed or abridged. Even the incitement or encouragement to a single case of murder, or a single cognizable offence involving violence, might have a tendency to overthrow the State; as for example, if the incitement or encouragement is to commit a cognizable offence or to murder a very high functionary of the State whose disappearance itself might undermine the security of the State, or tend to do so, it cannot be held that such incitement cannot come within cl. (2) of Art. 19. It is very difficult to postulate with any definiteness that the classes of offences mentioned in S. 4 (1) (a) will not undermine the security of the State or may not tend to overthrow it.)

1952 Mad 95 (Prs 5, 6, 8, 10) [AIR V 39 C 47] : I L R (1952) Mad 553, *In re Vengan.* (Section 7, Criminal Law Amendment Act, against picketing of North Indian Shops in Madras upheld as picketing might lead to hatred and strife between South Indians and North Indians and thus undermine security of State.)

1951 Bom 105 (Prs 23, 24, 38, 39) [AIR V 38 C 22] : I L R (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.* (Section 27 of the Industrial Disputes (Appellate Tribunal) Act (1950), does not contravene the right conferred by cl. (1) (a) or cl. (1) (c) of Art. 19 of the Constitution and as such is not *ultra vires* the Constitution. The law which seeks to obtain industrial peace for a limited period by prohibiting strikes cannot be said to be an unreasonable restriction on a right to go on a strike, if such a right was guaranteed by the Constitution. What the Legislature has rendered illegal is to go on a strike during a limited period during which the machinery of conciliation and arbitration is brought into operation and for some time thereafter which is reasonable enough. There has been therefore no abridgment of the right of freedom of expression.)]

Article 19
Note 26

Apart from the amendment, under which restrictions against incitement to offence are expressly permitted, it has been authoritatively held by the Supreme Court in *State of Bihar* v. *Shaila Bala Devi*[2] that even under the unamended cl. (2), restrictions against incitement to crimes of violence were constitutional. In that case which was an appeal from the Patna High Court, a majority of the Special Bench of that Court had held a contrary view. The majority had cited in support of their view the decisions of the Supreme Court in *Ramesh Thappar* v. *State of Madras*[3] and *Brij Bhushan* v. *State of Delhi*.[4] It was pointed out by the Supreme Court on appeal that the above two decisions of the Supreme Court only related to restrictions in the interests of "public order" and did not touch the question of the restrictions against incitement to offence. It was also pointed out that speeches or expressions of an individual which incite to, or encourage, the commission of violent crimes, such as murder, cannot but be matters which would undermine the security of the State and come within the ambit of ART. 19 (2) as it stood prior to the amendment.

(b) Importance of freedom of speech

The importance of freedom of speech and expression guaranteed by this article cannot be overestimated because it lies at the foundation of all democratic governments. In *Romesh Thappar* v. *State of Madras*,[5] Patanjali Sastri, J., observed as follows :

> "Very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected with Madison, who was the 'leading spirit in the preparation of the First Amendment of the Federal Constitution', that 'it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.[6]"

As was held in *Thornhill* v. *State of Alabama*,[7] the safeguarding of freedom of speech and the press to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion, is essential to free government. In *Terminiello* v. *Chicago*,[8] it was held that it is

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[2] 1952 S C 329 (330) [AIR V 39] : 1952 S C R 654 : 1952 Cri L Jour 1373 (SC).

[3] 1950 S C 124 (128) (Pr 10) [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC).

[4] 1950 S C 129 (133) (Pr 19) [AIR V 37 C 8] : 1950 S C R 605 : 51 Cri L Jour 1525 (SC).

[5] 1950 S C 124 (Pr 11) [AIR V 37 C 7]:1950 S C R 594: 51 Cri L Jour 1514 (SC).

[6] Quoted in (1931) 283 U S 697 (717, 718): 75 Law Ed 1357, *Near* v. *Minnesotta.*

[7] (1940) 310 U S 88 (95) : 84 Law Ed 1093 (1098).

[8] (1949) 337 U S 1 (4) : 93 Law Ed 1131 (1134).

Article 19
Note 26

only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. In *De Jonge* v. *Oregon*,[9] Chief Justice Hughes of the Supreme Court of the United States of America, observed as follows:

> "The First Amendment of the Federal Constitution expressly guarantees that right (freedom of speech and press) against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause."

In the same judgment the Chief Justice observed further as follows:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people, through their Legislatures, may protect themselves against that abuse but the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

(c) Freedom of speech under American Constitution— "Rule of clear and present danger"

In the Constitution of the United States of America the express provision as to freedom of speech and press is contained in the First Amendment, which refers to the United States as a whole. The freedom of speech and press, secured by the First Amendment against abridgment by the United States, is similarly secured to all persons by the due process clause in the Fourteenth Amendment against abridgment by a State.[10] Thus, under the Constitution of the United States of America, even in cases where an express provision guaranteeing freedom of speech and press does not apply, a clause which provides that no one shall be deprived of his life, liberty or property without due process of law has been regarded as the foundation of the right of freedom of speech and press also.[11] It is also worthy of note that under the American Constitution there are no express provisions corresponding to those in cl. (2) regarding the restrictions that may be imposed upon the freedom of expression and press. But it is established law under the Constitution of the United States of America that the freedom of expression and press does not mean immunity for any language and that the State has power to restrict such freedom when it is being abused.[12] Thus, in *American Communications Association* v. *Douds*,[13] it was held by the Supreme Court of America :

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[9] (1937) 299 U S 353 (365) : 81 Law Ed 278 (284).

[10] (1942) 308 U S 147 (160) : 84 Law Ed 155 (164), *Schneider* v. *Irvington*.
(1936) 299 U S 353 (365) : 81 Law Ed 278 (284), *De Jonge* v. *Oregon*.
(1925) 268 U S 652 (666) : 69 Law Ed 1138 (1145), *Gitlow* v. *New York*.

[11] (1940) 310 U S 88 (95):84 Law Ed 1093 (1098), *Thornhill* v. *State of Alabama*.
(1939) 307 U S 496 (512):83 Law Ed 1423 (1435), *Hague* v. *Committee for Industrial Organization*.
(1938) 303 U S 444 (450) : 82 Law Ed 949 (953), *Lovell* v. *Griffin*.
(1937) 299 U S 353 (364) : 81 Law Ed 278 (283), *De Jonge* v. *Oregon*.

> "Freedom of speech, press, and assembly are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. Freedom of speech does not comprehend the right to speak on any subject at any time . . . .
>
> "The First Amendment commands that speech may be fought with speech, that falsehoods and fallacies must be exposed, not suppressed, unless there is not sufficient time to avoid the evil consequences of noxious doctrine by argument and education. But force may and must be met with force.
>
> "The freedoms of the First Amendment are not absolute, since civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

But it is recognised that when the right to freedom of expression is abused, it is the abuse that must be checked and the right itself must not be curtailed.[14] So a very strong case for interference with

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(1936) 297 U S 233 (243) : 80 Law Ed 660 (665), *Grosjean* v. *American Press Co.*
(1931) 283 U S 697 (707) : 75 Law Ed 1357 (1363), *Near* v. *Minnesota.*
(1931) 283 U S 359 (368) : 75 Law Ed 1117 (1122, 1123). *Stromberg* v. *California.* [*See also* (1944) 323 U S 516 (529, 530):89 Law Ed 430 (440), *Thomas* v. *Collins.*]

[12] (1931) 283 U S 697 (708) : 75 Law Ed 1357 (1363), *Near* v. *Minnesota.*
(1931) 283 U S 359 (368, 369) : 75 Law Ed 1117 (1123), *Stromberg* v. *California.* (Right of free speech is not absolute and the State may punish its abuse by those who indulge in utterances which incite to violence or crime and threaten the overthrow of organized government by unlawful means.)
(1927) 274 U S 357 (371) : 71 Law Ed 1095 (1104), *Whitney* v. *California.*
(1925) 268 U S 652 (666) : 69 Law Ed 1138 (1145, 1146), *Gitlow* v. *New York.*
(1919) 249 U S 204 (206) : 63 Law Ed 561 (564), *Frohwerk* v. *United States.* (165 U S 275 (281) : 41 Law Ed 715 (717), *Robertson* v. *Baldwin.* Rel. on.)
(1919) 249 U S 47 (51, 52) : 63 Law Ed 470, *Schenck* v. *United States.* (The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force: *Gompers* v. *Buck's Stove & Range Co.*, (1911) 221 U S 418 (439) : 55 Law Ed 797 (805), Rel. on.)

[13] (1950) 339 U S 382 (394, 399) : 94 Law Ed 925 (941, 944).

[14] (1937) 299 U S 353 (365) : 81 Law Ed 278 (284), *De Jonge* v. *Oregon.* [*See* (1937) 301 U S 242 (258) : 81 Law Ed 1066 (1075), *Herndon* v. *Lowry.* (Abridgment is exception and not the rule.)]
[*See also* (1944) 323 U S 516 (530) : 89 Law Ed 430 (440), *Thomas* v. *Collins.* (It is the character of the right, not of the limitation, which determines what

Article 19
Note 26

the right of free speech and expression and freedom of the press is considered as necessary and what has come to be known as the test of "clear and present danger" is applied while judging if a restriction imposed on the freedom of expression and press is valid or not. In *Terminiello* v. *Chicago*,[15] Justice Douglas, delivering the judgment of the Supreme Court, held as *ultra vires* a law which permitted the punishment of a person if he delivered a speech which stirred people to anger, invited public dispute, brought about a condition of unrest. In delivering the opinion, Justice Douglas observed as follows:

> "The right to speak freely and to promote diversity of ideas and programmes is, therefore, one of the chief distinctions that sets us apart from totalitarian regimes.
>
> "Accordingly the function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute (*Chaplinsky* v. *New Hamshire*[16]), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, anger and annoyance. See *Bridges* v. *California*;[17] *Craig* v. *Harney*.[18] There is no room under our Constitution for a more restrictive view, for the alternative would lead to standardization of ideas either by legislatures, Courts or dominant political or community groups."

Similarly, in *Schenck* v. *United States*[19] Justice Holmes of the Supreme Court of America observed as follows:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

So also, in *Thomas* v. *Collins*[20] it was held that clear public interest, threatened not doubtfully and remotely but by clear and present public danger, actual or intended, was necessary for justifying

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standard is to govern the Court's choice between State power and individual freedom of speech and assembly.)]

[15] (1949) 337 U S 1 (4, 5) : 93 Law Ed 1131 (1134).

[16] (1942) 315 U S 568 (571, 572) : 86 Law Ed 1031 (1034, 1035).

[17] (1941) 86 Law Ed 192 (202) : 314 U S 252.

[18] (1947) 331 U S 367 (373) : 91 Law Ed 1546 (1550).

[19] (1919) 249 U S 47 : 63 Law Ed 470 (473, 474).

[20] (1944) 323 U S 516 (530) : 89 Law Ed 430 (440).

Article 19
Note 26

the restriction of the freedom of speech and press. But in the case of utterances inciting to the overthrow of the Government, a stricter rule is applied—see the undermentioned cases.[21]

The right to freedom of speech, however, implies the willingness of the hearer to hear the speech. In *Kovacs* v. *Cooper*,[22] the question was about the constitutionality of a law under which the use of loud-speakers in public streets was prohibited. The law was against the making of loud and raucous noises in public streets. In holding that the law was not *ultra vires*, the Supreme Court of the United States of America observed as follows:

> "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention. This is the phase of freedom of speech that is involved here."

A law imposing restriction on freedom of expression and speech will be *ultra vires* if it is too vague and uncertain.[23] (See also NOTES 5 and 20.) But the question whether the words used in a particular statute are vague and uncertain depends upon the usage with regard to those words and if the words have a well-understood meaning in their daily use they will not be held to be vague and uncertain. Thus, the words "loud and raucous noises" used in a statute, which prohibited the making of such noises in public streets and which was used for prohibiting loud-speakers being used in public streets, were held to have acquired a definite enough meaning in their daily use and therefore were not too vague and uncertain so as to require the statute to be pronounced as *ultra vires*.[24]

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[21] (1925) 268 U S 652 (669, 670) : 69 Law Ed 1138 (1147), *Gitlow* v. *New York*. (That utterances inciting to the overthrow of Government bear no causal relation to any substantive evil, consummated, attempted, or likely, does not render unconstitutional, as applied to them, a statute making penal utterances inciting to such overthrow by unlawful means.)

(1919) 249 U S 47 (51, 52) : 63 Law Ed 470, *Schenck* v. *United States*. (If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, there is no ground for saying that success alone warrants making the act a crime : *Goldman* v. *United States*, (1918) 245 U S 474 (477) : 62 Law Ed. 410 (413), Rel. on.)

[22] (1949) 336 U S 77 (87) : 93 Law Ed 513 (522).

[Compare (1952) 96 Law Ed 1068 (1077) : 343 U S 451, *Public Utilities Commission* v. *Pollak*. (In this case, a street railway company installed in the passenger vehicles receivers and loud-speakers for transmission of radio programmes consisting mainly of music interspersed with commercials—*Held* by a majority of the Supreme Court that this was not precluded by the constitutional guarantee of free speech and due process where the programmes do not interfere substantially with the conversation of passengers.)]

[23] (1949) 336 U S 77 (79, 80) : 93 Law Ed 513 (518, 519), *Kovacs* v. *Cooper*.
(1948) 333 U S 507 (518) : 92 Law Ed 840 (851), *Winters* v. *New York*. (Legislation affecting liberty of speech, e. g., punishment for distribution of magazines "principally made up of criminal news or stories of bloodshed or lust so massed as to become vehicles for exciting violent and depraved crimes against the person", held too vague.)

[24] (1948) 336 U S 77 (79, 80, 81) : 93 Law Ed 513 (518, 519), *Kovacs* v. *Cooper*.

A statute does not violate the guarantee of free speech merely because it requires an affidavit stating the affiant's beliefs in certain subjects. Its validity depends upon the circumstances giving rise to the enquiry and the consequences which flow from his refusal to do so or his disclosure of a particular belief, such as whether he is threatened with the loss of a particular position or with the loss of life or liberty. The public interests at stake in ascertaining one's belief must also be taken into consideration.[25]

See also the undermentioned case.[26] See also NOTE 41.

27. Freedom of the press. — Sub-clause (a) of cl. (1) of this article only refers expressly to freedom of speech and expression and does not expressly mention the freedom of the *press*. But it is settled law that the sub-clause guarantees also the freedom of the *press*. The non-reference to the liberty of the press in the article was merely due to the fact that express mention of the liberty of the *press* was considered unnecessary.[1] In this connection, the remark of Lord Russell of Killowen in *Queen* v. *Gray*[1a] may be recalled. His Lordship said

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[*See also* (1952) 96 Law Ed 1098 (1122) : 343 U S 495, *Burstyn* v. *Wilson.* (In this case, a statute required denial of a licence for exhibiting a film if it was "sacrilegious" — It was held by three of the Judges that the term "sacrilegious" as used in the statute was unconstitutionally vague.)

(1948) 333 U S 507 (518) : 92 Law Ed 840 (851), *Winters* v. *New York.* (Permissible uncertainty in statutes caused by describing crimes by words well understood through long use in criminal law, e. g., "obscene, lewd, lascivious, filthy, indecent, or disgusting"—The unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct is different.)]

25. (1950) 94 Law Ed 925 (949) : 339 U S 382, *American Communications Asso.* v. *Douds.*

26. (1919) 249 U S 47 (51, 52) : 63 Law Ed 470, *Schenck* v. *United States.* (It may well be said that the prohibition of laws abridging the freedom of speech is not confined to previous restraints although to prevent them may have been the main purpose as intimated in *Patterson* v. *Colorado,* (1907) 205 U S 454 (462) : 51 Law Ed 879 (881). In many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights but the character of every act depends upon the circumstances in which it is done : *Aikens* v. *Wisconsin,* (1904) 195 U S 194 (205, 206) : 49 Law Ed 154 (159), Rel. on.)

Article 19 — Note 27

1. 1950 S C 129 (Pr 25) [AIR V 37 C 8] : 1950 S C R 605 : 51 Cri L Jour 1525 (SC), *Brij Bhushan* v. *State of Delhi.*

1951 Mad 70 (Prs 4, 9) [A I R V 38 C 10] (SB), *Srinivasa* v. *State of Madras.* (The term "freedom of speech and expression" would include the liberty to propagate not only one's own views but also the right to print matters which are not one's own but have either been borrowed from someone else or are printed under the direction of that person. The freedom of the press is a guaranteed right under Art. 19 (1) (a) of a citizen who keeps a printing press or is an editor or a publisher.)

[*See also* 1914 P C 116 (124) [AIR V 1] : 15 Cri L Jour 309 (PC), *Channing Arnold* v. *Emperor.* (The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length the subject in general may got so also may the journalist, but apart from statute law his privilege is no other and no higher. The range of his assertions, his criticisms or his comments is as wide as, and no wider than, that of any other subject.)]

1a. (1900) 2 Q B 36 (40).

with reference to the law of contempt of Court: "In this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

The freedom of press includes also the freedom of circulation[2] and so the putting of a ban on the entry of a newspaper or magazine into a State would be an infringement of the right.[3] As observed by Justice Field of the Supreme Court of America in *In the matter of Orlando Jackson*,[4] "liberty of circulating is as essential to the freedom of the press as liberty of publishing; indeed, without the circulation, the publication would be of little value."

The liberty of the press means complete freedom to write and publish without censorship or restriction save such as is absolutely necessary for the preservation of society.[5]

The constitutional guarantee of freedom of press is not confined to newspapers and periodicals but applies also to all publications including pamphlets and leaflets.[6]

It may be noted that the Press (Objectionable Matter) Act, 1951, has repealed the Press (Emergency Powers) Act, 1931, and various other Acts restricting the freedom of the press. The Act of 1951 seeks to bring the statute law regarding the press into conformity with the Fundamental Rights under the Constitution.

28. Pre-censorship. — The imposition of pre-censorship on a journal or newspaper is clearly an infringement of the freedom of the press[1] which is an essential part of the right to the freedom of speech

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[2] 1950 S C 124 (Pr 6) [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras.*
(1948) 333 U S 507 (509) : 92 Law Ed 840 (846), *Winters* v. *New York.*
(1938) 303 U S 444 (452) : 82 Law Ed 949 (954), *Lovell* v. *Griffin.*
(1878) 24 Law Ed 877 (879) : 96 U S 727, *In the matter of Orlando Jackson.*

[3] 1950 S C 124 (Pr 6) [AIR V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras.*

[4] (1878) 24 Law Ed 877 (879) : 96 U S 727.

[5] (1868) 11 Cox Cr Cas 44 (49), *Reg.* v. *Alexander Martin Sullivan.*
[*See also* 1952 Sau 57 (59) (Prs. 7, 8) [AIR V 39] : 1952 Cri L Jour 937 (FB), *Bhanushanker* v. *State.* (Press (Emergency Powers) Act (1931), S. 7 (1) — Section is void under Art. 13 (1) of the Constitution—Section 7 (1) does not lay down any condition within the ambit of which the District Magistrate may exercise the power to require security to be furnished — This power is consequently an unlimited restriction on the Fundamental Rights and is, therefore, repugnant to Art. 19. NOTE. — The Act has been repealed by the Press (Objectionable Matter) Act, 56 of 1951.)]

[6] (1948) 303 U S 444 (452) : 82 Law Ed 949 (954), *Lovell* v. *Griffin.*

Article 19 — Note 28

[1] 1950 S C 129 (Prs 19, 20 26) [AIR V 37 C 8]: 1950 S C R 605 : 51 Cri L Jour 1525 (SC), *Brij Bhushan* v. *State of Delhi.*
1951 Ajmer 100 (Pr 5) [AIR V 38 C 96] : 52 Cri L Jour 1530, *Trilokchand Gopaldas* v. *The State.*
(1938) 303 U S 444 (450, 451) : 82 Law Ed 949 (953), *Lovell* v. *Griffin.* (Law, prohibiting distribution, without permit, of circulars, handbooks, advertising, or literature of any kind, is unconstitutional.)

Article 19
Notes 28–29

and expression declared by sub-cl. (a) of cl. (1). The liberty of the press consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press.[2] On the same principle, if an Act is passed under which a person may be required to obtain the permission of the executive authorities before he makes a particular speech, with no standard prescribed for the exercise of discretion by them, the Act would be *ultra vires.*[3]

As was held in *Burstyn* v. *Wilson*[4] by the Supreme Court of America, censorship is a form of infringement upon freedom of expression to be especially condemned. While the constitutional protection even against a previous restraint is not absolutely unlimited, limitation will be recognized only in exceptional cases. The State has a heavy burden to demonstrate that such a restraint presents an exceptional case.

Under the Press (Objectionable Matter) Act (56 of of 1951) no pre-censorship will be imposed on any newspaper. No action will be taken in anticipation but only after a proved abuse of the freedom of the press by publication of objectionable matter as defined in the Act.

29. Demanding security from the press. — Demanding security from the press is a form of restriction on the freedom of the press which will be *prima facie* unconstitutional as violating the freedom of speech and expression under this article.[1]

(1789) 100 E R 657 Note (661) : 3 T R 428 Note, *The King* v. *Dean of St. Asaph.* (The liberty of the press consists in printing without any previous licence, subject to the consequences of the law.)

[*See* (1931) 283 U S 697 (715, 716): 75 Law Ed 1357 (1367), *Near* v. *Minnesota.* (Constitutional guarantee against previous restraints upon publication is not absolutely unlimited but limitations are recognized only in exceptional cases, such as publications in time of war which would be a hindrance to national effort or obscene publication or publications inciting acts of violence and overthrow by force of orderly government.)]

[*See also* (1948) 334 U S 558 (559, 560) : 92 Law Ed 1574 (1577), *Saia* v. *New York.* (Previous restraint on free speech with no standards prescribed for exercise of discretion by Police Chief bad. Quoted in (1949) 336 U S 77 (82): 93 Law Ed 513, *Kovacs* v. *Cooper.*)]

[2] 1950 S C 129 (Pr 25) [AIR V 37 C 8] : 1950 S C R 605 : 51 Cri L Jour 1525 (SC), *Brij Bhushan* v. *State of Delhi.* (Blackstone's Commentaries, Vol IV, pp. 151, 152, quoted.)

[3] (1949) 93 Law Ed 513 (519, 520) : 336 U S 77 (82), *Kovacs* v. *Cooper.*
(1947) 92 Law Ed 1574 (1577) : 334 U S 558, *Saia* v. *New York.*

[4] (1951) 96 Law Ed 1098 (1107) : 343 U S 495.

Article 19 — Note 29

[1] 1951 Pat 12 (Prs 12, 35) [AIR V 38 C 4] : I L R 30 Pat 31 : 52 Cri L Jour 309 (SB), *In re Bharati Press.* (Per *Sarjoo Prasad and Ramaswami JJ.*)
1951 Mad 950 (Prs 4, 5, 7) [AIR V 38 C 333] (DB), *Pattammal* v. *Cheif Prescy. Magistrate, Egmore.* (A provision like S. 3 (1) of the Indian Press (Emergency Powers) Act cannot be allowed to remain on the statute book after the coming into force of the Constitution. It is inconsistent with Art. 19 (1) (a) and (g) of the

Under the Press (Objectionable Matter) Act, 1951, the Press (Emergency Powers) Act (23 of 1931) has been repealed. Hence the provisions of the latter Act under which security could be demanded when a newspaper is started are no longer in force. Under the new Act security can be demanded only after proof of actual abuse of freedom of the press by publication of objectionable matter; and even then, the demand of security or its forfeiture will not, as under the Act of 1931, be matters to be decided by the *executive*. In every case orders will be passed only by a *judicial* authority after a full trial. A right of appeal to the High Court is also provided.

30. Security of the State. — The security of the State is one of the matters in the interests of which reasonable restrictions can be imposed by law on the freedom of speech under cl. (2). Even in the United States of America, a law authorising the restriction on the freedom of expression and press in the interests of the security of the State is regarded as constitutional. (See also NOTE 26.) For instance, the cases in which the Espionage Act was held to be constitutional and not unduly restrictive of the freedom of expression,[1] may be referred to. (See also NOTE 38.) So also, a law against obstructing recruitment to the army has been upheld as valid although it involved a restriction of the freedom of expression.[2] In time of war, the freedom of speech can be restrained so that the morale of the people and the spirit of the army may not be broken by seditious utterances.[3] (See NOTE 26.) But, as was observed in *Frohwerk* v. *United States*,[4] "we

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Constitution. It is not saved by Art. 19 (2) or Art. 19 (6) : A I R 1950 S C 124 AIR 1950 S C 129 (SC), Rel. on.)

Article 19 — Note 30

[1] (1919) 249 U S 47 (52) : 63 Law Ed 470 (473, 474), *Schenck* v. *United States*. (Conspiracy to obstruct recruiting or enlisting in service of the U. S. when at war by the distribution of a circular tending to incite such obstruction may be made a crime punishable as such.)

(1943) 322 U S 680 (686) : 88 Law Ed 1534 (1538), *Hartzel* v. *United States of America*. (In this case the offence was held not made out.)

(1920) 251 U S 466 (477) : 64 Law Ed 360 (365), *Schaefer* v. *United States*.

(1919) 252 U S 239 (250, 251) : 64 Law Ed 542 (548), *Pierce* v. *United States*. (Violations of Espionage Act—Sufficiency of evidence to support conviction.)

(1919) 250 U S 616 (618, 619) : 63 Law Ed 1173 (1175). *Abrams* v. *United States*.

(1919) 249 U S 204 (206) : 63 Law Ed 561 (564), *Frohwerk* v. *United States*. (Constitutional freedom of speech and press was not infringed by the provisions of the Espionage Act of 1917, under which a person may be convicted for conspiring to obstruct the military recruiting or enlistment in service by words of persuasion in newspaper publication.)

[2] (1919) 249 U S 47 (51, 52) : 63 Law Ed 470, *Schenck* v. *United States*.

[3] (1931) 283 U S 605 (622): 75 Law Ed 1302 (1309), *United States* v. *Macintosh*. [*See also* (1919) 250 U S 616 (627, 628) : 63 Law Ed 1173 (1179), *Abrams* v. *United States*. (Per *Holmes J.* — By the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.)]

[4] (1919) 249 U S 204 (208) : 63 Law Ed 561 (565).

do not lose our right to condemn either measures or men because the country is at war".

Incitement to crimes of violence like murder would undermine the security of the State and a law against such incitement would have been constitutional even under cl. (2) as it stood prior to its amendment by the Constitution (First Amendment) Act (1 of 1951) when it did not expressly include "security of State" as one of the matters in respect of which freedom of speech and expression could be lawfully restrained.[5]

31. Sedition. — The offence of sedition is described in S. 124A of the Indian Penal Code. The first paragraph of that section which contains the definition of sedition runs as follows:

> "Whoever by words, either spoken or written or by signs or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India shall be punished . . . ."

In a case before the amendment of cl. (2) of this article by the Constitution (First Amendment) Act, 1951, it was held by the Supreme Court of India[1] that criticism of Government, exciting disaffection or bad feelings towards it, is not to be regarded as a justifying ground for restricting the freedom of expression and of the press unless it is such as to undermine the security of, or tends to overthrow, the State. Since that decision cl. (2) of the article has been amended by the Constitution (First Amendment) Act, 1951. But this does not make any difference in the position so far as the validity of any provision of law which makes merely the exciting of disaffection or hatred against the Government a ground for restricting the freedom of speech.

In this connection it is worthy of note that sedition does not include as an essential ingredient of it *incitement to disorder*. This was explained by the Judicial Committee of the Privy Council in *Queen Empress* v. *Bal Gangadhar Tilak*,[2] in which it was pointed out that the offence of sedition consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion or any sort of actual disturbance, great or small. This view was emphatically re-affirmed by the Judicial Committee in *Emperor* v. *Sadashiv*.[3] In this case the

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[5] 1952 S C 329 (330) [A I R V 39] : 1952 S C R 654 : ILR 31 Pat 544: 1952 Cri L Jour 1373 (SC), *State of Bihar* v. *Shailabala Devi*.

Article 19 — Note 31

[1] 1950 S C 124 (Pr 11) [A I R V 37 C 7] : 1950 S C R 594 : 51 Cri L Jour 1514 (SC), *Romesh Thappar* v. *State of Madras*. (Deletion of the word 'sedition' from the draft of Art. 13 (2) before the article was finally passed as Art. 19 (2) drawn attention to.)

[2] ('98) ILR 22 Bom 112 (134).

[*See also* ('91) ILR 19 Cal 35 (39) (DB), *Queen Empress* v. *Jogendra Chunder Bose*. (The term 'disaffection' is a wide one and does not necessarily point to a direct incitement to rebellion or any particuler form of force.)]

[3] 1947 P C 82 (Pr 12) [AIR V 34 C 20] : ILR (1947) Bom 110 : 74 Ind App 89 : 48 Cri L Jour 791 (PC).

Judicial Committee overruled the decision of the Federal Court of India in *Niharendu* v. *Emperor*[4] in which it was held that, in order to constitute sedition, the acts or words complained of must either incite to disorder or must be such as to satisfy a reasonable man that that is their intention or tendency. Thus, it is not only clear from S. 124A of the Penal Code but also a matter emphatically established by the highest authority that sedition does not necessarily involve any element of disorder. Hence, even under cl. (2) of this article *as amended*, a law which punishes sedition in the absence of any incitement to disorder or the overthrowing of the State will be void.

In this connection, the decision of the Supreme Court of the United States of America in *Terminiello* v. *Chicago*,[4a] referred to in NOTE 26, may be adverted to as showing that merely causing any amount of discontent is no ground for restricting the right of freedom of speech and expression. It follows that any law even other than the criminal law, as for instance a law relating to the press and printing establishments, which seeks to impose any restrictions on the freedom of press or of expression merely on the basis of any matter exciting hatred or discontent or disaffection against the Government, will be void.[5]

The definition of sedition even in a certain decision under the English law does not require as a necessary ingredient the incitement to disorder or violence.[6] But in a later decision[7] we come across another definition which requires incitement to violence for constituting the offence of seditious libel.

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[4] 1942 F C 22 (26, 27) [AIR V 29] : 43 Cri L Jour 504 (FC).

[4a] (1949) 337 U S 1 (4) : 93 Law Ed 1131 (1134).

[5] 1952 Sau 25 (Pr 6) [A I R V 39 C 12] : 1952 Cri L Jour 506 (DB), *State* v. *Hariprasad Jethalal.* (Press (Emergency Powers) Act (XXIII [23] of 1931). Clause (1) (d) of S. 4 is inconsistent with Art. 19 (1) (a) of the Constitution and does not come within Clause (2) of Art 19. As the clause is capable of including within its ambit many news sheets which may bring into hatred and contempt the Government but at the same time not undermine the security of the State or tend to overthrow it, the clause cannot be held to come within the limits of Cl. (2) of Art. 19. The same argument applies with greater force so far as the validity of sub-clause (f) of S. 4 (1) is concerned : A I R 1950 S C 124 and A I R 1950 S C 129, Foll.; A I R 1951 Mad 70 and A I R 1951 Pat 12, Rel. on. *Note.*—The law is not materially altered even after amendment of cl. (2) of this article, as even under amended cl. (2), liberty of expression cannot be restrained unless there is incitement to *disorder.*)

[6] *See* (1868) 11 Cox C C 44 (45, 49, 50, 51), *Reg* v. *Alexander Martin Sullivan.* (Those writings are seditious libel which are calculated and intended to excite hatred or contempt of the Government or the administration of the law or to violate the Constitution or to promote insurrection or to create discontent or bring justice into contempt or embarrass its functions. The Governments and Courts of justice may form the subject of criticism and censure but corrupt motives are not to be imputed.)

[7] *See* (1909) 22 Cox Cr Cas 1 (3): 74 J P 55, *Rex* v. *Aldred.* (Whoever by language either written or spoken incites or encourages others to use physical force or violence in some public matter connected with the State is guilty of publishing a seditious libel. The test of seditious libel is : was the language used calculated or was it not, to promote public disorder or physical force or violence in a matter of State?)

On the principles discussed in NOTE 7, this article does not affect the validity of laws relating to *total deprivation of personal liberty* as such laws come within the ambit of ART. 21 and not this article. Hence, although "sedition" as such cannot be made a ground for directly restricting the freedom of speech of a citizen the validity of S. 124A of the Penal Code under which *imprisonment* is awardable as a punishment for sedition is not affected by this article.

31a. Promoting enmity between classes. — In so far as a law makes anything an offence punishable with total deprivation of liberty, the validity of such law is not affected by this article (see NOTE 7). Hence, the validity of S. 153A of the Penal Code is not open to question under cl. (1) (a) read with cl. (2) of this article although the section clearly affects the freedom of speech and expression. But where there is no question of punishing for an offence but of directly restraining the freedom of speech of a citizen on the ground of his promoting class hatred, the validity of the law will fall to be determined under cl. (2). (See also NOTE 31.) It will be seen that promoting class hatred is not one of the matters specifically included in cl. (2) of this article as a permissible ground of restriction of freedom of speech. Hence, unless the law relating to promotion of class hatred falls under any other head specifically included in cl. (2), it will not be valid.[1]

32. Friendly relations with foreign States. — Clause (2) of this article authorises legal restrictions on the right of freedom of expression when such restrictions are necessary in the interests of friendly relations with foreign States. In this connection it may be re-called that at the time of the First World War there was considerable agitation in the United States of America against Great Britain and articles used to be published in newspapers and magazines, etc., attacking Great Britain and the tendency of these writings was to create misunderstandings between the two countries and to prejudice the friendly relations existing between them. Such attempts were put down by the State and the action of the State was upheld by the Supreme Court of America as being a restriction on the freedom of expression guaranteed by the American Constitution, which was completely justified under the then existing circumstances.[1]

33. Decency or morality.—The restriction of the right of free speech in the interests of decency or morality is also permitted under

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Article 19 — Note 31a

[1] *See* 1952 Mad 95 (Prs 5, 6, 8, 10) [AIR V 39 C 47] : I L R (1952) Mad 553, *In re Vengan.* (In this case, it was held that picketing of North Indian shops in Madras city by South Indians would create bad blood between North Indians and South Indians and might thereby undermine security of State — Hence, a law under which such picketing was prohibited was valid.)

Article 19 — Note 32

[1] *See* (1919) 249 U S 204 (206) : 63 Law Ed 561 (564), *Frohwork* v. *United States.* (In this case it was held that constitutional freedom of speech and press was not infringed by the provisions of the Espionage Act under which a person may be convicted for conspiring to obstruct the military recruiting or enlistment service by words of persuasion in newspaper publications.)

cl. (2) of this article. So also, under cl. (4) the right to form associations or unions conferred by cl. (1) (c) can be restricted in the interests of morality. This clause and cl. (4) are the only clauses under which *morality* as such is specifically made a matter in the interests of which the Fundamental Rights conferred by this article can be restricted. It is possible, however, that the interests of the general public for the protection of which rights referred to in cls. (5) and (6) may be restricted will also include, on a broad view of the matter, public morality and decency. But in the absence of a broad term like the "interests of the general public" capable of including decency or morality, decency or morality will not be a ground for the restriction of the Fundamental Rights under this article unless it is *specifically* mentioned as such ground.

As a prominent instance of legal restriction imposed in the interests of decency and morals, reference may be made to Chapter XIV of the Indian Penal Code (Sections 268 to 294A) entitled "of offences affecting the public health, safety, convenience, decency and morals". In this chapter there is a section, S. 292, which deals specifically with the sale, etc., of obscene books, etc. The provisions of the section are reproduced below :

"292. Whoever —

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

> "*Exception.*—This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

This section is a typical instance of restriction on the freedom of speech and expression in the interests of morality and decency. Similarly, under S. 294 of the Penal Code, cl. (b), it is an offence for any one to annoy others by singing, reciting or uttering any obscene songs, ballad or words in or near any public place. This is also a very good instance of a law restricting the freedom of expression in the interests of public decency. Similarly, it is conceived that the law relating to nuisances, both civil and criminal, may operate in certain cases in restraint of the freedom of expression if that freedom is abused so as to become a nuisance to the public or to the neighbours. Under English law[1] and in the United States of America also,[2] the restriction of freedom of expression in the interests of public morality and decency is considered a very legitimate restriction.

Apart from the fact that the above sections of the Penal Code relate to decency and morals, their validity is also saved in so far as they are provisions in respect of the *total deprivation of personal liberty*. (See NOTE 7.)

The morality referred to in this article is not an *ad hoc* morality, as for instance the morality of prohibition law forbidding the drinking of liquor by people. Hence, a provision in such law punishing people for commending an intoxicant will be void as an uncalled for restriction on the freedom of expression which is not justified by any demands of morality or decency.[3]

34. Contempt of Court.—Clause (2) expressly permits restrictions on the freedom of speech and expression when such restrictions are imposed by a law relating to contempt of Court. There is no statutory definition of contempt of Court. There is also no definition of contempt of Court in the Constitution. Although the Contempt of Courts Act, 1952, provides for punishment for contempt of Court in certain cases and defines the limits of the powers of the High Courts, the Act does not give any definition of contempt of Court. But this does not preclude

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Article 19 — Note 33

[1] (1868) L R 3 Q B 360 (371, 372) : 37 L J M C 89, *The Queen* v. *Hicklin.* (Obscene publication is criminal—Purity of motive is immaterial.)

(1727) 2 Str 788 (790) : 93 E R 849 (850), *Dominus Rex* v. *Curl.* (Obscene book is punishable as a libel.)

[2] (1948) 333 U S 507 (510) : 92 Law Ed 840 (847), *Winters* v. *New York.* (Constitutional guarantee of freedom of speech and press does not preclude prohibition of what is lewd, indecent, obscene or profane.)

[3] 1951 S C 318 (330) (Pr 27) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (S C), *State of Bombay* v. *F. N. Balsara.* (None of the conditions in cl. (2) applies to the case.)

1951 Bom 210 (Pr 22) [AIR V 38 C 42] : I L R (1951) Bom 17 : 52 Cri L Jour 80 (FB), ***Fram Nusservanji Balasara* v. *State of Bombay.***

the High Courts from exercising their power to punish contempt of Court under the Contempt of Courts Act.[1] It is open to the High Court to draw on the case-law to determine what is contempt of Court.[2]

Thus, we are thrown back upon case-law for ascertaining the limits within which the freedom of speech and expression can be restrained as amounting to contempt of Court. In *Reg.* v. *Gray*,[3] Lord Russell of Killowen C. J. observed as follows:

> "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L. C. characterised as scandalising a Court or a Judge.[4] That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

Lord Russell's observations were quoted with approval by Lord Atkin in *Andre Paul* v. *Attorney-General*,[5] a decision of the Judicial Committee of the Privy Council. For similar important decisions of the

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Article 19 — Note 34

[1] 1950 All 556 (Prs 10, 11) [AIR V 37 C 225] : I L R (1952) 1 All 131 : 52 Cri L Jour 1062 (FB), *State* v. *Brahma Prakash*.

[*See also* 1953 Orissa 249 (252) (Pr 12) [AIR V 40 C 71] : I L R (1953) Cut 283 : 1953 Cri L Jour 1491 (DB), *Bijoyananda* v. *Balakrushna*. (Article 19 does not curtail the right of the High Court to deal with contempt of Courts.)

[2] 1950 All 556 (Prs 10, 11) [AIR V 37 C 225] : I L R (1952) 1 All 131 : 52 Cri L Jour 1062 (FB), *State* v. *Brahma Prakash*.

1953 All 342 (Prs 10, 16) [AIR V 40 C 151] : 1953 Cri L Jour 733 (DB), *Lakhan Singh* v. *Balbir Singh*. (After amendment by Constitution (First Amendment) Act, the restrictions as to contempt of Court have to be "reasonable". (Previously it was not so) But there is nothing unreasonable in the law of contempt as laid down by British and Indian Courts.)

1952 Orissa 318 (Pr 66) [AIR V 39] : I L R (1952) Cut 1 : 1952 Cri L Jour 1605 (DB), *State* v. *E. & P., E. T. & P.* (The definition of 'existing law' in Art. 366 (10) should not be applied to the expression occurring in cl. (2), in so far as it relates to contempt of Court because the context otherwise requires. Hence, existing law must include not only statutory law but the entire law of contempt.)

[3] (1900) 2 Q B 36 (40) : 69 L J Q B 502.

[4] (1742) 2 Atk 469 (471) : 26 E R 683 (684), *In re Read and Huggonson*.

[5] 1936 P C 141 (145, 146) [AIR V 23] (P C).

Privy Council on the law of contempt of Court, see the undermentioned cases.[6]

It is neither necessary nor would it be appropriate to dilate on the law of contempt of Court here any more than it would be appropriate to write a thesis on the law of defamation merely because cl. (2) of this article says that the law of defamation is one of the exceptions to the principle of freedom of expression enacted in this article. But some of the cases on the law of contempt of Court are given in the foot-notes below to illustrate the nature of the subject.[7]

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[6] 1945 P C 147 (150) [AIR V 32] : I L R (1945) Bom 959 : I L R (1945) Kar (P C) 355 : 72 Ind App 226 : 47 Cri L Jour 61 (P C), *Ali Mahomed* v. *Emperor.*
1945 P C 134 (135, 136) [AIR V 32] : 72 Ind App 189 : I L R (1945) Bom 950 : I L R (1945) Kar (P C) 294 (P C), *Parashuram Detaram* v. *Emperor.*

[7] 1943 P C 202 (204, 205) [AIR V 30] : 46 Cri L Jour 318 (PC), *Debi Prasad* v. *Emperor.* (In a newspaper report the Chief Justice of a High Court was untruly alleged to have committed an ill-advised act in writing to his subordinate Judges asking them to collect subscriptions for the War fund. In the proceedings for contempt of Court: *Held* that the proceedings were misconceived. The report did not involve any criticism of the Chief Justice in his administrative capacity and did not amount to contempt known as scandalizing the Court.)
1936 P C 141 (145, 146) [AIR V 23] (P C), *Andre Paul* v. *Attorney General.*
(1946) 328 U S 331 (346, 348) : 90 Law Ed 1295 (1303, 1304), *Pennekamp* v. *Florida.* (In weighing danger of coercion and intimidation of Courts by newspaper criticism of their action, against the right of free speech for the purpose of determining whether such criticism may constitutionally be punished as contempt, freedom of public comment in border line instances should weigh heavily against a possible tendency to influence pending cases. It was held that newspaper editorials intimating bias on the part of Courts towards those who are charged with crime, did not create such a clear and present danger to the administration of justice as to be punishable as contempt consistently with the constitutional right of free speech.)
1941 All 140 (141) [AIR V 28] (DB), *Janak Nandini* v. *Kedar Narain Singh.* (The lower Court is not a Court of record and has no power to punish any one for contempt. It has power only to enforce its order in the manner prescribed by the rules made under the provisions of the Civil P. C.)
(1941) 314 U S 252 (262, 263) : 86 Law Ed 192 (203), *Bridges* v. *California.* (Clear and present danger of substantive evils as a result of indiscriminate publication regarding judicial proceedings justifies restriction of right of free speech and press, only if the evils are extremely serious and the degree of imminence extremely high — A public utterance or publication, merely because it concerns pending judicial proceedings, is not to be denied the constitutional freedom.)
(1928) 44 T L R 301 (302, 303), *Rex* v. *Editor of the New Statesman.* (Observations on distinction between legitimate criticism of a Judge and such an imputation of unfairness and lack of impartiality as constitutes contempt of Court.)
1918 Cal 988 (1001, 1016, 1017) [AIR V 5] : 19 Cri L Jour 530 (S B), *In re Tarit Kanti.* (Criminal and civil contempt distinguished.)
(1911) 221 U S 418 (441, 446) : 55 Law Ed 797 (896, 897), *Gompers* v. *Buck's Stove & Range Co.* (Remedies for civil and criminal contempt.)
('02) I L R 26 Mad 494 (495) (DB), *Kochappa* v. *Sachi Devi.* (A Court which is not a Court of Record has no inherent power to commit for contempt. A District Court is not a Court of Record, and as such has no inherent power to commit for contempt.)
(1900) 2 Q B 36 (40) : 69 L J Q B 502, *Reg.* v. *Gray.* (Publication in a newspaper of an article containing scurrilous personal abuse of the Judge with reference to his conduct as a Judge in a judicial proceeding which has terminated is a contempt of Court.)

In India, the law of contempt of Court is not only based upon case-law but also forms the subject of statutory provisions. The Contempt of Courts Act, 1952, is an important instance of a statutory enactment of the law of contempt of Courts. The validity of the Act is saved by cl. (2) of this article.[8]

There are also provisions of the Penal Code which can be regarded as falling within the ambit of the law of the contempt of Courts. For instance, under S. 228 of the Penal Code, whoever intentionally offers any insult or causes interruption to any public servant while such public servant is sitting in any stage of judicial proceeding, shall be punished with simple imprisonment. Similarly, S. 480 of the Criminal Procedure Code, giving summary powers to a Court to punish a person in certain cases of contempt of its authority, is another instance of a statutory provision for the punishment of contempt.

Article 215 of the Constitution expressly provides that every High Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself. So far as this article is concerned, being a part of the Constitution itself, on the principles discussed under Art. 13, it is not "a law" which is liable to be questioned as being repugnant to the Fundamental Rights. Hence, the limitation on the freedom of speech and expression, which Art. 215 involves, does not require the sanction of cl. (2) of

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('83) I L R 10 Cal 109 (132) : 10 Ind App 171 (P C), *Surendra Nath Banerjee* v. *The Chief Justice and Judges.* (The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court, and the powers of the High Courts to punish it, are the same in such Courts as in England, not by virtue of Penal Code and the Code of Criminal Procedure but by virtue of the Common Law of England.)

('81) I L R 7 Bom 1 (4), *Hassonbhoy* v. *Cowasji Jehangir.* (Under the authority conferred by the Charters of the Supreme Courts and continued by their own Letters Patent, the High Courts in India possess the power of enforcing obedience to their orders by committal for contempt. As regards the High Courts in India, the remedies provided by S. 136 of the Civil Procedure Code (Act X of 1877) in cases of disobedience to an order of Court may be regarded as cumulative. They subject the offender to particular liabilities for his contumacy, but do not extinguish the Court's power of constraining him to obedience.)

('83) I L R 7 Bom 5 (13) (DB), *Navivahoo* v. *Narotamdas Candas.* (Do.)

(1879) 13 Ch D 110 (118) : 41 L T 388, *In re Bishop.* (Violation of injunction — No contempt if the party has *bona fide* believed that in spite of his having received a notice of injunction by telegram, no injunction had in fact been granted and the circumstances show that his belief was reasonable.)

(1873) L R 9 Q B 219 (225) : 28 L T 222, *Onslow's and Whalley's case.* (It is contempt of Court to address public meetings alleging that the defendant is not guilty and that there is a conspiracy against the defendant and that he cannot have a fair trial.)

(1864) 5 B & S 299 (308, 310) : 122 E R 842 (845, 846), *Ex parte Pater.* (Every Court of Record has attached to its jurisdiction, as inherent in it, the power to punish for contempt. The Barrister may be punished for contempt of Court even for language professedly used in the discharge of his function as advocate.)

(1821) 4 B & Ald 329 (334) : 106 E R 958 (960), *The King* v. *Davison.* (A Judge sitting at nisi prius has the power of fining a defendant for contempt committed by him in the course of addressing the jury.)

[8] 1950 All 556 (Prs 10, 11) [AIR V 37 C 225] : I L R (1952) 1 All 131 : 52 Cri L Jour 1062 (FB), *State* v. *Brahma Prakash.*

this article for its validity. Even if it be held otherwise it is clearly a law the validity of which is expressly saved by cl. (2). See also ART. 129 under which the Supreme Court is declared to be a Court of Record having all the powers of such Court, including the power to punish for contempt.

It should be noted that under cl. (2), it is only the law relating to contempt of *Court* that is saved from becoming void as being a restriction of the freedom of speech and expression guaranteed under cl. (1) (a). The law as to contempt of authority of the *legislative bodies* or of *public servants* is not saved under cl. (2).

In so far as there may be any *legislative enactment* defining and punishing *contempt* of Court or other authority with imprisonment, its validity will be saved under ART. 21, apart from the provisions of cl. (2) — See NOTE 7.

35. Defamation. — Clause (2) also exempts from the operation of cl. (1) (a) the law as to defamation. The law of defamation is a definite limitation of the freedom of speech and expression, inasmuch as it makes the expression of defamatory words actionable as a civil wrong and also punishable as an offence. According to the definition of defamation given in Mr. Ramaswami Iyer's LAW OF TORTS, 4th Edn., 1950, p. 244, defamation is the wrong done by a person to another's reputation by words, signs or visible representations. Thus, the wrong is essentially a wrong done through words or expressions and, in so far as defamatory words are made actionable or punishable by law, the law is a restriction on the freedom of speech and expression.

The law of defamation consists of two branches: (1) civil branch and (2) the criminal branch. The civil branch is essentially based on the English Common Law which has been applied in India also as embodying the principles of justice, equity and good conscience, and which is contained in the English and Indian decisions on the subject. The criminal branch is found in Ss. 499 and 500 of the Penal Code. These sections are validated under cl. (2) in spite of their embodying a restriction on freedom of speech and expression.[1] But even apart from cl. (2), the validity of the above sections in the Penal Code would seem to be saved on the ground of their falling under ART. 21 and not this article—See NOTE 7. Even under the clause as it stood before the amendment made by Constitution (First Amendment) Act, 1951, the law of defamation was exempted from the operation of the clause guaranteeing freedom of speech and expression under this article. In the United States of America also, where the freedom of expression is a constitutional right but where there is no express provision similar to cl. (2) specifically exempting the law of libel and slander from the operation of the constitutional provision guaranteeing freedom of speech and expression, such law is not unconstitutional.[2]

Article 19 — Note 35

[1] **1951 Cal 176 (Pr 24) [AIR V 38 C 30 (T)]: 52 Cri L Jour 1422 (DB), *Dr. Suresh Chandra* v. *Punit Goala*.**

[2] **(1931) 283 U S 697 (715): 75 Law Ed 1357 (1367), *Near* v. *Minnesota*. (Punishment for the abuse of the liberty accorded to the Press is essential to the protec-**

Under English law, "defamation" is the generic name for the wrong. "Libel" and "slander" are particular forms of the wrong. The question whether a statement or a representation falls within the one or the other category is important in England and the United States, where a slander unlike libel is not always actionable or punishable. The question is not material in India where both forms are treated alike. Libel is the name given to defamatory statements or representations in writing or otherwise recorded (e. g., by printing, typing, lithography, etc.), while slander denotes defamatory statements or representations which are expressed by one speech or its equivalents. Inasmuch as cl. (1) (a) guarantees not only the freedom of spoken word but also of the written word, both the law as to libel as well as slander would *prima facie* amount to a restriction of the freedom guaranteed by that sub-clause, had it not been saved under cl. (2).

36. Incitement to offence. — Under cl. (2), as it stood before the amendment by Constitution (First Amendment) Act, 1951, it was held in some decisions that a law forbidding or punishing incitement to offence would be void as being an unwarranted restriction on the freedom of speech and expression under cl. (1) (a).[1] (See NOTE 26.) This has been expressly pointed out in the Statement of Objects and Reasons, extracted immediately under the text of this article, for the Constitution (First Amendment) Act, 1951. In order to get over this defect in the provision, incitement to offence has been specifically included in cl. (2) as one of the matters in relation to which a law may impose reasonable restrictions on the freedom of speech and expression. The Supreme Court, however, has held that incitement to murder or other violent crime would necessarily endanger the security of the State and hence a restriction against such incitement would be constitutional even under cl. (2) as it stood prior to its amendment.[2]

Incitement to offence is itself an offence under English law,[3] although the offence incited has not been actually committed.

Under the Penal Code, S. 107, instigation of a person to commit an offence will amount to abetment and such abetment is punishable under the provisions of the Penal Code. Under S. 117 of the Penal

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tion of the public—Common Law rules that subject the libeler to responsibility for the public offence as well as for the private injury are not abolished by the protection extended in the American Constitution. The law of criminal libel rests upon that secure foundation.)

Article 19 — Note 36

[1] *See* 1952 S C 329 (331) [AIR V 39] : 1952 S C R 654: I L R 31 Pat 544: 1952 Cri L Jour 1373 (S C), *State of Bihar* v. *Shailabaladevi*. (Incitement to commit offence of violence, like murder, was before the amendment covered by "security of State" and now it is expressly covered by the amendment.)

[2] 1952 S C 329 (330) [AIR V 39] : 1952 S C R 654: I L R 31 Pat 544: 1952 Cri L Jour 1373 (S C), *State of Bihar* v. *Shailabaladevi*.

[3] (1805) 6 East 464 (472) : 102 E R 1365 (1368), *The King* v. *Philipps*. (Endeavour to provoke another to commit misdemeanour of sending challenge to fight is itself a misdemeanour indictable.)

(1801) 2 East 5 (17, 18): 102 E R 269 (274), *The King* v. *Higgins*. (Soliciting and inciting servant to rob his master is an offence.)

Code, even instigating the public in general to commit an offence is an offence in itself.

37. The film as a medium of expression. — In *R. M. Seshadri* v. *District Magistrate, Tanjore*,[1] it was held by the High Court of Madras that the licensee of a cinema theatre, who exhibits films, cannot be said to be exercising his freedom of *speech and expression* in exhibiting films which he desires to exhibit, inasmuch as he is not exhibiting them either as the expression of his thoughts or ideas or of those borrowed from someone else and adopted by him According to the High Court of Madras, he is doing nothing but carrying on a business. His right to freedom of speech and expression is no more infringed by his being prohibited from exhibiting certain films or by being directed to exhibit certain films than in the case of a book-seller who is prohibited from selling certain books or is directed to sell certain other books.

In the United States of America, it was held in *Mutual Film Corporation* v. *Industrial Commission of Ohio*,[2] that freedom of speech and publication, with responsibility only for abuse, was not violated by the provision for the creation of a board of censors which is to examine and censor as a condition precedent to exhibition of motion picture films which are to be publicly exhibited. But the above view should be treated as superseded by the decision of the Supreme Court in *Burstyn* v. *Wilson*.[3] As to the effect of this decision the following passage from the Annotation in the Lawyer's Edition of the Supreme Court Reports, 96 Law Ed. at p. 1129, may be quoted :

> "Overruling earlier decisions to the contrary, so far as inconsistent, the Supreme Court has now held that motion pictures are within the ambit of the constitutional protection of free speech and press, even though their production, distribution and exhibition is a large-scale business conducted for private profit, and they are designed to entertain as well as to inform, and even though it could be assumed that they possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression.
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> "However, the Court recognised that motion pictures are not necessarily subject to the precise rules governing any other particular method of expression. It is still an open question whether a state may establish a system for the licensing of motion pictures and refuse a license on account of the contents of a picture under a

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Article 19 — Note 37

[1] 1952 Mad 120 (Pr 13) [AIR V 39 C 58] : ILR (1953) Mad 636 (DB). (AIR 1951 Mad 70 (S B), Ref. to.)

[2] (1915) 236 U S 230 (245) ; 59 Law Ed 552 (560).

[3] (1952) 96 Law Ed 1098 (1106) : 343 U S 495 (502). (The Supreme Court ruled that no film can be banned on the ground that is is sacrilegious — Movies had the same constitutional status as other information media and censorship on religious grounds was illegal.)

[*See also* (1947) 334 U S 131 (166) : 92 Law Ed 1260 (1297), *United States* v. *Paramount Pictures, Inc.* (Moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.)]

clearly drawn statute. All that has been squarely decided by the Supreme Court is that a state violates the constitutional guaranty of free speech and press if it bans a motion picture on the basis of a censor's conclusion that it is 'sacrilegious: *Burstyn* v. *Wilson*,[4] or that it is of such character as to be prejudicial to the best interests of the people : *Gelling* v. *Texas*.[5]"

38. Revolutionary movements.— It is clear that any law for putting down revolutionary and subversive movements, or movements and trends for destroying all organized Government is in the interest of the "security of the State". Hence, the validity of such a law will be saved under cl. (2) of this article, although it may restrict the freedom of speech and expression. Even in the United States of America, restriction of the constitutional freedom of speech and expression has been regarded as amply justified if directed against such subversive movements.[1] But if the danger is a remote one, restriction of the freedom of speech and expression will be unconstitutional. Thus, it has been held that applying a penal statute to a political party, one of the doctrines of which, established by reference to a document not exhibited to any one, may be said to be ultimate resort to violence at some indefinite future time against organized Government, is unconstitutional.[2] Similarly, merely because a particular organization advocates the employment of unlawful means to effect industrial or political changes, every meeting held under the auspices of such organization for the discussion of public issues must not be treated as *ipso facto* a danger to organized Government, and if the meeting is held actually for a lawful discussion of public issues, a statute making participation in such meetings unlawful merely because the meeting is held under the auspices of an organization of the above kind will be unconstitutional.[3] See also NOTE 26.

39. Distribution of handbills, etc., in public streets.—In the United States of America the question about the freedom of distributing handbills, pamphlets, leaflets, etc., in public streets has come

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[4] (1952) 96 Law Ed 1098 : 343 U S 495.

[5] (1952) 96 Law Ed 1359 (1359) : 343 U S 960 (960).

Article 19 — Note 38

[1] (1927) 274 U S 357 (371) : 71 Law Ed 1095 (1104), *Whitney* v. *California*.
(1924) 69 Law Ed 1138 (1146, 1147): 268 U S 652, *Gitlow* v. *New York*. (Advocating overthrow of Government by revolutionary mass action etc., is inherently unlawful — State may punish utterances endangering foundations of organized Government and threatening its overthrow by unlawful means.)
[*See also* (1949) 94 Law Ed 925 (951) : 339 U S 382, *American Communications Association* v. *Douds*. (Statute requiring statement of a person's beliefs is not *ipso facto* invalid — Statute requiring disclosure of affiliation with or membership in Communist party—Validity upheld — Statute requiring affiant to state that he does not believe in and is not a member of or supports any organization that believes in or teaches the forceful overthrow of the Government—Validity upheld by equally divided Court.)

[2] (1937) 301 U S 242 (259) : 81 Law Ed 1066 (1076), *Herndon* v. *Lowry*.

[3] (1937) 299 U S 353 (357) : 81 Law Ed 278 (280), *De Jonge* v. *Oregon*.

Article 19
Notes 39-41

up for consideration by the Supreme Court of the United States of America and the right has been treated as part of the right of freedom of expression guaranteed by the Constitution.[1] But the right may be restricted under the general principles according to which the restriction of constitutional liberties has been considered permissible.[2]

40. **Restriction of canvassing, solicitation of business, etc.** — The right to canvass orders or votes is part of the freedom of speech and expression and as such any unreasonable restriction of the right, which is not justified by the Constitution, will be void.[1]

41. **Loudspeakers, ban of.**—In *Kovacs* v. *Cooper*,[1] it was held that the banning of the use of loudspeakers in public streets under a law which prohibited the making of loud and raucous noises in public

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Article 19 — Note 39

1. (1943) 318 U S 413 (414) : 87 Law Ed 869 (871), *Jamison* v. *Texas.* (Law forbidding distribution of handbills on city streets interferes with freedom of press and in the case of handbills containing invitation to participate in religious activity, constitutional guarantee of religious freedom.)

(1946) 326 U S 501 (504, 505) : 90 Law Ed 265 (267), *Marsh* v. *Alabama.* (Distribution of religious literature on private property — Law prohibiting—*Held* to be unconstitutional.)

(1943) 319 U S 141 (149) : 87 Law Ed 1313 (1320), *Martin* v. *Struthers.* (Distribution of literature—Law forbidding person distributing, to ring door-bell or otherwise summon inmates to the door for the purpose of receiving literature is unconstitutional invasion of right of freedom of speech and press, since the law by failing to distinguish between house-holders who are willing to receive the literature and those who are not, is extended further than is necessary for the protection of the community.)

2. (1939) 308 U S 147 (160) : 84 Law Ed 155 (164), *Schneider* v. *Irvington.* (Municipal law for regulating conduct of persons using public streets for the purpose of keeping them open and available for movement of people and property is not *ultra vires,* so long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or distribution of literature—Municipal ordinance which prohibits distribution of leaflets, handbills etc., on public streets is *ultra vires* although the object is to prevent the littering of a street by persons who after receiving the handbills, throw them away.)

[*See* (1942) 316 U S 52 (54) : 86 Law Ed 1262 (1265), *Valentine* v. *Chrestensen.* (Prohibition of distribution in city streets of handbills, held not *ultra vires* in circumstances of the case.)]

Article 19 — Note 40

1. (1945) 323 U S 516 (537): 89 Law Ed 430 (444), *Thomas* v. *Collins.* (Requiring labour organizer to obtain an organizer's card before soliciting membership etc., of union is unconstitutional.)

(1943) 319 U S 105 (108, 109): 87 Law Ed 1292 (1296), *Murdock* v. *Pennsylvania.* (Exacting license fee for house to house canvassing for religious books is unconstitutional.)

(1939) 308 U S 147 (162, 163): 84 Law Ed 155 (165, 166), *Schneider* v. *Irvington.* (Prohibiting door to door canvassing except with the permission of the police is *ultra vires.*)

Article 19 — Note 41

1. (1949) 336 U S 77 (80, 81) : 93 Law Ed 513 (519). ((1948) 334 U S 558 : 92 Law Ed 1574, *Saia* v. *New York,* Distinguished.)

streets was not unconstitutional. The decision proceeded on the ground that freedom of speech necessarily implied the *willingness* of the listener to listen and that this necessarily meant an opportunity to him to choose whether to listen or not. As this opportunity was denied to the listener in the case of loudspeakers employed for advertisement purposes in public streets, it was held that the prohibition of such loudspeakers in public streets was not a denial of the right of free expression and speech. But in *Saia* v. *New York*,[2] a law prohibiting the use of amplifying devices causing sounds upon public streets and public places, except with the permission of the chief of police of the town, without prescribing any standard for the exercise of his discretion, was held to be unconstitutional. The opinion which was delivered by Justice Douglas on behalf of the Supreme Court was based on the ground of pre-censorship or previous restraint on freedom of speech, being unconstitutional. Justice Douglas also observed as follows: "Loudspeakers are to-day indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached." In the same case, however, Justices Frankfurter (with whom Reed and Burton JJ. concurred) and Jackson were for controlling the "aural aggression" caused by these devices. It is not clear what the position would be under this article. Possibly the prohibition of disturbing noises especially at night times or near hospitals and so on might be sustained as a reasonable restriction imposed in the interests of public order.

42. Picketing, prohibition of.—Odham's DICTIONARY describes a 'picket' as a striker posted on guard outside a place of employment during a strike, to dissuade blacklegs or non-unionists from continuing at work. The same Dictionary also gives the meaning of the word 'picket' as a verb, as "to endeavour to dissuade persons from remaining at work by use of pickets". The word 'picket' is also used in common parlance to describe the action of people who station themselves at the entrance of a business house and try to dissuade people from dealing with that business house. It seems to cover all cases where certain people station themselves at a certain place and try to dissuade others from doing something there. It is clear, therefore, that picketers exercise their right of free speech and expression in picketing and any restriction of picketing as such will, therefore, have to be justified as falling under cl. (2) before it can be held as constitutional.

In the United States of America also, the right of picketing is

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[2] (1948) 334 U S 558 (559, 560) : 92 Law Ed 1574 (1577). (This case was distinguished in *Kovacs* v. *Cooper*. (1949) 336 U S 77 : 93 Law Ed 513 (519).)

[*See also* (1951) 96 Law Ed 1068 (1077) : 343 U S 451, *Public Utilities Commission* v. *Pollak*. (Installation in passenger vehicles of street vehicles of receivers and loudspeakers for transmission of radio programmes consisting mainly of music interspersed with commercials—*Held* this was not precluded by the Constitution—*Black J.* : Subjecting passengers to broadcasting of news, public speeches, views or propaganda of any kind, would violate the First Amendment —*Douglas J.*, dissented, holding that "forcing a captive audience" to listen violated the liberty guaranteed by the due process clause.)]

Article 19
Note 42

regarded as involving the freedom of speech and undue restrictions on the right are watched with jealousy.[1]

But even peaceful picketing may be restrained or prohibited in the interests of law and order if members of the picketing party have been guilty of acts of violence and the peaceful picketing is seen to have a coercive effect.[2]

In cases that have come up before the High Courts in India relating to the constitutionality of forbidding of peaceful picketing, the Courts have inclined in favour of the prohibition where the picketing interferes with the lawful exercise of their rights by other persons. Thus, in *Damodar Ganesh* v. *State*,[3] S. 7 (1) of the Criminal Law Amendment Act, 1932, under which peaceful picketing in a mill area during a period of strike was prohibited, was held to be valid and not *ultra vires*. The ground of decision was that the right of free speech and freedom of movement claimed by the picketers conflicted with the right of freedom of carrying on their occupation by the others who wish to work and, therefore, taking into consideration this conflict, the restriction was a reasonable one imposed in the *interests of the general public*. (See NOTE 10.) A similar decision was also arrived at by a learned Judge of the Madras High Court in *In re Vengan*[4] in which his Lordship held that S. 7 of the Criminal Law Amendment Act,

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Article 19 — Note 42

[1] *See* (1943) 320 U S 293 (295, 296) : 88 Law Ed 58 (60), *Cafeteria Employees Union* v. *Angelos*. (Picketing, prohibition of, by law held unconstitutional restriction of freedom of speech—Right to picket cannot be taken away merely because there have been isolated incidents of abuse falling far short of violence occurring in the course of picketing.)

(1942) 315 U S 722 (725) : 86 Law Ed 1143 (1146), *Carpenters and Joiners Union* v. *Ritter's Cafe*. (Right to freedom of speech and to communicate peacefully to the public the facts of legitimate dispute is not lost merely because a labour dispute is involved or because the communication takes the form of picketing.)

(1941) 312 U S 321 (325) : 85 Law Ed 855 (857), *American Federation of Labor* v. *Swing*. (Forbidding resort to peaceful persuasion through picketing is unconstitutional.)]

[*See also* (1940) 310 U S 106 (113) : 84 Law Ed 1104 (1108), *Carlion* v. *State of California*. (Display of banners by picketing made unlawful—No qualification made—*Ultra vires*.)

(1940) 310 U S 88 (98, 99) : 84 Law Ed 1093 (1100), *Thornhill* v. *State of Alabama*. (Statute forbidding loitering or picketing at scene of labour dispute, may be *ultra vires* if it leaves no room for exceptions on the ground of special circumstances justifying the publication of the facts of the dispute.)]

[2] (1941) 312 U S 287 (291, 294) : 85 Law Ed 836 (840, 842), *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*. (Injunction against peaceful picketing does not involve infringement of right of free speech so long as previous acts of violence, neither episodic nor isolated, by members of the picketing union or their sympathisers, give to continued picketing, even though peacefully carried on, a coercive effect—Picketing which is itself peaceful may be coercive when set in a background of violence—Right of peaceful picketing cannot be forfeited merely because of dissociated acts of past violence nor may be enjoined merely because it may provoke violence in others.)

[3] 1951 Bom 459 (Prs 9, 11, 12) [AIR V 38 C 101] : 1952 Cri L Jour 37 (DB).

[4] 1952 Mad 95 (Prs 5, 6, 8, 10) [AIR V 39 C 47] : I L R (1952) Mad 553.

1932, under which certain persons were convicted for picketing of shops owned by North Indians in the city of Madras, was not *ultra vires*. According to his Lordship, not only there was a conflict of Fundamental Rights involved but also, the picketing was calculated to undermine the security of the State itself by creating bad blood between South Indians and North Indians. It is submitted with respect that although the right of *free movement* under sub-cl. (d) of cl. (1) of this article may be restricted by law under cl. (5) in the interests of the general public and the validity of S. 7 of the Criminal Law Amendment Act, 1932, may be sustained on that ground, a restriction on the *freedom of speech* and expression of picketers would not be constitutional unless such restriction was necessary in the interests of *public order*. In this connection, it may also be noted that S. 7 of the Criminal Law Amendment Act, 1932, is more concerned with *acts* of persons than with their words.

43. Restrictions on freedom of speech and expression — Miscellaneous examples. — Requiring a licence from a person engaged in the business of publishing advertisements in any newspaper, magazine, periodical or publication, having a circulation of more than a stated number, has been held in the United States of America to abridge the freedom of the press.[1]

Rustication of a student of a college on the ground that he had issued a handbill containing a scurrilous attack on the authorities of the college was held justified in the undermentioned case.[2] The ground of decision was that there was a conflict of rights in such cases, between the right of free expression of the student and the right of the authorities to maintain discipline in the college and that the exercise of the rights guaranteed by cl. (1) should not infringe the rights of others. (See also NOTE 10.)

44. Clause (1) (b)—(General). — Under cl. (1) (b), the right to assemble peaceably and without arms is guaranteed. The sub-clause has to be read with cl. (3) of this article which permits the right to be restricted by reasonable provisions of law in the interests of public order. It must be noted that restriction in the "interests of the general public" is not permitted under this clause. Therefore, unless the restriction is called for in the interests of public *order*, it will be void. As to the meaning of 'public order', see NOTE 23.

This sub-clause guarantees the right of *assembly*. It must be distinguished from the right to form associations or unions which is guaranteed under sub-cl. (c), subject to the restrictions permissible under cl. (4).

Under the Constitution of the United States of America, First Amendment, the Congress, i. e., the Central Legislature of the United

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Article 19 — Note 43

[1] (1936) 297 U S 233 (244) : 80 Law Ed 660 (666), *Grosjean v. American Press Co.*

[2] 1951 Pepsu 59 (Pr 5) [AIR V 38 C 22] : 2 Pepsu L R 506 : 52 Cri L Jour 403, *Jang Bahadur v. Principal, Mahendra College.*

States, is prohibited from making any law abridging the right of the people peaceably to assemble and to petition the Government for redress of grievances. This provision may be taken to correspond to sub-cl. (b). In cases not covered by the First Amendment, the right of assembly is regarded as protected by the clause against depriving any person of his liberty without due process of law in the Fifth and the Fourteenth Amendments. It has been held in America that the constitutional right of free assembly is infringed by a law requiring a permit to be taken for holding a public meeting in a public street, public parks, public buildings, etc., and authorising a certain officer to refuse the permit for purposes of preventing riots, etc.[1] This view would obviously be untenable under this article because cl. (3) expressly permits restrictions on the right of free assembly in the interests of public order.

It should be noted that sub-cl. (b) only guarantees the right to assemble *peaceably and without arms.* Even in the United States it has been held that American citizens have no right to associate together to drill or parade with arms.[2]

Under the Second Amendment to the Constitution of the United States of America, the right of the people to keep and bear arms has been assured and, therefore, the question of the validity of laws which may be regarded as curtailing this right has arisen.[3] Under the Indian Constitution there is no similar *specific* provision. But the restrictions imposed under the Arms Act have been questioned as violating the Fundamental Right under cl. (1) (f); but their validity has been upheld as being reasonable restrictions imposed in public interest.[4]

45. Right to take procession along highway. — The right to take a procession along a highway has not been expressly made a Fundamental Right under the Constitution. But undoubtedly, it is a *legal* right and possibly it may be treated as a *Fundamental* Right also if it is regarded as an aspect of the right of free assembly guaranteed by sub-cl. (b).

It is conceived that the right of taking a procession along a highway is also an aspect of the right to move freely throughout the

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Article 19 — Note 44

[1] (1939) 307 U S 496 (514) : 83 Law Ed 1423 (1436), *Hague* v. *Committee for Industrial Organization.* ((1897) 167 U S 43 : 42 Law Ed 71, *Davis* v. *Commonwealth of Massachusetts,* Distinguished.)

[2] (1886) 116 U S 252 (266, 267) : 29 Law Ed 615 (619), *Presser* v. *People of Illinois.*

[3] *See* (1939) 307 U S 174 (178) : 83 Law Ed 1206 (1208), *United States* v. *Miller.* (National Fire-arms Act regulating and taxing the transfer of certain types of fire-arms and requiring the registration of such arms by persons possessing them held not unconstitutional.)

[4] 1953 Mad 476 (478) [AIR V 40 C 182] : 1953 Cri L Jour 917, *Narasimha* v. *District Magistrate.*

1953 Madh B 236 (240) (Pr 10) [AIR V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of Madhya Bharat.*

Article 19
Note 45

territory of India guaranteed under sub-cl. (d). Hence, any restriction by law on the right, in order to be valid, will have to be reasonable and in the interests of public order, or in the interests of the general public.[1] See also A. I. R. Commentaries on the Civil Procedure Code, 5th (1951) Edn., S. 9, NOTE 24.

Article 19 — Note 45

[1] *See* 1951 Pat 242 (Pr 8) [AIR V 38 C 48] (DB), *Inderdeo Singh* v. *The State.* (The restriction imposed by the Bihar Maintenance of Public Order Act (3 of 1950), so far as it related to public processions, etc., was not unreasonable.)

[*See also* 1944 P C 33 (34, 35) [AIR V 31] (PC), *Martin & Co.* v. *Faiyaz Husain.* (The rights of the Shia Mahomedans to take out in procession tazias through the public streets are no more and no less than the rights of any member of the public. So, where public rights may lawfully be abridged, so may the rights of the Shias. When the electric company under a licence under the Electricity Act to supply electricity has been given the right to place the electric wires at a height of 20 feet on the public streets, the electric company must be taken to have been given the power to abridge the public right to carry through the streets objects of a greater height and the Shia Muslims would have no right to carry tazias along the public street of a height greater than 20 feet : AIR 1939 All 280, Reversed.)

1925 P C 36 (36, 37) [AIR V 12] (PC), *Sd. Manzur Hassan* v. *Sd. Muhammad Zaman.* (There is a right to conduct a religious procession with its appropriate observances along a highway. Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace; and a suit lies for the declaration of such right. But claim by persons of one sect for the exclusive use of the highway for their worship is untenable : ('77) ILR 2 Bom 457, Overruled.)

1927 Mad 611 (611, 612) [AIR V 14] : 28 Cri L Jour 509, *Venkata Subbaya* v. *Md. Falauddin Khaji.* (Where Hindus of a certain place, in accordance with a decree obtained in their favour, applied for leave to take procession along the streets and the Magistrate passed an order under S. 144, Criminal P. C., forbidding the Hindus to conduct that procession, holding that the likelihood of rioting and bloodshed was too great to allow them to exercise their lawful rights — *Held*, that this was a confession of impotence on the part of the authorities. The District Magistrate is the person who is to look after the peace of his district and naturally in cases of sudden emergency it may be necessary to restrict a person from exercising a perfectly lawful right. But it should not be necessary to prevent that person not only on a particular occasion in the near future, but for all time, from exercising that right, because it would be too much trouble to render him adequate protection against persons who intended to disobey the law. Orders under S. 144 are not intended to be used as a means of depriving the citizens of lawful rights which have been declared by competent Courts.)

(1941) 312 U S 569 (576) : 85 Law Ed 1049 (1054), *Cox* v. *New Hampshire.* (It is not unconstitutional to require license for taking out procession on public street when licensing authority is not invested with *arbitrary* discretion to grant or refuse license and the provision is made only for the purpose of conserving public convenience and arranging for proper police arrangement.)

('83) ILR 6 Mad 203 (222) (FB), *Sundram Chetti* v. *The Queen.* (In affording special protection to persons assembled *for* religious worship or religious ceremonies, the law points to congregational rather than private worship and it may fairly be required of congregations that they should inform the Magistrate or Police at what hours they customarily assemble for worship, in order that the rights of other persons may not be unduly curtailed. No sect is entitled to deprive others for ever of the right to use the public streets for processions, on

46. Clause (1) (c)—(General).—Clause (1) (c) guarantees the right to form associations or unions. This clause has to be read with cl. (4) of this article which permits the imposition of legal restrictions on the right in so far as such restrictions may be reasonably required in the interests of public order or morality.[1]

In *Gompers* v. *Buck's Stove and Range Co.*,[2] Mr. Justice Lamar of the Supreme Court of America observed as follows :

> "Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of working men to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labour unions have been organized.
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> "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a Court of equity. When such appeal is made it is the duty of Government to protect the one against the many as well as the many against the one."

The above passage explains the rationale of permitting reasonable restrictions on the right of forming associations and unions. It is worthy of note that the right of free association is considered so important that the Constitution permits restriction of the right only in the interests of public order or morality and not in the "interests of the general public" which is a very much wider phrase.

The restrictions imposed on the freedom of association must not only be in the interest of public order or morality but must also be reasonable. In *The State of Madras* v. *V. G. Row*,[3] the Supreme Court

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the plea of the sanctity of their place of worship, or on the plea that worship is carried on therein day and night.)]

Article 19 — Note 46

[1] 1952 Cal 901 (905) (Pr 26) [AIR V 39], *Bidhu Bhusan* v. *State of West Bengal.*

[2] (1911) 221 U S 418 (439) : 55 Law Ed 797 (805).

[3] 1952 S C 196 (Prs 16, 19) [AIR V 39] : 1952 S C R 597 : 1952 Cri L Jour 966 (SC). (Confirming on appeal : AIR 1951 Mad 147 (FB).)

[*See also* 1952 Trav Co 217 (223, 224) [AIR V 39] : ILR (1952) Trav Co 1 : 1952 Cri L Jour 1066 (FB), *G. Chadayammury* v. *State.* (Section 3 of the Cochin Criminal Law Amendment Act (1124) oversteps the bounds of permissible legislation and it therefore has to be declared to have become void on the coming into force of the Constitution. Likewise the notifications issued under that section would also become void. The safeguard of a judicial review which is provided in the Act is really illusory. The absence of a provision for proper notice or sufficient publicity and the imposition of a time limit for seeking a review of the Government order or notification by the High Court make that law overstep the bounds of permissible legislation in such a way that Art. 19 (4) held that S. 15 (2) (b) of the Criminal Law Amendment Act, 1908, as amended by the Criminal Law Amendment (Madras) Act, 1950, fell outside the scope of authorised restrictions under cl. (4) of this article and was, therefore, unconstitutional and void. The ground of decision was that the impugned provision imposed *unreasonable* restrictions on the freedom of association. Patanjali Sastri, C. J., in delivering the opinion of the Court observed as follows :

> "The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed . . . . on the exercise of the Fundamental Right under ART. 19 (1) (c) ; for, no summary and what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on Fundamental Rights."

The right to form associations or unions under sub-cl. (c) refers not only to the initial commencement of the association but also to the continuation of the association as such, as it is obvious that if an

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of the Constitution cannot save it. It is an unreasonable restriction on the exercise of the right conferred by Art. 19 (1) (c), and therefore on the coming into force of the Constitution, not only S. 3 of the Act but also the notifications issued under it became void.)

1953 Trav.-Co 174 (Prs 2, 3) [AIR V 40 C 58] : 1953 Cri L Jour 915 (DB), *Krishna Warrier* v. *State.* (Travancore-Cochin Public Safety Measures Act contains no provision for a judicial review of the declaration nor does it provide for a reference to any advisory board. Section 23 of the Act is nothing but a reproduction of S. 16, Indian Criminal Law Amendment Act, with words added to widen its scope and amplitude and contains restrictions which are not in any sense reasonable within the meaning of Art. 19 (4) of the Constitution. Therefore the section and the notification issued under the same declaring the Cochin Communist Party unlawful are *ultra vires* the Constitution : AIR 1952 S C 196, Rel. on.)]

[Compare 1952 Assam 167 (169) (Prs 8, 9) [AIR V 39] : I L R (1952) 4 Assam 18 : 1952 Cri L Jour 1659, *Prabhat Malla* v. *D. C. Kamrup.* (Criminal Law Amendment Act, Ss. 15 and 16—Far from imposing restrictions on a citizen's right given by Art. 19 (1) (c) of the Constitution of India, S. 16 restricts the power of the Provincial Government in the matter of making a declaration by laying down certain requirements for a valid declaration. Assuming that such requirements can be regarded as restrictions on the right of a citizen to form an association, they cannot be regarded as unreasonable. The provisions of association has to be dissolved the moment it has been formed, it cannot be said that the members have the right to form the association.[4]

The freedom to form an association necessarily includes the negative right of not joining an association, inasmuch as a right to form an association necessarily implies the freedom of volition to form or not to form, to join or not to join an association or union. Hence, to compel a person by law to become a member of an association or a union is clearly a violation of his Fundamental Right under sub-cl. (c). This question was raised in *Suryapalsingh* v. *U. P. Government*[5] and it was held that the Act in question in that case was not liable to be impugned on the ground of its coercing or compelling any one to join any association or union against his will.

If a Legislature should enact a law which, while nominally allowing formation of a trade union, makes the right to form a union illusory by preventing the union from doing anything in the interests of the members, then the legislation would be rendering the right, which is guaranteed by this article, illusory and the legislation could be impugned as affecting the Fundamental Right under cl. (1) (c).[5a]

The sub-clause does not refer to statutory bodies like local boards and municipalities. Hence, the supersession of a local board or municipality under the relevant law cannot be deemed as an invasion of the Fundamental Right to form associations or unions under sub-cl. (c).[6] (See also NOTE 48.)

47. Nationalisation of industry. — See NOTE 79.

48. Labour and trade unions.—Sub-clause (c) of cl. (1) expressly guarantees the right to form unions. Hence, the right to form labour unions and trade unions, etc., is specifically and in terms guaranteed by the Constitution.[1] This right of employees to form themselves into unions is recognized in all civilized countries. As was observed by the Supreme Court of the United States of America,[2] "employees have as

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Ss. 15 and 16 cannot, therefore, be held to offend the Fundamental Rights guaranteed by Art. 19 (1) (c).)]

[4] 1951 Mad 147 (Pr 88) [AIR V 38 C 16] : 52 Cri L Jour 515 (FB), *V. G. Row* v. *State of Madras.*

[5] 1951 All 674 (Pr 132) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB). (Under the U. P. Zamindari Abolition and Land Reforms Act (I [1] of 1951), S. 114, no person can be made a member of the Gaon Samaj against his will. Hence there is no contravention of the provisions of Art. 19 (1) (c), Constitution of India.)

[5a] *See* 1951 Bom 105 (Pr 20) [AIR V 38 C 22] : ILR (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.* (Bombay Industrial Relations Act (11 of 1947) does not render illusory the right guaranteed by the Constitution to form trade unions.)

[6] 1952 Cal 901 (905) (Pr 26) [AIR V 39], *Bidhu Bhusan* v. *State of West Bengal.*

Article 19 — Note 48

[1] 1951 Bom 105 (Pr 20) [AIR V 38 C 22] : ILR (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.*

[2] (1937) 301 U S 1 (33) : 81 Law Ed 893 (909), *National Labour Relations Board* v. *Jones & Laughlin Steel Corporation.*

[*See also* (1944) 89 Law Ed 430 (441) : 323 U S 516, *Thomas* v. *Collins.* (The right to discuss and inform people concerning the advantages and disadvantages clear a right to organize and select their representatives for lawful purposes as a corporate employer has to organize its business and select its own officers and agents."

Labour organizations are formed for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners.[3] Any undue restriction of the right of employees to form unions is unconstitutional.[4] But the right conferred by this sub-clause is subject to the provisions of cl. (4) of this article under which reasonable restrictions can be imposed upon the right in the interests of public order or morality. Even under the American Constitution, the State has the power to regulate labour unions with a view to protecting the public interests.[5]

In *Ramakrishniah* v. *President, District Board, Nellore*,[6] the Madras High Court declared it as an unconstitutional and unwarranted interference with the right conferred by this sub-clause to prohibit teachers in recognized elementary schools, etc., from joining any but officially approved teachers' unions. Their Lordships held as follows :

> "Rules contained in a certain Government Order, in so far as they empower the Director of Public Instruction to forbid the existence of, and dissolve, any teachers' union not conforming to the rules and compelling teachers in local board or municipal service to obtain the permission of the board or council concerned before forming unions and in so far as they prohibit teachers in recognized elementary schools from becoming members of teachers' unions or other teachers' organizations not constituted in accordance with the Orders of the Government, should be declared to be void as constituting an abridgment of the right of freedom of association guaranteed by ART. 19 (1) (c) of the Constitution."

Their Lordships of the Madras High Court also observed as follows :

> "It is well established that the exercise of any of the Fundamental Rights, like the right of free speech, right of freedom of religion or the right of freedom of association, cannot be made subject to the discretionary control of administrative or executive

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of labour unions and of joining them is protected, not only as a part of free speech, but as a part of free assembly.)]

[3] (1908) 208 U S 161 (178) : 52 Law Ed 436, *Adair* v. *United States.*

[4] (1944) 89 Law Ed 430 (445) : 323 U S 516, *Thomas* v. *Collins.* (Requiring organizer of labour union to obtain and possess an organizer's card before soliciting membership of union is unconstitutional.)

[Compare (1950) 94 Law Ed 925 (951): 339 U S 382, *American Communications Asso.* v. *Douds.* (Act requiring that as condition of a union's utilizing the opportunities afforded by the Act, each of its officers should file an affidavit with the National Labour Relations Board that he is not a member of the Communist Party or affiliated with such party and that he does not believe in it and is not a member and does not support any organization that believes in or teaches the overthrow of the U. S. Government by force or by illegal or unconstitutional methods—Validity of requirement as to disclosure of membership or affiliation with Communist Party upheld by five Judges.)]

[5] (1944) 89 Law Ed 430 (441) : 323 U S 516, *Thomas* v. *Collins.*

[6] 1952 Mad 253 (254, 255) (Pr 7) [AIR V 39 C 105 (3)]: ILR (1953) Mad 57(DB).

authority which can grant or withhold permission to exercise such right at its discretion. It is equally well established that there cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is in the nature of administrative censorship. The guaranteed freedoms cannot be abridged or abrogated by the exercise of official discretion."

Then their Lordships cited some decisions of the Supreme Court of the United States of America to illustrate this well-established rule. The decisions were, *Lovell* v. *Griffin*,[7] *Hague* v. *Committee for Industrial Organization*,[8] *Schneider* v. *Irvington*,[9] and *Largent* v. *Texas*.[10]

In *Raja Kulkarni* v. *State of Bombay*[11] the High Court of Bombay held that there was nothing in the Bombay Industrial Relations Act (11 of 1947) which renders the right guaranteed by sub-cl. (c) to form associations or unions illusory. The right to form a union, it was held, does not carry with it the right to represent, when there is an industrial dispute, before a conciliator or a Court of voluntary or compulsory arbitration, those persons who are members of the Trade Union. Therefore, it was held that there was no abridgment of the right guaranteed by sub-cl. (c) by reason of Ss. 27A and 30 of the Bombay Industrial Relations Act. At the same time, the Bombay High Court conceded the proposition that if an Act prevented a trade union from doing anything in the interests of the members it would be rendering the right of forming a trade union illusory and so would contravene cl. (1) (c) of this article.

49. Right of businessmen to form combinations. — It is clear under this article that right to form associations has been guaranteed not only in favour of employees but also in favour of employers and traders and merchants, etc. In the United States of America owing to the operation of anti-trust laws, etc., considerable restriction is placed upon trade combinations.[1] It is doubtful how far such restrictions would be valid under cl. (4) of this article, because the clause permits restrictions of the right of forming associations or unions only in so far as they are necessary in the interests of *public order or morality.* Such restrictions may, however, be defended as reasonable restrictions of the right of *carrying on business* under sub-cl. (g), the restrictions being regarded as called for in the interests of the general public under cl. (5) of this article. It might be that while a restriction on the right to form associations and combinations among businessmen might itself be open to attack as unconstitutional under cl. (1) (c) read with cl. (4), such restrictions might be validly applied against objectionable *activities* of such combinations under cl. (6) read with cl. (1) (g).

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[7] (1938) 303 U S 444 (451) : 82 Law Ed 949 (953). (A municipal ordinance prohibiting distribution of circulars, handbooks etc., without permission obtained from the City Manager was held to be invalid because it struck at the very foundation of the freedom of the press by subjecting it to license and censorship.)

[8] (1939) 307 U S 496 (514, 516): 83 Law Ed 1423 (1436, 1437). (A municipal ordinance requiring the obtaining of a permit for public assembly in or upon the public streets, highways etc., was held to be unconstitutional — Roberts J. : Uncontrolled official suppression of the privilege of free speech cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.)

[9] (1942) 308 U S 147 (163, 164) : 84 Law Ed 155 (166). (A municipal ordinance which prohibits canvassing, soliciting and the distribution of circulars or calling from house to house without first having received written permit from the chief of police held bad because the liberty of free speech was made to depend upon the exercise of the police officers' discretion.)

[10] (1943) 318 U S 418 (422) : 87 Law Ed 873 (877). (A municipal ordinance making it unlawful for any person to solicit orders or to sell books, wares or merchandise within the residential portion of a city without first obtaining a permit from the municipal authority was held to be an unconstitutional abridgment of the press and of speech—"Dissimination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form" : Read, J.)

[11] 1951 Bom 105 (Prs 21, 22) [A I R V 38 C 22] : I L R (1951) Bom 318 : 52 Cri L Jour 779 (DB).

50. Supersession of local board, municipality, etc. — In *Bidhu Bhusan* v. *State of Bengal,*[1] the question arose as to the constitutionality of the power given to the State under the Bengal Local Self-Government Act to supersede the local board. It was held that the power of supersession was not *ultra vires.* The ground of the decision was that the right guaranteed by sub-cl. (c) was the ordinary right which is enjoyed by all citizens. It had no reference to the right which was conferred by a particular statute to act as members of a body which was the creation of the statute itself. But even assuming that the members of the superseded board had as such members a Fundamental Right to form an association under the sub-clause, that right was subject to the provisions of cl. (4) under which it might be restricted in the interests of public order. It was held that the term "public order" was wide enough to include and justify the supersession of a local board for incompetency, as such incompetency might lead to public disorder resulting from the mismanagement of the affairs of

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Article 19 — Note 49

[1] "Anti-trust laws are illustrations of social control which aim to further economic progress by enforcing competition : *Northern Securities Co.* v. *United States,* (1904) 193 U S 197 : 48 Law Ed 679 ; *Standard Oil Co.* v. *United States,* (1911) 221 U S 1 : 55 Law Ed 619. Some anti-trust laws have been held unconstitutional because unreasonable in not setting forth a standard of conduct, *International Harvester Co.* v. *Kentucky,* (1914) 234 U S 216 ; *Cline* v. *Fink Dairy Co.,* (1927) 274 U S 445" — From Willis on Constitutional Law of the United States, 1936, p. 757.

[*See also* (1910) 217 U S 433 (443) : 54 Law Ed 826 (831), *Grenada Lumber Co.* v. *Mississippi.* (Freedom of contract not unreasonably abridged by State Act which condemns as a combination in restraint of trades, agreement between retail lumber dealers.)

(1905) 199 U S 401 (409, 410) : 50 Law Ed 246 (249, 250), *Carroll* v. *Greenwich Insurance Company, New York.* (Right of insurance companies not violated by law prohibiting them from entering into combination.)]

Article 19 — Note 50

[1] 1952 Cal 901 (Pr 26) [A I R V 39].

the board. It was further held that the fact that the supersession of the board involved the loss of franchise, which otherwise the members of the board would have, did not also make the power of supersession *ultra vires* on the ground that it affected the right of franchise, inasmuch as that right is not a Fundamental Right under the Constitution.

51. **Secret society.**—In *New York Ex Rel Bryant* v. *Zimmerman*,[1] it was held by the Supreme Court of the United States of America that membership in a secret oath-bound association within a State is not a privilege arising out of citizenship of the United States so as to be protected by the privilege and immunity clause of the Federal Constitution.[2] Hence it was held that it was not unconstitutional to penalise membership of such secret association which has not filed a copy of its constitution, bye-laws, rules, regulations, oath of membership and roster of membership. This principle was applied to the Ku Klux Klan.

52. **Clause (1) (d).** — This clause guarantees to a citizen the right to move freely throughout the territory of India. As stated in NOTE 2, the rights guaranteed by this article are the rights of a *free* citizen. Hence, it is only a free citizen who can claim the Fundamental Right under this clause, namely, the right of freedom of movement throughout the territory of India. When a person is held in detention either after conviction for an offence or as a preventive measure, or otherwise, he necessarily is prevented from moving freely. But sub-cl. (d) does not apply to such a case, because the person whose freedom of movement is thus taken away is not a *free* person to whose rights alone this clause applies. Hence, in the case of such a person under detention, no question arises about the restriction on his freedom of movement being a reasonable restriction imposed in the interest of the general public and validated by virtue of cl. (5) of this article. Conversely, where a person's freedom is not wholly taken away by his incarceration but only a restraint is placed on his freedom of movement, as for instance by interning him in a certain town or district or by externing him from a certain town or district, the validity of such restriction will have to be judged solely under this article and it cannot be treated as the deprivation of personal liberty covered by ART. 21 under which such deprivation will be justified if it is "according to procedure established by law". All these principles have already been discussed in NOTE 2 and NOTE 7 and have been established by the decision of the Supreme Court in *Gopalan* v. *State of Madras*.[1] (See also NOTE 4.)

As will be clear from the above and as also from the principles discussed in NOTE 2, this sub-clause must be read with cl. (5) of this

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Article 19 — Note 51

[1] (1928) 278 U S 63 (71, 72) : 73 Law Ed 184 (189).

[2] The Fourteenth Amendment to the Constitution of U. S. A. provided, *inter alia* : — " No State shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States."

Article 19 — Note 52

[1] 1950 S C 27 (Pr 12) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

article. So read, it will be seen that the State has power to impose reasonable restrictions[1a] on the right of freedom of movement of a free citizen where such restriction is necessary in the interests of the general public or for the protection of the interests of a Scheduled Tribe. The questions as to what will be reasonable restrictions and what matters will be covered by the phrase "the interests of the general public" have already been discussed. (See NOTES 20 and 21.)

This sub-clause may be compared to ARTS. 301 and 302. Under ART. 301, freedom of commerce and intercourse throughout the territory of India is assured. Under ART. 302, Parliament is given power to impose restrictions upon the freedom of trade, commerce or intercourse between one State and another in the public interest. The freedom of inter-State trade and commerce ensured under ART. 301, subject to such restrictions as may be imposed by Parliament by law under ART. 302, is not identical with the freedom to move freely throughout the territory of India which is guaranteed to every citizen of India under sub-cl. (d). The freedom under sub-cl. (d) is of a personal nature and relates to the freedom of movement of the citizen himself personally, while ARTS. 301 and 302 relate to the free movement of merchandise and commerce between one State and another and not of *person.*

This clause is complementary to ART. 5 which establishes a single citizenship for the whole country.[2] The object of the clause is the removal of all internal barriers in the country and to make India as a whole the abode of the citizens of India.[3]

53. "Throughout the territory of India" — (Clause 1 (d)). —As to what constitutes the territory of India, see ART. 1 and the notes thereon. Under SCH. VII, LIST 1, Entry 81, Parliament is given power to legislate about "inter-State migration" and "inter-State quarantine". Had it not been for the provision of this sub-clause and sub-cl. (e) (entitling a citizen to reside and settle in any part of India), Parliament would be able under the above entry to make a law restricting inter-State travel and migration and this power of the Parliament would be absolute and unqualified; but by virtue of sub-cls. (d) and (e) this power of the Parliament is restricted, and although under cl. (5) the Parliament might still make laws under Entry 81 of LIST 1, SCH. VII, the laws will have to be reasonable and in the interests of general public or for the protection of the interests of any Scheduled Tribe. The words "throughout the territory of India" in sub-cl. (d) only indicate that free movement from one State to another within the Union is protected and the power of the Parliament under SCH. VII, LIST 1, Entry 81 is restricted to making reasonable provisions in the public interest under cl. (5). It is thus not a mere expression of the idea of freedom of locomotion incidental to the freedom of the person. Hence, the right guaranteed under this sub-clause is not the right against the total deprivation of personal liberty which forms the subject-matter of ART. 21.[1]

[1a] *See* 1953 Assam 77 (78) (Pr 4) [A I R V 40 C 32] : ILR (1952) 4 Assam 126 : 1953 Cri L Jour 657, *Amrit Bhattacharjya* v. *The State.* (It is not essential that the law imposing restrictions on movements (as distinguished from preventive detention) should contain what are characterised as safeguards such as the advisory board etc. — In the case of preventive detention such safeguards are dictated by Art. 22.)

1953 Punj 52 (55) (Prs 5, 7, 9) [AIR V 40 C 19] : I L R (1952) Punj 362 & 495 : 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi.* (U.P. Goondas Act (1 of 1932) (as modified and extended to the State of Delhi)— So far as the proviso to cl. (2) of S. 5 of the Act makes the representation by a person a matter of discretion with the advising judges, this proviso must be held to infringe the Fundamental Right given by Art. 22 (1) of the Constitution and this infringement is not saved by clause (3) of that Article — Further, there is no reason to justify the exceptional procedure laid down in S. 5 — The procedure cannot be justified on the basis of reasonableness and cl. (5) of Art. 19 of the Constitution cannot be brought in aid of the procedural nature — If S. 5 is to be omitted the whole Act must fail—Therefore, the United Provinces Goondas Act (1 of 1932) (as modified and extended to the State of Delhi) is *ultra vires* of the Constitution, being in violation of the Fundamental Rights set out in Art. 19 (1) (d) and (e), and not being saved by clause (5) of that same article.)

[2] 1952 Trav-Co 274 (276, 277) [AIR V 39] : ILR (1952) Trav-Co 347, *C. Philiph* v. *Travancore-Cochin State.*

[3] 1952 Trav-Co 274 (276, 277) [AIR V 39]: ILR (1952) Trav-Co 347, *C. Philiph* v. *Travancore-Cochin State.*

The words "throughout the territory of India" in this sub-clause were used because the Constitution is not guaranteeing to the citizen any right of free movement outside its territories. It was saving passport restrictions. Further, those words were used to indicate that the Constitution was not giving a citizen any absolute right to enter the territory of India from outside.[2]

Although under this sub-clause the restriction of free movement of citizen between one State and another will be unconstitutional unless it is covered by cl. (5), this does not mean that the movement of a citizen within the limits of the *same* State can be restricted by the State. The expression "throughout the territory of India" does not indicate freedom of movement *only* from one State to another. The expression indicates also freedom of movement within the same State.[3]

54. Externment and internment orders.—When a citizen is ordered to leave a certain area or not to enter a certain area the order

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Article 19 — Note 53

[1] 1950 S C 27 (Prs 8, 46, 59, 65, 174, 222) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *Kania C. J., Mukherjea J.* and *Das J.*—Per *Fazl Ali J.* contra.)

[2] 1950 Cal 274 (Pr 6) [AIR V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunilkumar* v. *West Bengal Government.*

[3] 1950 S C 211 (Pr 22) [AIR V 37 C 16] : 1950 S C R 519 : 52 Cri L Jour 550 (SC), *N. B. Khare* v. *State of Delhi.* (What the Constitution lays stress upon is that the entire Indian territory is one unit so far as the citizens are concerned. Hence the provisions of clause (c) of S. 4 (1), East Punjab Public Safety Act, 1949, authorising the Provincial Government or the District Magistrate to direct any person to remove himself from any area and prohibit him from entering the same represent an interference with Fundamental Right guaranteed by Art. 19 (1) (d) of the Constitution.)

is one of externment. Where an order is not to leave a certain area the order is one of internment. It is obvious that in both cases the citizen's freedom of movement under this sub-clause is curtailed and, therefore, unless such curtailment is justifiable under cl. (5), it is *ultra vires.*[1]

The question of the validity of externment orders and the legal provisions under which the orders were passed has frequently come before Courts. *N. B. Khare* v. *State of Delhi*[2] is one of such cases. It is a decision of the Supreme Court. In that case, the validity of S. 4 of the East Punjab Public Safety Act (5 of 1949), under which an order of externment from a certain area was passed against Dr. Khare, was challenged before the Supreme Court. It was held that the validity of the provision was saved under cl. (5) of this article.

Kania, C. J., pointed out that in considering the reasonableness of the restriction imposed by the law the Court could consider both the substantive part of it as well as the procedural part of it. If the law permitted the externment of a citizen for a period of five years or ten years, his Lordship said, that would be a matter of substantive law and its reasonableness would be obviously open for consideration by the Court. Similarly, the Court could consider the reasonableness of the procedure under which the exercise of the right conferred by this sub-clause was restricted. Mukherjea, J., pointed out that in considering the reasonableness of provisions restricting the right under the sub-clause, Courts were not bound to confine themselves to an examination of the restrictions in the abstract with reference merely to their duration or territorial extent and it was not beyond their province to look at the circumstances under which or the manner in which restrictions were imposed.

It was also held in that case that the fact that under the impugned provision the power to make an order of externment was given to the District Magistrate whose personal satisfaction was final and not open to review by the Court, did not amount to legislative delegation and was not on that ground an unreasonable provision. It was pointed out that the desirability of passing an individual order of externment against a citizen has to be left to an officer and the provision as to the satisfaction of the officer did not impose an unreasonable restriction on the exercise of the citizen's rights. It was pointed out by Mukherjea, J., that the vesting of authority in particular officers to take prompt action under emergent circumstances entirely on their own responsibility or personal satisfaction was not necessarily unreasonable. And hence the

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Article 19 — Note 54

[1] 1952 Pat 376 (Prs 5, 6) [AIR V 39] (DB), *Bodi Alam* v. *State of Bihar.*
1951 Bom 432 (Pr 14) [AIR V 38 C 98] : I L R (1952) Bom 90 : 52 Cri L Jour 1442 (DB), *Hasanalli* v. *State of Bombay.* (Externment order is curtailment of right under cl. 1 (d).)
1951 Cal 3 (Pr 11) [AIR V 38 C 3] (DB), *Khagendra Nath* v. *District Magistrate.*

[2] 1950 S C 211 (Prs 5, 25) [A I R V 37 C 16] : 1950 S C R 519 : 52 Cri L Jour 550 (SC).

Article 19
Note 54

provisions of S. 4 (1) (c) of the East Punjab Public Safety Act could not be pronounced to be unreasonable, simply because the order could be passed by the Provincial Government or the District Magistrate on their own personal satisfaction and not on materials which satisfy certain objective tests.

It was also held by the majority of the Court that the absence of a provision as to the maximum amount of time for which an order of externment could be passed by the Provincial Government did not make the provision necessarily unreasonable in the circumstances.

Supposing under a law a citizen can be excluded from an entire State. Is such a law unreasonable? This question was raised in the undermentioned cases,[3] in which it was contended that if such a law were permitted and if a citizen were excluded by the Government of every State in India from its territory, that would amount to his deportation from India and would be unreasonable as being excessive. The Courts refused to consider such hypothetical possibilities in judging of the reasonableness of legal provisions and held that even a law under which a citizen can be externed from the whole of a State would not necessarily be unreasonable on that ground.

It is obvious that the validity and reasonableness of each Act under which the right under this sub-clause is restricted must be determined with reference to the provisions of that Act and the circumstances bearing upon them and that in such matters there is no hard and fast rule. The judicial decisions in which the validity of such legal provisions has been considered are noted below and the main points in each case also have been noted along with the case.[4]

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[3] 1950 Bom 374 (375) [AIR V 37 C 108] : I L R (1950) Bom 564 : 52 Cri L Jour 1059 (FB), *Abdul Rahiman* v. *Emperor*. (Section 46 (3) of Bombay District Police Act (4 of 1890) not rendered void under Art. 13 read with Art. 19 (1) (d) and (e).)

1951 Assam 106 (Prs 85, 87) [AIR V 38 C 54] : I L R (1951) 3 Assam 181 : 52 Cri L Jour 966 (DB), *Israil Khan* v. *The State*. (The reasonableness of the provisions of Ss. 16 and 17, Assam Opium Prohibition Act (23 of 1947), cannot be questioned on the ground that they enable the authorities to extern a person from the entire State. The reasonableness of the impugned legislation has to be determined on the basis of existing conditions. The Court is not concerned with the situation that might arise if every State were to pass a similar legislation, and to pass a similar order against the person: AIR 1950 Bom 374 (FB), Rel. on.)

[4] 1952 S C 221 (Pr 7) [AIR V 39] : 1952 S C R 737 : 1952 Cri L Jour 1147 (SC), *Gurbachan Singh* v. *State of Bombay*. (City of Bombay Police Act, S. 27 (1)—There can be no doubt that the provision of S. 27 (1) was made in the interest of the general public and to protect them against dangerous and bad characters whose presence in a particular locality may jeopardize the peace and safety of the citizens. The restrictions that this law imposes upon the rights of free movement of a citizen are reasonable and come within the purview of cl. (5) of Art. 19 of the Constitution.)

1950 Bom 374 (Pr 5) [AIR V 37 C 108] : I L R (1950) Bom 564 : 52 Cri L Jour 1059 (FB), *Abdul Rahman* v. *Emperor*. (Section 46 (3), Bombay District Police Act (4 of 1890), has not been rendered void by Art. 13 of the Constitution on the ground that it contravenes the Fundamental Right under Art. 19 (1) (d) and (e). The Act is reasonable—There is provision for externee being heard before authority externing him — There is also provision for appeal — Fact that no time limit is fixed is not by itself unreasonable : AIR 1950 Bom 363 (FB), Distinguished.)

1950 Bom 363 (Pr 11) [AIR V 37 C 107] : I L R (1950) Bom 539 : 52 Cri L Jour 120 (FB), *Jeshingbhai* v. *Emperor.* (Per *Chagla C. J. and Bavdekar J.*; *Shah J.*, Contra—Bombay Public Security Measures Act (6 of 1947) to the extent that it empowers the Government to issue an externment order under S. 2 (1) (b) is void under Art. 13 (1) of the Constitution inasmuch as it imposes a restriction on the Fundamental Rights of the citizen under Art. 19 (1) (d) and (e), such a restriction being an unreasonable restriction.)

1950 Pat 322 (Prs 4, 12) [AIR V 37 C 87]: ILR 29 Pat 461: 52 Cri L Jour 610 (FB), *Brajnandan Sharma* v. *State of Bihar.* (Per *Majority*; *Shearer J.* contra—Section 2 (1) (b), Bihar Maintenance of Public Order Act, 1949 (III [3] of 1950), in so far as it operates to restrict freedom of movement of a free citizen has become void by reason of Art. 13 (1) read with Art. 19 which came into force on 26-1-1950.)

1952 Pat 376 (Prs 5, 6) [AIR V 39] (DB), *Bodi Alam* v. *State of Bihar.* (Bihar Maintenance of Public Order Act, 1949 (3 of 1950)—Externment—Provisions for communicating grounds of order to externee—Externee entitled to make representation—Representation to be considered by Advisory Board—All safeguards fulfilling test of reasonableness—Existence of provision against externment from usual place of residence is not essential criterion of reasonableness.)

1951 All 718 (Pr 33) [AIR V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.* (The restrictions imposed under the U. P. Prevention of Crimes (Special Powers) (Temporary) Act (V [5] of 1949) on free movement and the right to reside and settle anywhere in India are not unreasonable. Externment in the interests of the State and public order is resorted to by all governments. The order of expulsion may be irrevocable but the period of expulsion is limited to one year. Hence the Act is not obnoxious to Art. 19 of the Constitution. Even if it is obnoxious, only that part of S. 3 (2) that is obnoxious would be invalid because it is admittedly severable from the rest of the Act. (Meaning and test of reasonable restriction considered.))

1951 Assam 106 (Prs 74, 75, 79 & 82) [AIR V 33 C 54]: I L R (1951) 3 Assam 181: 52 Cri L Jour 966 (DB), *Israil Khan* v. *The State.* (It cannot be said that in leaving the specification of the period of externment under Assam Opium Prohibition Act (23 of 1947) to the Magistrate whose decision is subject to judicial review and scrutiny, the Legislature acted unreasonably. Hence the validity of the provisions contained in Ss. 16 and 17 are not assailable on the ground that no maximum duration for externment has been fixed: AIR 1950 S C 211 (SC), Foll.; AIR 1950 Bom 374, Rel. on.; AIR 1950 Bom 363 (FB), Disting.)

1951 Bom 432 (Pr 14) [AIR V 38 C 98]:I L R (1952) Bom 90 : 52 Cri L Jour 1442 (DB), *Hasanalli* v. *State of Bombay.* (Section 27 (7) of the City of Bombay Police Act, 1902, which provides that the validity of an order passed under S. 27 shall not be called in question in any Court, except on the specific grounds mentioned in S. 27 (7), is repugnant to the provisions of Art. 226 of the Constitution and is, therefore, void under Art. 13 of the Constitution. Sub-section (7) of S. 27 prevents the High Court from enforcing the Fundamental Rights conferred by Art. 19 (1) (d) and (e) of the Constitution, in cases in which the order is invalid not on the grounds mentioned in S. 27 (7) but on other grounds, e. g., that the order imposes unreasonable restrictions or that it was made *mala fide*. Sub-section (7) is also *ultra vires* of the Constitution because it imposes an unreasonable restriction in the sense that it prevents a person against whom an order of externment has been made from questioning the validity of the order even on the ground that it has not been made in conformity with the provisions of the statute which authorised the making of such an order, or that it was passed *mala fide.*)

1951 Cal 322 (Prs 26, 34) [AIR V 38 C 76] : 52 Cri L Jour 327 (DB), *Tozammal* v. *Government of West Bengal.* (Sections 21 and 22, West Bengal Security Act (1950), make provisions for an extension of the period of externment without

Article 19
Note 55

55. Restrictions on entry into India.—As seen in Note 53, sub-cl. (d) by expressly limiting the right to the territory of India has made it clear that even in the case of citizens of India there is no Fundamental Right to enter India from outside and, therefore, any restriction of such right will not be an invasion of a *Fundamental* Right.[1] But some decisions have proceeded on the basis that even the right of entering India from outside is embraced by this sub-clause but that the imposition of restrictions by the requirement of permits and so on is justified as a reasonable restriction in public interest under cl. (5).[2]

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any provision for (1) intimation to the externee of the grounds of detention, (2) a right of the externee to make a representation against the order of externment, and (3) any procedure or tribunal for consideration of the representation that may be made for the review of the order of externment passed on the externee. Sections 21 and 22 impose unreasonable restrictions on the exercise of the Fundamental Right of a citizen secured by Art. 19 (1) (d) and (e).)

1951 Cal 3 (Prs 20, 26 & 30) [AIR V 38 C 3] (DB), *Khagendra Nath* v. *District Magistrate.* (Section 38 of the West Bengal Security Act (XIX [19] of 1950), which entitles Government to delegate its powers under the Act to any officer subordinate to it irrespective of whether that officer is fit to make such orders is a procedure which is wholly unreasonable and that being so, S. 38 must be held to be *ultra vires* as being beyond the powers given to the State by cl. (5) of Art. 19 of the Constitution. Once S. 38 is held *ultra vires*, there is no longer any power in the Act to delegate and externment orders, unless made by the State Government itself, would be in valid. The West Bengal Security Act (XIX [19] of 1950) cannot be held to be *ultra vires* on the ground that the Act gave the State of West Bengal or persons to whom powers of externment had been delegated, power to extern persons from districts in which they were ordinarily resident.)

Article 19 — Note 55

[1] *See* 1950 Cal 274 (Pr 6) [AIR V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government.* (Article 19 (1) (d) indicates that the Constitution was not giving a citizen an absolute right to enter the territory of India from outside.)]

[2] 1952 All 257 (Prs 34a, 35, 35a, 77, 85) [AIR V 39 C 90 (8)] : I L R (1952) 1 All 513 : 1952 Cri L Jour 553 (DB), *Shabbir Husain* v. *U. P. State.* (Per *Raghubar Dayal J.* — Influx from Pakistan (Control) Act, 1949 is valid — Per *Bhargava J.* Contra — Rule 19 of the Permit System Rules, 1949 and S. 7 of the Act and the order of the Central Government in so far as they are applicable to citizens of India are *ultra vires.*)

1952 Cal 837 (837) (Pr 5) [AIR V 39] : 1952 Cri L Jour 1683 (DB), *Bimala Kanta* v. *State.* (In interests of Indian security reasonable restrictions can well be imposed on the movements of Indian citizens coming from Pakistan.)

1951 Kutch 38 (Pr 4) [AIR V 38 C 25] : 52 Cri L Jour 585, *Mandhara Jakab* v. *Kutch Government.* (The Influx from West Pakistan (Control) Act (1949) does not absolutely bar the right of freedom of movement. It merely imposes a restriction on that right which is both reasonable and in the interest of the public generally consequent upon the partition of the country. The provisions of the Act are therefore not inconsistent with the right under Art. 19 (1) (d).)

1951 Nag 185 (Pr 7) [AIR V 38 C 39] : I L R (1951) Nag 328 : 52 Cri L Jour 74 (DB), *Mohammad Hanif* v. *State of Madhya Pradesh.* (The Influx from Pakistan (Control) Ordinance (1948) was not *ultra vires* of the powers of the Governor-General. So also, S. 7 of the Influx from Pakistan (Control) Act (1949) is not *ultra vires* of the powers of the Legislature in so far as the persons of the Indian domicile are concerned. Further, the restrictions imposed by the Ordinance and the Act by the introduction of permit system, being in the interests of the

56. Clause (1) (d) — Illustrative examples. — As seen in Note 52, this sub-clause is concerned with the movement of citizens personally and not that of goods and that free commerce and intercourse throughout India is assured not under this article but under Arts. 301 and 302. Hence, a restriction on the movement of goods from one area to another is not a matter which is covered by this sub-clause.[1] But, even assuming otherwise, the validity of the provisions will have to be considered under cl. (5) of this article and if they are held to be reasonable restrictions imposed in the public interest, they will be valid.[2]

The use of a public way can be regulated by reasonable restrictions.[3] The reasonable restrictions may in some cases amount to complete prohibition or stoppage of use.[4]

See also the undermentioned cases.[5]

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general public consequent on the partition of the country and reasonable, are not inconsistent with Art. 19 (1) (d) of the Constitution.)

Article 19 — Note 56

[1] 1952 Cal 61 (Prs 7, 8, 9) [AIR V 39 C 19-20], *Indra Narayan* v. *State of West Bengal.* (West Bengal Foodgrains (Movement Control) Order, 1951, is not covered by this clause.)

[2] 1952 Cal 61 (Prs 7, 8, 9) [AIR V 39 C 19-20], *Indra Narayan* v. *State of West Bengal.* (West Bengal Foodgrains (Movement Control) Order, 1951—Even assuming that the effect of cordoning off of certain areas may have an indirect effect on free movement of a citizen, the State is empowered under Art. 19 (5) to enact laws which may impose reasonable restrictions on the exercise of the rights conferred by cls. (d), (e) and (f) of Art. 19 (1) in the interest of the general public. And as the Order has been made in the interest of the general public the restriction imposed on free movement of goods is not an unreasonable restriction on the Fundamental Right of the citizen either under Art. 19 (1) (d) or under Art. 19 (1) (f) or under Art. 19 (1) (g).)

[3] 1952 Nag 353 (354) (Pr 6) [AIR V 39] : I L R (1953) Nag 110 (DB), *S. T. Co.* v. *State of M. P.*

1952 Tra-Co 274 (276, 277) [AIR V 39] : I L R (1952) Tra-Co 347, *C. Philiph* v. *Tra-Co. State.*

[4] 1952 Nag 353 (354) (Pr 6) [AIR V 39] : ILR (1953) Nag 110 (DB), *S. T. Co.* v. *State of M. P.*

1952 Trav-Co 274 (276, 277) [AIR V 39] : ILR (1952) Trav-Co 347, *C. Philiph* v. *Trav-Co. State.* (The Fundamental Right to move freely throughout the territory of India does not mean the use of any particular road for that purpose.)

[5] 1951 Bom 210 (Pr 23) [AIR V 38 C 42] : ILR (1951) Bom 17 : 52 Cri L Jour 80 (FB), *Fram Nusservanji Balsara* v. *State of Bombay.* (Clauses (b) and (c) of S. 136 (2) of the Bombay Prohibition Act (25 of 1949) are void as offending against cls. (d) and (e) of Art. 19, the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India, as it cannot be said that the restrictions imposed by these provisions are reasonable restrictions in the interest of the general public.)

1953 All 613 (616) (Pr 14) [AIR V 40 C 306] : 1953 Cri L Jour 1384 (DB), *Bimla Debi* v. *Chaturvedi.* (Restoration under Abducted Persons (Recovery and Restoration) Act (1950) to the relatives of the abducted persons does not amount to deportation of citizen against his wishes and is not repugnant to cls. (1) (d) and (e): AIR 1952 All 257 held not applicable.)

1953 Mad 664 (Prs 13 to 16) [AIR V 40 C 254]: ILR (1953) Mad 937: 1953 Cri L Jour 1174 (DB), *P. Arumugham* v. *State of Madras.* (Madras Restriction of Habitual Offenders Act (6 of 1948), S. 5—Though the Act undoubtedly imposes

57. Clause (1) (e). — This clause entitles a citizen to reside in any part of the country and this right cannot be abridged except by reasonable restrictions imposed in public interest.[1] Thus, S. 9 (1) of the Bombay Prevention of Prostitution Act (11 of 1923), under which the authorities of the Government are given power to evict persons from places or houses believed to be used for purposes of prostitution, has been held to be *ultra vires* as imposing an unreasonable restriction on the rights under this clause and cl. (d).[2] The ground of decision was that it gives absolute power to the Commissioner of Police or the District Magistrate to decide that a particular place is being used for the business of common prostitution without giving an opportunity to the party affected to be heard in his or her defence, and to order him or her to leave the place and to go to some other place that may be specified.

It must be noticed that this clause is only concerned with the right to reside and settle in any part of India. It is not concerned with the right to carry on a business in any part of India. Hence, it is conceived that a rule or a municipal bye-law prohibiting the carrying on of a business in a residential locality will not be open to question as a violation of the right under this sub-clause. In any case, such a restriction might be upheld as being reasonable and in the general public interest.

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restrictions on the right of free movement of habitual offenders, the validity of the impugned provisions must be upheld as reasonable because of the purpose behind such restrictions. The restrictions imposed by Ss. 5, 6 and 16 (1) are reasonable and in the interests of the general public.)

1952 Madh B 114 (Prs 18, 19) [AIR V 39] : ILR (1952) Madh B 364 : 1952 Cri L Jour 1058 (DB), *State* v. *Motilal*. (United State of Gwalior, Indore and Malwa (Madhya Bharat) Maintenance of Public Order Act (7 of 1949), S. 3—Restrictions are unreasonable and therefore void.)

1952 Sau 124 (125) (Pr 3) [AIR V 39] : 1953 Cri L Jour 21 (DB), *Sanghar Umar* v. *State*. (Nawanagar Pass Hajari Dhara Act (Smt. 2003). The important restrictive provisions of the Act, namely, Ss. 4, 5, 6, 10, 11, 13 and 14, impose restrictions not depending upon the individual propensities of the persons to whom the Act has been applied. Since a person who might not have committed a single offence and might be living a pure life could legally be subjected to the restrictions as a result of the provisions of the sections and since no public interest can be served by subjecting a person to the severe restrictions undeservingly, these sections are void and of no effect as being in contravention of the provisions of Art. 19 (1) (d) and (e).)

1951 Bom 337 (338, 339) (Prs. 3, 5) [AIR V 38 C 72] : ILR (1951) Bom 621 : 52 Cri L Jour 897 (DB), *In re Shantabai*. (Section 9 (1), Bombay Prevention of Prostitution Act, imposes unreasonable restrictions on the rights under Art. 19 (1) (d) and (e).)

Article 19 — Note 57

[1] 1953 Assam 61 (62) (Pr 4) [AIR V 40 C 24] : ILR (1952) 4 Assam 320 : 1953 Cri L Jour 495, *Dhan Bahadur* v. *The State*. (Garo Hill village —There was a custom on which an old standing order was based, that no Nepali or foreigner should live in the village without Deputy Commissioner's permission — Deputy Commissioner ordering petitioner to leave village within a certain time — Order based on petition of villagers that he was undesirable character— Order valid.)

[2] 1951 Bom 337 (Prs 3, 5) [AIR V 38 C 72] : ILR (1951) Bom 621 : 52 Cri L Jour 897 (DB), *In re Shantabai*.

Article 19
Note 58

58. Clause (1) (f).—This clause guarantees to a citizen of India the right to acquire, hold and dispose of property. The clause has to be read with cl. (5) under which reasonable restrictions may be imposed by law on the exercise of the right, in the interests of the general public or for the protection of the interests of any Scheduled Tribe.[1] What is intended to be conveyed by the phrase "interests of the general public" has been discussed in NOTE 21 and what will amount to reasonable restrictions of Fundamental Rights has generally been discussed in NOTE 20. For meaning of Scheduled Tribe, see NOTE 22.

Under the Constitution of the United States of America, what may be regarded as provisions corresponding to this clause are contained in the general provision in the Fifth and the Fourteenth Amendments against any one being deprived of his life, liberty or property without due process of law.

Under ARTS. 31, 31A and 31B, there are other provisions relating to the right of property of a person. (See NOTE 8.)

Under the Government of India Act, 1935, S. 298, no subject of His Majesty domiciled in India could be prohibited, on grounds solely of religion, place of birth, descent, colour or any of them, from acquiring, holding or disposing of property. This general provision was, however, subject to exceptions contained in S. 298 (2) under which the validity of laws and customs in restraint of alienation of agricultural land was recognised in certain cases and there were also certain other exceptions recognized to the general rule already referred to.

The idea behind the right given by this clause is that of individualism and private property. It means that a man is free to acquire any property (including means of production) either by inheritance, personal earning or other lawful means, to hold it as his own and to dispose of it, limited only by the exigencies of public welfare.[1a]

The law of India has long recognised *benami* transactions. So, A may obtain a transfer of certain property in B's name instead of directly in his own name. A restriction on or a prohibition of this right of A is also a restriction upon his right to acquire property.[2]

From the examination of this clause read with cl. (5) and ART. 31 cls. (1), (2) and (3), it is clear that no property can be acquired or taken possession of, nor any restraint, reasonable or otherwise, be imposed on the proprietary rights of any person in the interest of any *individual* or individuals, restrictions being permitted only in the

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Article 19 — Note 58

[1] 1953 Madh B 236 (239) (Pr 8) [AIR V 40 C 88] : 1953 Cri L Jour 1109 (DB), *Mohendra Bahadur* v. *State of M. B.*

[1a] 1952 Mad 11 (Pr 25) [AIR V 39 C 2] : ILR (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran.*

[2] 1942 F C 38 (41, 42, 43, 44, 46, 47) [AIR V 29] (FC), *Punjab Province* v. *Daulat Singh.* (Benami sale for benefit of a third person — Law prohibiting such sale would be in contravention of right to acquire, etc. property — Case under S. 298 (1) of Government of India Act, 1935.)

interests of the *general public.* Hence, if by any legislative enactment property of A is transferred to B, such enactment will not be valid.[3]

Any *restraint* short of total deprivation of property will be a restriction within the meaning of cl. (5) of this article and will have to comply with the requirements of that clause.[4] The general interests of the public require that every citizen should have reasonable security to hold such property and where a law takes away such reasonable security, it cannot be said to be one in the interests of the general public.[5]

The effect of the Constitution is not to enlarge the proprietary right or any other right in property of a citizen as such right was before the Constitution. Where the *right itself* is of a limited character, it would remain so despite coming into force of the Constitution.[6] Where a right in respect of property is the creature of statute, it must be taken along with the limitations imposed by the statute.[7]

59. "Property." — The word "property" as used in this clause has the same meaning as in ART. 31.[1] The term includes every possible interest which a party may have in property.[2] It includes both movable and immovable property.[2a] A decree of a Court may amount to property.[3]

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[3] 1952 Pat 166 (Pr 26) [AIR V 39 C 55 (12)] : I L R 30 Pat 1085 (DB), *Bankey Singh* v. *Jhingan Singh.*

[4] 1952 Cal 273 (Pr 36) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.*

[5] 1952 Sau 59 (Prs 5, 10, 15) [AIR V 39] (SB), *Jayantilal* v. *State of Saurashtra.*

[6] 1953 Nag 51 (Pr 17) [AIR V 40 C 23] : ILR (1952) Nag 808 (DB), *Laxman* v. *D. F. Officer.* (Right to collect and appropriate tendu leaves conferred by Land Tenure Order was a qualified right.)

1952 Him Pra & B 42 (43) [AIR V 39], *Hoshiar Singh* v. *Kowla.* (The restrictions on the widow's power of disposal of property do not amount to the infringement of any of the Fundamental Rights under the Constitution and are not void under Art. 13 (1).)

[7] 1953 Mad 351 (355) [AIR V 40 C 120], *Dr. K. C. Nambiar* v. *State of Madras.* (Rent control law — Right of tenant to continue in possession until evicted in accordance with provisions of the Act — Provision in the Act empowering Government to exempt any property from the provisions of the Act is an incident of the right and is not an unreasonable restriction on it.)

1953 Nag 51 (Pr 17) [AIR V 40 C 23] : ILR (1952) Nag 808 (DB), *Laxman* v. *D. F. Officer.* (Right to collect tendu leaves conferred on raiyat by Land Tenure Order.)

Article 19 — Note 59

[1] 1951 Bom 86 (Pr 6) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.*

[2] (1835) 5 L J Ch 87 (90), *Jones* v. *Skinner.*

[2a] 1951 S C 318 (328) (Pr 24) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.* ("Liquor" is "property" within meaning of cl. (1) (f) — Prohibition of sale, purchase, possession, consumption and use of liquor is invalid unless it is justifiable under cl. (5).)

1953 Mad 476 (477) (Pr 5) [AIR V 40 C 182] : 1953 Cri L Jour 917, *Narsimha* v. *Dist. Magistrate.* (It includes a gun — What constitutes "property" explained.)

[3] 1951 Hyd 1 (Prs 21, 22, 23) [AIR V 38 C 1] (FB), *Mahbub Begam* v. *Hyderabad State.* ((Hyderabad) Wali-Ud-Daula Succession (Decision of Disputes) Act (16 of 1950)—Rights under decree obtained by certain persons taken away — Provisions void.)

The property, which is contemplated by this clause, is obviously property which can be acquired, held and disposed of. A village office like that of Karnam, which is held on a precarious tenure—the holder of the office being liable to be removed at any moment lawfully from office—cannot be said to be property.[4]

A mere right to collect revenue is not property.[5] The right of the Dharmakarta of a temple or the Head of a Math with beneficial interest in the property of the temple or the Math is property.[6]

A land owner, although entitled to bore a well for natural gas or oil, has no title to these substances as owner until they are actually reduced by him to possession.[7]

It has been held that this clause in guaranteeing the rights of property does not guarantee that the conception of property shall ever remain the same. What is today regarded as a legitimate object of property may cease to be so regarded tomorrow. The clause does not contain any guarantee against this. Thus, it has been held that liquor, according to existing ideas in States, in which prohibition law operates, has ceased to be a legitimate object of property and any restriction with regard to its acquisition, etc., will, therefore, be quite constitutional.[8]

See also the undermentioned cases.[9]

[*See* 1953 Pat 259 (264) (Pr 10) [AIR V 40 C 92] : ILR 31 Pat 963 (DB), *Jugal Prasad* v. *Bhadai Das.* (Bihar Money-lenders (Regulation of Transactions) Act, S. 4 is valid — Cl. (1) (f) does not cover right to sue for recovery of money — Even otherwise, above section is a "reasonable restriction".)]

[4] 1952 Mad 150 (Pr 4) [AIR V 39 C 65] (DB), *Purushotham* v. *Venkatappa.* (Madras Restoration of Village Officers (Validating) Act (18 of 1939) does not in any way infringe Art. 19 (1) (f): AIR 1922 P C 96, Rel. on.)

[5] 1953 Raj 22 (Prs 17, 26 27) [AIR V 40 C 8] : ILR (1951) 1 Raj 888 (DB), *Manohar Singh* v. *State of Rajasthan.* (Taking possession of the management of Jagir in so far as it relates to the collection of revenue and also the management of forests for which provisionally 35% of the forest income is being deducted on an ad hoc basis for supervision and administrative charges, does not amount to taking possession within the meaning of Art. 31 (2), when the various rights that go with the possession of the Jagir like the granting of pattas, control over unoccupied lands which fall vacant and making of grants to Chhutbhais, etc., all remain in the Jagirdar. The position of the State is somewhat analogous to that of an agent. If, for example, the Jagirdar appointed an agent to collect rents, there would be no transfer of possession from the Jagirdar to the agent. Under the Ordinances, therefore, the Government has in a sense become statutory agent of the Jagirdar for the purposes of collection : A I R 1952 Mad 203 and A I R 1951 S C 41, Rel. on. Therefore, the two provisions for the State taking over the management of jagir in Ordinances Nos. 10 and 15 of 1949 are not void under Art. 13 (1) of the Constitution read with Art. 31 (2) or under Art. 19 (1) (f).)

[6] 1952 Mad 613 (Prs 32, 33, 77) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Rights of Dharmakartas and heads of Mutts fully discussed.)

[7] (1900) 177 U S 190 (208) : 44 Law Ed 729 (739), *Ohio Oil Co.* v. *Indiana.* (This is settled rule in the State of Indiana.)

[8] 1951 Nag 58 (Prs 174, 175) [AIR V 38 C 20]: ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheoshankar* v. *M. P. State Govt.*

[9] 1953 All 25 (29) [AIR V 40 C 7] (DB), *Jyoti Sarup* v. *Board of Rev., U. P.* (U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1) Proviso 1—Absolute

Article 19
Notes 60-61

60. "Acquire". — Unless there is a transfer of property from one person to another or vesting and divesting of property, there cannot be said to be any "acquisition" of property.[1] So it has been held that the provisions of the Madras Estates Land (Reduction of Rent) Act (30 of 1947), reducing the rent and giving power to Government to collect the same, do not involve any "acquisition" of the land and do not contravene S. 299 (2) of the Government of India Act, 1935, and ART. 31 (2) of this Constitution.[2]

61. "Hold".—In *Manohar* v. *G. G. Desai*,[1] a Division Bench of the Nagpur High Court held that the word "hold" in this clause can have no other meaning than "own" or "be the owner of". The view was based on the ground that although the word "hold" has several meanings including "possess", yet in the context of the preceding and succeeding words, it could only mean "own". The observations of Patanjali Sastri, J., in *Gopalan* v. *The State of Madras*[2] to the effect that the word "hold" had the sense of the exercise of rights of possession over property, were held to be *obiter*. With great respect to their Lordships of the Nagpur High Court, it is submitted that their view is not only against the remarks of Patanjali Sastri, J., in *Gopalan's case*[2a] but also against the general trend of decisions[3] and seems to place an unduly strained construction on the word "hold".

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and unfettered discretion given to Board of Revenue to grant or refuse permission to assessee under S. 6 (2) Proviso of the U. P. Agricultural Income-tax Act (3 of 1949) to make a change in the method of computation of his income does not infringe Art. 14—No question of infringement of Art. 19 (1) (f) arises in the case.)

1953 Nag 40 (50) (Pr 47) [AIR V 40 C 22] : ILR (1952) Nag 736 (DB), *Bhaskar* v. *Mohd. Alimulla Khan*. (The right to hold property means the right of ownership to property. Neither the right of re-entry nor the right to take direct possession of the property is equivalent to this right and therefore deprivation by any law of the right of re-entry or of the right to take direct possession does not amount to deprivation or confiscation of the ownership of the property itself.)

Article 19 — Note 60

[1] 1952 Mad 203 (Prs 14, 17) [AIR V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras*.

[2] 1952 Mad 203 (Prs 17, 18, 19, 30, 42) [AIR V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras*.

Article 19 — Note 61

[1] 1951 Nag 33 (Pr 14) [AIR V 38 C 11] : I L R (1951) Nag 791 (DB).

[2] 1950 S C 27 (Pr 102) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC).

[2a] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *The State of Madras*.

[3] 1952 Cal 273 (Pr 36) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen*. (Right to hold property includes right to enjoy the same — Restriction on the right to hold property may be something less than a deprivation of such property.)

1952 Mad 203 (212) (Pr 25) [AIR V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras*. (Per *Rajamannar C. J.* — The proper meaning to be attached to the word 'hold' in cl. (1) (f) is to 'enjoy.' Enjoyment of property consists in actual occupation and possession of it and will also comprise the reception of rents and profits from it.)

1951 Bom 86 (Pr 6) [AIR V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.* (If the totality of the rights are not acquired or taken possession of but only some of the rights are interfered with, then clearly the

Article 19
Notes 61-62

The right to hold property includes the right to hold it in any manner that the owner chooses.[4]

The right to hold property is not affected merely because a *tax* is imposed retrospectively on goods.[5]

62. Taking away right of management of property, etc.— The right of the owner of property to manage it and to be in a position to enjoy it is clearly included in the term "hold" in this article and where unreasonable restrictions are placed on that right, the law under which such restrictions are imposed will be invalid under this article read with Art. 13. Thus, the Madras Hindu Religious and Charitable Endowments Act (19 of 1951), although not involving any violation of Arts. 14 and 15 of this Constitution, has been held to be *ultra vires* under this clause as restrictions imposed by that Act on all Dharmakartas and Mathadhipatis, etc., who had beneficial interest in the properties under their management, were too drastic and unreasonable.[1] Similarly, it has been held that Section 35 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, 1949, contravenes the Fundamental Right of a citizen, to hold property and to practise the occupation or business of a landholder, guaranteed by

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subject can ask for the assistance of the Court under Art. 19 (1) (f) of the Constitution, because without an acquisition or taking possession of the totality of rights the interference with some of the rights of ownership would result in restrictions upon ownership, and whether those restrictions are reasonable or not would have to be determined by the Court.) .

1951 Cal 539 (Pr 34) [AIR V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.* (In dealing with relationship of landlord and tenant, admitting that tenancy itself is a species of property, yet the landlord does not 'acquire' that species of property when he sues to obtain recovery of possession from the tenant. Similarly, the property, though let, remains disposable by the landlord. The right 'to hold' property includes the right to recover possession of the property. In one sense, the landlord holds the property even when he lets it out to the tenant but that is only in the sense of holding the reversion which is also property. Holding the reversion is only a portion of the total right to hold. The word "to hold" thus means not only to hold the reversion but also to hold the property *in præsenti* and that to the exclusion of others. The right to hold is affected by S. 18 (5) of the West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950). Ordinarily, when a landlord lets out his property he can, subject to the terms of the contract of tenancy, hold the property by determining the tenancy. But that right is restricted by S. 18 (5).)

[*See also* 1953 Trav-Co 327 (Pr 20) [AIR V 40 C 122] : I L R (1952) Trav-Co 670 (DB), *Vishnu* v. *Poulo.* (The right to recover possession of property in execution comes within meaning of right to hold property.)]

[4] 1952 Cal 184 (Prs 7a, 10, 10a, 12) [AIR V 39 C 67] (DB), *Ramhari* v. *Nilmonidas.* (West Bengal Bargadars Act (II [2] of 1950), S. 5 (1), held reasonable and valid.)

[5] 1952 Nag 139 (Prs 29, 31) [AIR V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

Article 19 — Note 62

[1] 1952 Mad 613 (Pr 35) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (AIR 1950 S C 211 (SC) and AIR 1951 S C 118 (SC), Rel. on.)

ART. 19 (1) (f) and (g), inasmuch as under that section a holder of land can be deprived of its management and incidentally of his occupation and business of agriculturist, and the provision is not saved under cls. (5) and (6) of this article.[2] See also the undermentioned cases.[3]

The Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance, 1950, and Act (28 of 1950) under which the management of the mills and the company was taken over by the Government is also an instance of legislation affecting the rights in regard to property.[4]

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[2] 1952 Sau 59 (Prs 8, 10, 11, 15) [AIR V 39] (SB), *Jayantilal* v. *State of Saurashtra.* (The Ordinance does not define what is 'full and efficient use' of the land for agriculture. No standard has been laid down in any part of the Ordinance nor does the Ordinance prescribe the pre-existing circumstances of necessity compelling the exercise of the power of taking over management. Various other factors showing the unreasonableness of the Act pointed out: AIR 1950 S C 211 (SC), Applied—Case law discussed.)

[3] 1951 Hyd 1 (Prs 21, 22, 23) [AIR V 38 C 1] (FB), *Mahabub Begum* v. *Hyderabad State.* (The (Hyderabad) Wali-ud-Daula Succession (Decision of Disputes) Act (XVI [16] of 1950) takes away the property of persons mentioned in S. 2 (1), viz., the decree obtained by them, in contravention of Art. 31 of the Constitution, and also infringes the rights of those persons to hold property accruing to them under the decree as per Art. 19 (1) (f) of the Constitution. The Act is therefore void under Art. 13 (2) in so far as it relates to the claims and rights of those persons. Section 2 (1) and S. 3, so far as it relates to S. 2 (1), are declared void.)

1950 Pat 392 (Prs 7, 40, 80) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.* (The Bihar State Management of Estates and Tenures Act (21 of 1949) imposes restrictions on the power of proprietors and tenure holders to deal with their property, which are neither "reasonable" nor "imposed in the interests of the general public".)

1953 Pat 65 (72) (Prs 12, 28, 30) [AIR V 40 C 21] (DB), *Shri Durgaji* v. *State of Bihar.* (Bihar Private Forests Act (9 of 1948) — Provision for taking over by Government, of control and management of a person's forest — *Held* to be for public good and reasonable.)

[4] 1951 S C 41 (Prs 56, 60, 77, 78) [AIR V 38 C 9]: 1950 S C R 869 : ILR (1951) Hyd 461 (S C), *Charanjit Lal* v. *Union of India.* (Per *Kania C. J., Fazl Ali, Mukherjea and Das JJ.*—The Sholapur Spinning and Weaving Company (Emergency Provisions) Act (28 of 1950) does not infringe the Fundamental Rights conferred on a share-holder of the Sholapur Spinning and Weaving Company by Art. 19 (1) (f) or Art. 31 of the Constitution of India and the Act is not unconstitutional and void on that ground. The right to dispose of the share and the right to receive dividend, if any, or to participate in the surplus in the case of winding up that have been left to the share-holder cannot be said to be illusory or practically valueless because the right to control the management by directors elected by him, the right to pass resolutions giving directions to the directors and the right to present a winding up petition have, for the time being, been suspended. The rights still possessed by the share-holder are the most important of the rights constituting his property, although certain privileges incidental to the ownership have been put in abeyance for the time being. It is impossible to say that the Act has deprived the share-holder of his property in the sense in which that word is used in Arts. 19 (1) (f) and 31. The curtailment of the incidental privileges may well be supported as a reasonable restraint on the exercise and enjoyment of the share-holder's right of property imposed in the interests of the general public under Art. 19 (5), namely, to secure the supply of an essential commodity and to prevent unemployment.)

Where there is a provision for a Court of Wards taking over possession and management of property of a person, there is *prima facie* an infringement of his rights under cl. (1) (f).[5] Hence, unless the provision is reasonable and is justified in public interest, it will be void.[6]

63. Control of accommodation and rents. — The various Acts, etc., relating to the control of accommodation in urban areas which are in force in the different States in India are all instances of legislation affecting more or less the right to hold and dispose of property under cl. (1) (f).[1] But such provisions are obviously necessary in public interest in times of shortage of houses. Hence, in so far as such restrictions are not unreasonable they will be upheld by the Courts as being valid. Some of the decisions relating to this part of the subject are noted below.[2]

[*See also* 1952 Punj 9 (18) (Prs 56, 58, 59) [AIR V 39 C 2] : ILR (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Raja Gopalan.* (In this case the management of an insurance company was taken over by Government under S. 52A of the Insurance Act and the provision was held to be valid.)

1951 Bom 86 (Prs 10, 12, 13) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas Shriniwas* v. *Sholapur Spg. & Wvg. Co. Ltd.* (By Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance, II [2] of 1950, the juridical possession of the company has not been in the slightest degree affected or interfered with. Though under the Ordinance the right of the shareholders to control and manage the company has been controlled and regulated, and restricted, the right of management is not property under Art. 31. Even if it is a property, the Ordinance merely places a restriction upon use of that property and such restriction would come under Art. 19 and it would be a reasonable restriction in the public interest under Art. 19 (5).)]

[5] 1953 S C 373 (374, 375) [AIR V 40 C 84] (S C), *Raghubir Singh* v. *Court of Wards, Ajmer.*

1953 Orissa 121 (Pr 57) [AIR V 40 C 52] : ILR (1952) Cut 529 (DB), *Brundaban Chandra* v. *State of Orissa.*

[6] 1953 S C 373 (374) [AIR V 40 C 84] (S C), *Raghubir Singh* v. *Court of Wards, Ajmer.*

1953 Orissa 121 (Pr 57) [AIR V 40 C 52] : ILR (1952) Cut 529 (DB), *Brundaban Chandra* v. *State of Orissa.* (Court of Wards Act is designed to protect the estate against its being frittered away by mismanagement, in interests of public revenue.)

1953 Punj 30 (38) (Pr 50) [AIR V 40 C 9] (DB), *Harmohendra Singh* v. *Punjab State.* (If for the purposes of protection of the revenues of the State and for seeing that there is no discontent amongst the tenants, laws of the kind such as Punjab Court of Wards Act are passed by the Government, it cannot be said that they are unreasonable interference with the Fundamental Rights of persons : AIR 1951 S C 41 (S C), Foll.)

1952 All 746 (749) (Pr 13) [AIR V 39] : ILR (1953) 1 All 29 (DB), *Cracknell* v. *State of Uttar Pradesh.* (A provision, which deprives a female proprietor of an estate of the right to hold and enjoy her property only on the ground of sex, is an unreasonable restriction on the right under cl. (f), in view of Art. 15.)

Article 19 — Note 63

[1] See however 1952 All 703 (705) (Pr 8) [AIR V 39] (FB), *Ramandas* v. *State of Uttar Pradesh.* (The order of allotment officer under Rent Control Law allotting the house to one of the claimants including the landlord does not interfere with the landlord's right to hold, acquire and dispose of the property.)

[2] 1952 All 703 (705) (Pr 8) [AIR V 39] (FB), *Ramandas* v. *State of Uttar Pradesh.* (U. P. (Temporary) Control of Rent and Eviction Act (III [3] of 1947),

S. 7—Section 7 of the Act does not in any way interfere with the Fundamental Right of a citizen under Art. 19 (1) (f) of the Constitution. In any case, where the allotment officer after taking into consideration the respective claims of the landlord and other claimants passes an order allotting the vacant premises to one of the claimants on the ground that his need for accommodation was greater than that of the landlord, it cannot be said that the order in any way imposes an unreasonable restriction on the rights of the landlord.)

1952 Cal 273 (Prs 7, 11) [AIR V 39 C 75 (29)] (FB), *Iswari Prosad* v. *N. R. Sen.* (The Rent Acts in West Bengal were enacted to meet the grave housing shortage caused by the last Great War and the congestion particularly in the cities and towns of West Bengal caused by the War and the partition of the province in 1947. It may be that the margin of profits allowed to the landlord by the Rent Act of 1950 is small but that would not of necessity make the Act *ultra vires* as being an unreasonable restriction on the landlord's rights. In the interests of law and order and good government restrictions on the landlord's rights were absolutely necessary. It cannot possibly be said that in the circumstances existing when these Acts were passed, the restrictions imposed by the Acts generally were unreasonable, more than were necessary in the interests of the general public.)

1952 Cal 533 (533) (Pr 4) [AIR V 39] (SB), *Shibaram* v. *Subodh Kumar.* (West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948), S. 1—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 1—Validity of — Acts are not void of the Constitution : AIR 1952 Cal 273 (FB), Foll.)

1952 Cal 550 (551) (Pr 5) [AIR V 39] (SB), *Satyanarain Chamaria* v. *Sewmurat Sharma.* (Do).

1953 All 543 (Pr 3) [AIR V 40 C 264] (DB), *Ram Katori* v. *Rent Control & Eviction Officer.* (U. P. Rent Control and Eviction Act (3 of 1951), is not inconsistent with the provisions of Art. 19 (1) (f) of the Constitution and is not void : AIR 1952 All 703, Foll.)

1953 All 51 (54) (Pr 10) [AIR V 40 C 18] (DB), *Prem Shankar* v. *U. P. Provincial Co-operative Bank.* (U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7 (1) (a)—The owner's right to hold and dispose of the property is restricted by the provisions of S. 7 (1) (a) authorising the District Magistrate to ask the landlord to let or not to let the accommodation to any person. But the restriction imposed is a reasonable restriction on the exercise of the right to hold and dispose of property.)

1953 Mad 351 (355) [AIR V 40 C 120], *Dr. K. C. Nambiar* v. *State of Madras.* (Power of Government under Rent Control Act to exempt certain property from the Act is not unreasonable restriction on the right of the tenant who is in possession.)

1952 All 699 (702) (Pr 7) [AIR V 39] (DB), *Karam Chand Thapar & Bros.* v. *Vijay Anand.* (U. P. (Temporary) Control of Rent and Eviction Act (III [3] of 1947) (as amended in 1948), S. 3 — Validity — Unfettered discretion given to District Magistrate to grant permission for eviction. Suit does not render S. 3 bad.)

1952 All 697 (Pr 4) [AIR V 39] (DB), *Ram Krishna* v. *Radhamal.* (United Provinces (Temporary) Control of Rent and Eviction Act, 1947, is not a permanent Act. It is only a temporary measure enacted in order to tide over certain difficulties arising out of the scarcity of accommodation which, it is common knowledge, still exists. The restrictions placed by the Act upon the exercise of the Fundamental Rights of a citizen are not of a nature which can be described as "unreasonable" and hence the Act is not void under Art. 13 of the Constitution as contravening Fundamental Right under Art. 19 (1) (f).)

1952 Raj 137 (Pr 5) [AIR V 39] : ILR (1951) 1 Raj 853 (DB), *Jeewan Ram* v. *United State of Rajasthan.* (Rajasthan Premises (Requisition and Eviction) Ordinance (XI [11] of 1949) is valid, because it only places reasonable restrictions on the right to acquire, hold or dispose of property in the interest of the general public.)

64. Tenancy laws.—In *Rajah of Bobbili* v. *State of Madras*,[1] the validity of the Madras Estates Land (Reduction of Rent) Act (30 of 1947) came to be questioned before the High Court of Madras. It was held that the Act or any of its provisions did not affect materially the right of the landholders to hold property. In the course of his judgment in the case, Rajamannar, C. J., observed as follows :

> "I think the proper meaning to be attached to the word 'hold' there is to 'enjoy'. Enjoyment of property consists in actual occupation and possession of it and will also comprise the perception of the rents and profits from it. Now, in the case of these landholders in respect of ryoti land which is the only kind of land directly sought to be affected, the only way in which they can be said to hold the property is by appropriating the rents payable to them thereon. It may, therefore, be contended that inasmuch as the Act reduces substantially the rents and also takes away from the landholders the right to collect the rents (the right to collect the rents is given by the Act to the Government), the Act does diminish their rights. But that is only a superficial aspect of the scope of the Act. The landholder will be entitled only to collect such rent as is lawful and in the exercise of the admitted right conferred on the Provincial Legislature to regulate the relation between the landlord and tenant, an enactment could declare what that lawful rent is or provide for its determination. It is not as if there is an inviolate and absolute right in the landholder to collect any particular rent. It may be a matter of contract or of usage, but the Legislature could always provide for the ascertainment of a fair and proper rent notwithstanding any contract or usage. What the Act purports to do is to reduce the rents payable by ryots in estatesg overned by the Madras Estates Land Act approximately to the level of the assessment levied on lands in ryotwari areas in the neighbourhood. Of course the Legislature presumes that the ryotwari assessment is fair and reasonable and evidently for the reason that ryotwari lands are held directly under the State. If, therefore, rents substantially higher than the corresponding ryotwari assessments are being collected, it may be said that the landholder is collecting rents which are neither fair nor reasonable. If the object of the legislation is to prevent the landholder making an excessive use of his right, it would be open to the Legislature to make such use unlawful. It is on this principle that forced exactions ostensibly based on contract and usage have been abolished in recent tenancy legislation.

1951 Cal 539 (Pr 36) [AIR V 38 C 158], *S. B. Trading Co.* v. *Shyamlal.* (The law contained in S. 18 (5), West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) (as amended by W. B. Act 62 of 1950) is not an unreasonable law and cannot be said to infringe Art. 19 (1) (f) of the Constitution read with cl. (5) thereof. Housing is a necessity of life and some control of housing accommodation in the present economic context is in the interest of every one concerned ; (1921) 256 U S 135 : 65 Law Ed 865, *Block* v. *Hirsh*, Referred.)

Article 19 — Note 64

[1] 1952 Mad 203 (Pr 25) [AIR V 39 C 98] (DB).

"Though at first sight the argument that depriving the landholder of his right to collect the rents would amount to an interference with his right to hold the property looks plausible, yet on a close examination, it appears to me that there is really no abridgment of any property right by reason of the Government taking over exclusively the collection of rents. In the *Sholapur Mills case*,[2] his Lordship Mukherjea, J., pointed out the difference between rights, which would be comprised in the term 'property' and privileges which are appurtenant to or flow from the ownership of property but by themselves and taken independently could not be reckoned as 'property' capable of being acquired, held or disposed of, as is contemplated by ART. 19 (1) (f) of the Constitution. In that case before the Supreme Court, the petitioner undoubtedly was precluded from exercising his right of voting at the election of directors, from getting a resolution passed by the shareholders without the sanction of the Central Government and from instituting any winding up proceedings in a Court of law; but these disabilities were not restrictions on the rights of the shareholders. Das, J., described these disabilities as curtailment of incidental privileges not amounting to deprivation of any property ...... Even assuming that the provisions of the impugned Act do restrict the exercise of the petitioners' enjoyment of their property, I am prepared to hold that they can well be supported as reasonable restraints imposed in the interests of a large section of the public and therefore saved by ART. 19 (5) of the Constitution."

The imposition of a penalty or *punishment* for habitual infringement by a landlord of tenants' rights is not the imposition of a *restriction* on the landlord's rights.[3] Hence, where it is provided that a landlord, who habitually infringes his tenants' rights, should be deemed as a person disqualified to manage his own property and that his property should be taken over by the Court of Wards, the provision cannot be regarded as a *restriction* on the landlord's rights within the meaning of cl. (5).[4] Further, when the determination of the question, whether the landlord is a person habitually infringing the rights of his tenants and whether his estate should be taken over by the Court of Wards, is left entirely to the subjective determination of the Executive, the provision cannot be deemed as a reasonable one.[5] See also the undermentioned case.[6]

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2. 1951 S C 41 (Mukherjea J. — Para 60 ; Das J. — Para 78) [A I R V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

3. 1953 S C 373 (375) [AIR V 40 C 84] (SC), *Raghubir Singh* v. *Court of Wards, Ajmer.*

4. 1953 S C 373 (375) [A I R V 40 C 84] (SC), *Raghubir Singh* v. *Court of Wards, Ajmer.*

5. 1953 S C 373 (375) [A I R V 40 C 84] (SC), *Raghubir Singn* v. *Court of Wards, Ajmer.* (When a law deprives a person of possession of his property for an indefinite period merely on the subjective determination of an executive officer such law cannot be regarded as "reasonable.")

6. 1953 Raj 53 (Prs 5, 7) [AIR V 40 C 18]:ILR (1951) 1 Raj 770 (DB), *Ghamandi* v. *Parshadi.* (Rajasthan Tenants Protection Ordinance, S. 7—The only restriction

65. Law of pre-emption. — The right of pre-emption denotes the right of a person to buy certain property in preference to others. Thus, if *A* sells his property to *B* and *C* is entitled to pre-emption, *C* can claim that the property must be sold to him in preference to *B* for the same price. It must be noted that the right of pre-emption will not arise unless *A* has decided to sell the property to someone. *C* cannot claim that *A* must sell the property to him if he has no desire to sell the property at all. *C* can only claim that if *A* is selling the property at all to any one, it must be to himself. But *A* as owner of the property has a right to dispose of the property and this right necessarily means his right to dispose of the property to any one he likes, and *C's* claim that the property must only be disposed of to him and not to *B* clearly seeks to put a restriction on *A's* absolute right. If there is a law which entitles *C* to put forward and enforce such a claim, that law clearly, therefore, imposes a restriction upon *A's* absolute right under cl. (1) (f). Similarly, *B's* right to *acquire* property under this clause suffers also a restriction owing to the law which recognises *C's* right of pre-emption. But such a law can be validated by recourse to cl. (5) if it is held to be a reasonable law required in public interest.[1]

Under S. 298 (1) of the Government of India Act, 1935, which has already been referred to in NOTE 58, it was provided that no subject of His Majesty domiciled in India should, on grounds *only* of religion, place of birth, descent, colour or any of them be prohibited from acquiring, holding or disposing of property. In *Mohammad Hussain* v. *Sajawal Buksh*,[2] the late Federal Court of India held that the above provision did not operate to render invalid the right of pre-

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that had been placed upon the landlords was that of not ejecting the tenants who were holding land when the Ordinance came into force and of re-instating tenants who were in occupation of their holding on prescribed date and were ejected or dispossessed thereafter provided they made application for re-instatement within three months from their ejectment or dispossession or the commencement of the Ordinance whichever be later. The restriction was reasonable and it was in the interest of general public.)

Article 19 — Note 65

[1] 1953 Punj 20 (21) (Prs 4, 6, 7) [AIR V 40 C 4] (DB), *Punjab State* v. *Inder Singh*. (There can be very little doubt that the law of pre-emption is a clog or fetter upon the freedom of sale. It disqualifies certain types of persons from purchasing land freely. But the sole object of this legislation is to preserve the homogeneity of the village community and to prevent fragmentation of holdings. The terms of S. 15 of the Punjab Pre-emption Act do not go beyond the objects aimed at and the restrictions imposed are just sufficient to achieve the interest of general public. Section 15 is not, therefore, *ultra vires* the Constitution.)

1951 All 247 (Prs 12, 13) [AIR V 38 C 33] : ILR (1952) 1 All 149, *Abdul Hakim* v. *Jan Mohd.* (The law of pre-emption in Utter Pradesh is for the welfare of the people because it avoids litigation, consolidates property and tends to increase the production of wealth. The Agra Pre-emption Act, 1922, has, therefore, not become void by virtue of Arts. 13 (1) and 19 (1) (f) of the Constitution of India, as it does not impose any unreasonable restriction on the right of property : AIR 1916 Bom 255, Disting.)

[2] 1945 F C 8 (9) [AIR V 32] : 1944 F C R 280 : ILR (1944) Kar (FC) 127 : ILR (1945) Lah 169 (FC).

emption based upon relationship with the vendor. The argument in the case was that inasmuch as the effect of the relevant portions of S. 15 of the Punjab Pre-emption Act (1 of 1913), was to enable the heirs of a vendor ultimately to deprive the vendee of the benefit of a sale made in his favour, the vendee was by virtue of those provisions in effect prohibited from acquiring property, or having acquired it, was prohibited from continuing to hold it. This argument was rejected by the Federal Court which held that because the right of pre-emption in such cases is based on descent, it cannot be argued that the effect of the exercise of that right is to *prohibit* the acquisition or holding of property by a vendee who has not the qualifications as to descent or relationship. The Federal Court observed that in such a case there was no prohibition imposed upon the vendee on account of his descent or lack of descent from any particular person nor did the grant of a right to one person to acquire property in preference to the other persons amount to a *prohibition* against the acquisition or holding of property by those persons.

It will be seen that the above decision does not apply to this article under which not only the *prohibition* of acquisition of property by any person would be void but also any *other* restriction short of prohibition imposed upon such right, unless the restriction was sustainable under cl. (5). (See also NOTE 67.)

66. Acquisition of lands. — As seen in NOTE 8, cl. (1) (f) of this article has no application to cases where a person is wholly deprived of his property. Article 31 applies to such cases. Article 31 and not this clause, therefore, applies to the acquisition or requisitioning of property. Hence, in such cases, the Court is not entitled to enquire under cl. (5) into the reasonableness of the law providing for the acquisition or requisitioning of property.

In the undermentioned cases,[1] however, the statutory provisions relating to acquisition of land were held to be reasonable and in public

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Article 19 — Note 66

[1] 1952 Cal 870 (874) (Pr 17) [AIR V 39], *Naba Kumar* v. *State of West Bengal.* (West Bengal Land Development and Planning Act purports to make acquisition for a public purpose—that is, in the interest of and for the benefit of the public viz., the settlement of immigrants and the rehabilitation of refugees which is an urgent matter and demands speedy acquisition of lands, and hence the restriction put by S. 7 of the Act at once becomes a reasonable restriction and the provision becomes a valid provision under Art. 19 (5).)

1952 Cal 554 (559) (Pr 41) [AIR V 39] (DB). *W. B. S. K. Co-op. Cr. Society* v. *Mrs. Banerjee.* (West Bengal Land Development and Planning Act (21 of 1948), S. 8 and Explanation to Proviso (a)—The provision in S. 8 making the declaration of Government conclusive as to the nature of the purpose of acquisition is *ultra vires* Art. 31 (2) of the Constitution and therefore void. But the Explanation to proviso (a) of S. 8 does not offend against Art. 19 (1) (f) or Art. 19 (5) and is therefore *intra vires* and valid—Provision intended to enable Government to take possession immediately. *Held* provision was justified in view of the urgent and pressing circumstances due to migration of vast numbers from East Pakistan and the urgent need to rehabilitate them.)

interest and as such constituted authorised restrictions under cl. (5) of this article.

67. Restraint on alienation. — Any restraint on powers of alienation of property clearly amounts to a restriction on the right under cl. (1) (f) which expressly assures every citizen the right to "dispose of" his property in any way he pleases. But any law, under which such restraint on alienation may be imposed, may be justified and held valid if the restraint is reasonable and imposed in the public interest. If the restraint is not of this character, it will be treated as void.[1] In *Nathu* v. *Ralla*,[2] the question was raised as to the validity under this article of the restriction imposed by the Customary Law of Punjab on the right of a male proprietor in regard to alienation of ancestral land in his hands. It was held that considering the nature of the right of a male proprietor under the Punjab Customary Law, there was really no abridgment of his rights under this clause involved. On a parity of reasoning, the restraint on powers of alienation of joint family property of the manager of a Hindu joint family with reference to joint family property and restrictions on the power of alienation of a Hindu widow, being inherent in the nature of the property held by these persons, itself does not amount to any restriction on the right conferred by cl. (1) (f).[3] (See also NOTE 65.)

68. Evacuee property legislation. — The provisions of the Administration of Evacuee Property Act, 1950, are of a very drastic nature. They enable the Custodian to hold and manage the property of an evacuee and also of his co-sharers. But in view of the special circumstances arising in the wake of the partition of India, to meet which the legislation was passed, the restrictions imposed have been held to be reasonable and in public interest.[1]

Article 19 — Note 67

[1] 1952 Pepsu 190 (Pr 5) [AIR V 39] : ILR (1952) Patiala 1 (FB), *Rulia Ram* v. *Sadh Ram.* (Patiala Alienation of Land Act, S. 3 — Section is void — The restriction imposed by S. 3 upon the power of the members of statutory agricultural tribes to dispose of land was not reasonable and whether or not it was in the interests of the tribes notified to be agriculturists, it was certainly not in the interests of the general public. Section 3 is inconsistent with Art. 19 of the Constitution and accordingly it is void.)

1951 Mad 930 (Pr 22) [AIR V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.* (The restriction on the power of disposal of immovable property contained in S. 20 of the Administration of Evacuee Property Ordinance (1949), as it stands, is an unreasonable restriction on the exercise of the intending evacuee's right as a citizen under Art. 19 (1) (f) of the Constitution.)

[2] 1951 Punj 445 (Prs 5, 6, 8) [AIR V 38 C 142].

[3] *See* 1952 Him Pra & B 42 (43) [AIR V 39], *Hoshiar Singh* v. *Kowla.* (Restrictions on Hindu widow's power of disposal of property do not amount to infringement of any Fundamental Right.)

Article 19 — Note 68

[1] 1951 All 746 (Prs 86, 88, 89) [AIR V 38 C 194] : ILR (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.*

1953 Hyd 157 (159) (Pr 8) [AIR V 40 C 68] : ILR (1953) Hyd 147 (DB), *Md. Habibuddin* v. *Govt. of Hyderabad.* (Section 40 of the Act, being intimately

Article 19
Note 69

69. Clause (1) (f)—Illustrative examples—Valid restrictions. — See the undermentioned cases.[1]

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connected with the scheme of the Act and being based on the necessity for ascertaining the genuineness and legality of transfers, is a reasonable restriction on the right of a citizen to acquire property and is not violative of Art. 19 (1) (f) of the Constitution.)

1953 Pat 112 (115) (Pr 4a) [AIR V 40 C 34] : I L R 32 Pat 131 (DB), *S. M. Zaki* v. *State of Bihar.*

1953 Sau 73 (74) (Pr 5) [AIR V 40 C 31] (DB), *Samsudin* v. *Asst. Custodian, E. P.* (Sections 8 to 12 of the Act are not *ultra vires.*)

1952 Madh B 181 (Pr 10) [AIR V 39] (DB), *Shanta Devi* v. *Custodian, E. P.* (Having regard to the events which happened soon after the partition in 1947 and also taking into consideration the entire scheme of the Act which is to make a provision for the custody, management and the administration of evacuee property until a satisfactory and final settlement takes place between India and the Dominion of Pakistan, it cannot be said that the Act does not satisfy the requirements of Art. 19 (5).)

1952 Punj 428 (432) (Pr 14) [AIR V 39] : ILR (1952) Punj 546 (DB), *Sheikh Mohd. Din* v. *Thakar Singh.* (It cannot be said that S. 17 imposes any restrictions upon the right of any citizen to hold property and these restrictions are in any case reasonable and in the interest of the general public.)

1951 Bom 440 (Pr 24) [AIR V 38 C 100] : ILR (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.*

[*See also* 1951 Mad 930 (Pr 21) [AIR V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.* (None of the restrictions contained in S. 21 of the Administration of Evacuee Property Ordinance (1949) can be said to be not reasonably imposed—It is in the interests of the general public that powers have been conferred on the Custodian to see that moneys are not transferred to Pakistan before final settlement is arrived at between the Dominions of India and Pakistan, as such indiscriminate transfer of assets would render the final settlement extremely difficult. Section 21 does not really prohibit the moneys of an intending evacuee being used by him or being invested. The incidental powers of the Custodian to require the intending evacuee to furnish returns and other information and the power of the Custodian to inspect the books of account and other documents do not restrict the Fundamental Right to acquire, hold and dispose of property.)]

Article 19 — Note 69

[1] 1953 Madh B 236 (240) (Pr 10) [AIR V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of M. B.* (Restrictions imposed on possession and disposal of arms by Arms Act are reasonable and justified.)

1953 Mad 476 (478) [AIR V 40 C 182] : 1953 Cri L Jour 917, *Narasimha* v. *Dist. Magistrate.* (Restrictions created by R. 43, Arms Act Rules, on Fundamental Right to hold a gun are reasonable restrictions and in interest of public.)

1953 Pat 32 (33) (Pr 8) [AIR V 40 C 9] : ILR 31 Pat 296 (DB), *B. S. S. M. Awkab* v. *Sitaram.* (Bihar Wakf (Amendment) Act (33 of 1950), S. 2, does not directly affect the Fundamental Rights of the Mutawalli.)

1953 Raj 22 (Pr 17) [AIR V 40 C 8]: ILR (1951) 1 Raj 888 (DB), *Manoharsingh* v. *State of Rajasthan.* (Rajasthan Ordinances No. 27 of 1948, No. 10 of 1949 and No. 15 of 1949 — Mere taking over by Government of collection of revenue is not taking possession within Art. 31 nor unreasonable restriction on Fundamental Right to hold property.)

1953 Trav-Co. 327 (Prs 21, 26) [AIR V 40 C 122] : ILR (1952) Trav-Co 670 (DB), *Vishnu* v. *Poulo.* ((Travancore-Cochin) Holding (Stay of Execution Proceedings) Act (8 of 1950) does prevent the owner of a property, though for a limited period, from recovering possession of the same from a tenant. It would therefore infringe Art. 19 (1) (f) of the Constitution unless it would come under cl. (5) of that article. In view of the fact that the restriction imposed is of a very

70. Clause (1) (f)—Illustrative examples—Invalid restrictions. — See the undermentioned cases.[1]

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temporary nature, and of the further fact that the object of the legislation is to afford relief to a large section of the public, the restriction imposed by the statute is not unreasonable.)

1952 Cal 184 (Pr 17) [AIR V 39 C 67] (DB), *Ramhari* v. *Nilmoni Das.* (West Bengal Bargadars Act (2 of 1950), S. 5 (1) (a). Proviso — The proviso requiring the Board's order for termination of Bargadar's cultivation on the ground of owner's desire under S. 5 (1) (a) is not an unreasonable procedure which comes within the prohibition of Art. 19 (1) (f) read with cl. (5) under the Constitution.)

1952 Mad 11 (Pr 27) [AIR V 39 C 2] : ILR (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkataswaran.* (Madras Agriculturists' Relief Act (4 of 1938) has done nothing more than to redress an admittedly serious state of affairs, namely, imminent ruination of the agriculturists, by prices falling down and interests mounting up. Looked at from any point of view it cannot be stated that Act 4 of 1938 places arbitrary restrictions on acquisition, holding and disposal of property: AIR 1951 S C 118, Rel. on.)

1952 Vind Pra 13 (Prs 11, 12) [AIR V 39 C 8], *Raghavendra Singh* v. *State of Vindhya Pradesh.* (The Government passed an order whereby thereafter auction of Tendu leaf contracts would be unconditional and would cover not only Government forests but other areas—Proportionate compensation to private land-holders was also provided for by the order — *Held* that the right of the grantees or lessees of immovable properties (including forests) to the free management of the property was restricted only in a reasonable manner, and in the interests of the public and the restrictions imposed by the order were within the exception contained in Art. 19 (5).)

1951 Madh B 159 (Pr 9) [AIR V 38 C 64] : 52 Cri L Jour 1538, *Madan* v. *The State.* (It cannot be said that the provisions contained in Ss. 523 and 524 of the Criminal P. C. deny to any person equality before the law or the equal protection of the laws, or infringe the Fundamental Right of citizens to acquire, hold and dispose of property, or are inconsistent with Art. 31.)

(1926) 272 U S 365 (395) : 71 Law Ed 303 (314), *Village of Euclid* v. *Ambler Realty Co.* (Zoning—Exclusion from residential districts by zoning law, of business and trade is valid.)

(1915) 239 U S 394 (409, 410) : 60 Law Ed 348 (356), *Hadacheck* v. *Sebastian.* (Police Power—Forbidding brickyards in designated area does not necessarily take away property without due process of law.)

(1900) 177 U S 587 (600) : 44 Law Ed 899 (905), *L'Hote* v. *New Orleans* (Zoning—Designating limits for prostitutes—This is not an unconstitutional interference with the property rights of persons living in that locality, although the value of their property may depreciate.)

(1894) 152 U S 133 (141, 143) : 38 Law Ed 385 (390, 391), *Lawton* v. *Steele.* (If the property is of little value and its use for illegal purpose clear, Legislature may declare it to be a nuisance and subject to summary abatement.)

See also illustrative examples under cl. (g)—Note 82.

Article 19 — Note 70

[1] 1953 Orissa 277 (278) (Pr 5) [AIR V 40 C 78] : 1953 Cri L Jour 1601 (DB), *Bhajaram* v. *State of Orissa.* (Essential Supplies (Temporary Powers) Act (1946), S. 3 (2) (f)—Requiring a person compulsorily to sell the whole of his stock without reserving anything for his normal requirements is an unreasonable restriction on his right under cl. (f). A final opinion was not pronounced as the question had become academic.)

1951 Cal 85 (Prs 32, 38, 54, 57, 58) [AIR V 38 C 25] (DB), *Subodh Gopal* v. *Beharilal.* (Section 7 of the Bengal Land Revenue Sales (West Bengal Amendment) Act, which makes the amending Act applicable to pending suits and unexecuted decrees, is *prima facie* unreasonable as it affects vested right and

71. Prohibition law. — Under cl. (1) (f) every citizen of India is guaranteed his right to acquire, hold and dispose of property. The word "property" includes every kind of property, both movable and immovable. (See NOTE 59.) Hence, the validity of prohibition laws banning or restricting the consumption of intoxicating liquors and other articles, or trade in such articles, has been questioned both here and in the United States of America. The validity of such laws also may be questioned, it may be noted, under cl. (1) (g) guaranteeing to every citizen the right to practise any profession, or to carry on any occupation, trade or business. Both these clauses, however, have to be read in conjunction with cls. (5) and (6), which enable the State to make reasonable laws imposing restrictions on the rights declared in such clauses, when such restrictions are dictated by the requirements of public interest. Hence, the validity of the provisions of such laws has to be tested in view of these provisions of the Constitution.[1] It may be broadly stated that prohibition is not *ultra vires* in the United States of America.[2]

In *Sheoshankar* v. *M. P. State Government*,[3] the validity of various provisions of the C. P. and Berar Prohibition Act (7 of 1938) and of some of the Rules in the C. P. and Berar Foreign Liquor Rules, was attacked and the Full Bench of the Nagpur High Court held in favour of the validity of the Act. After an elaborate consideration of the case-law in the United States, the conclusion was expressed by their Lordships Mangalmurti and Mudholkar, JJ., as follows :

> "It cannot, therefore, be questioned that the general right to property or to carry on any activity is not unreasonably restricted

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imposes an unreasonable restriction on the right to hold property contrary to the provisions of Art. 19 (1) (f) read with Art. 19 (5) and is therefore void by reason of Art. 13 (1).)

(1917) 245 U S 60 (81, 82): 62 Law Ed 149 (163, 164), *Buchanan* v. *Warley*. (Class Legislation—U. S. 14th Amendment—Law preventing occupancy of property by coloured person thereby preventing sale of property to Negroes is not legitimate exercise of Police Power — Such law cannot be justified on the ground that it will promote the public peace by preventing race conflicts.)

See also illustrative cases under cl. (g) — Note 82.

Article 19 — Note 71

[1] 1951 S C 318 (328) (Pr 24) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara*. (Sections 12 and 13 of Bombay Prohibition Act (25 of 1949) *prima facie* infringe Fundamental Right under cl. (1) (f).)

[2] (1887) 123 U S 623 (661, 662) : 31 Law Ed 205 (210), *Mugler* v. *State of Kansas*. (Government does not interfere with, nor impair anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society and constitute therefore a business in which no one may lawfully engage. Prohibition law is not in conflict with 14th Amendment.)
[*See also* (1925) 267 U S 188 (193, 194) : 69 Law Ed 568 (570), *Samuels* v. *Mc Curdy*. (Making unlawful possession of intoxicating liquor, which was legally obtained before passage of prohibition law, does not unconstitutionally deprive owner of his property.)]

[3] 1951 Nag 58 (Prs 174, 175) [AIR V 38 C 20] : ILR (1951) Nag 646 : 52 Cri L Jour 1140 (FB).

merely because a particular commodity is excepted from its purview in the public interest. As we have already observed, liquor is not an innocuous article and regulation or prohibition of its consumption therefore unquestionably falls within the competence of the Legislature."

In determining the reasonableness of legislative provisions, prohibiting or restricting the use of intoxicant liquors, the Court is entitled to take into consideration the Directive Principles of State Policy in Part IV of the Constitution. Article 47 contains the following provision : "The State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health." Hence, so far as intoxicating liquors, which are used as beverages, are concerned, the prohibition or restriction of their use and consumption by Indian citizens cannot be regarded as unreasonable or as uot being in public interest.[4] But although this may be stated as the general rule, particular provisions in a law of prohibition may be unconstitutional as being unreasonable or as offending against Article 14 or other articles of the Constitution. Thus, the prohibition of the sale, purchase, possession, use or consumption of liquid toilet or medicinal preparations containing alchohol, merely because there is a possibility of their being used by some perverted addicts, would be unreasonable and would not be justified under clause (5).[5] Similarly, it has been held that a law prohibiting citizens from commending the use of liquor is an unwarranted and invalid restriction of the freedom of speech and expression conferred by cl. (1) (a).[6]

In *State of Bombay* v. *F. N. Balsara*,[7] the validity of the Bombay Prohibition Act, 1949, was considered in detail by the Supreme Court and the undermentioned provisions of the Act[8] were declared invalid.

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[4] 1951 S C 318 (328) (Pr 24) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.*

[5] 1951 S C 318 (329) (Pr 25) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara.*

[6] 1951 S C 318 (330) (Pr 27) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N Balsara* (So also a provision against inciting and encouraging to commit act which will frustrate or defeat provisions of the Prohibition Act held to be too wide and vague and as entirely invalid under cl. 1 (a) read with cl. (2) of this article.)

[7] 1951 S C 318 (331) (Pr 33) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC). (On appeal from AIR 1951 Bom 210 (FB).)

[8] Only the following provisions of this Act were declared invalid : (1) Clause (c) of Section 12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol. (2) Clause (d) of S. 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol. (3) Clause (b) of S. 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol. (4) Clause (a) of S. 23, so far as it prohibits the commendation of any intoxicant or hemp. (5) Clause (b) of S. 23 in entirety. (6) Clause (a) of sub-s. (1) of S. 24, so far as it prohibits commendation of any intoxicant or hemp; (7) Sub-section (1) of S. 136 in entirety. (8) Clauses (b), (c), (e) and (f) of sub-s. (2) of S. 136 in their entirety. It was also held that the remaining provisions of the Act were not invalid and that the

Article 19
Note 72

72. Clause (1) (g)—(General). — This clause guarantees to all Indian citizens the right to practise any profession or to carry on any occupation, trade or business. The clause is to be read with cl. (6) under which restrictions can be imposed upon the right by means of laws within the limits laid down in that clause. This clause was amended by Constitution (First Amendment) Act, 1951. The main change made in this clause by the above Amendment was the introduction of the provision contained in sub-cl. (ii) of cl. (6) relating to the carrying on by the State or by a corporation owned or controlled by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. This clause was specially introduced to make it clear that any scheme of nationalisation which the State may undertake would be constitutional as being in the interest of the general public for which the clause already reserves power to the State to impose reasonable restrictions on the citizen's right to carry on any trade or business under cl. (1) (g). Under the amended cl. (6), therefore, the restrictions on the right of carrying on any trade or profession, etc., under cl. (1) (g) will fall into three classes — (a) reasonable restrictions imposed under the general power of imposing such restrictions in the interest of the general public; (b) restrictions in the form of professional or technical qualifications (clause 6 (i)); and (c) any law relating to carrying on of trade or business, industry or service, by the State or by a corporation owned or controlled by the State.

The explicit words in cl. (6) "nothing in the said sub-clause shall affect . . . . . " show that the test of reasonableness of the restriction is not applicable to cl. (6) (i) and (ii).

It is thus clear that the right conferred by cl. (1) (g) is not an absolute right but one which is liable to be restricted under cl. (6).[1] The restrictions may be *in the interests of general public*, an expression which is a very wide one and will include all matters affecting public weal, such as public safety, public health, public morals, etc.[2] (See

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decision declaring some of the provisions invalid did not affect the rest of the Act.

Article 19 — Note 72

[1] 1953 S C 79 (82) (Pr 13) [AIR V 40 C 22]: 1953 S C R 290 (SC), *T. B. Ibrahim* v. *Regional Transport Authority.* (Restrictions placed upon use of bus stand held valid as being reasonable and in interest of public convenience—There is no Fundamental Right in a citizen to carry on business wherever he chooses.)

1952 Mad 528 (529) (Pr 4) [A I R V 39 C 117] (DB), *Vallinayagam* v. *State of Madras.* (License refused for cinema on grounds connected with public health and safety—Valid.)

[2] 1953 Mad 98 (101) (Pr 10) [A I R V 40 C 33] (DB), *Indian M. & M. Corpn.* v. *Industrial Tribunal.* (The right of the State to regulate any business is not confined to "public utility businesses" only—Businesses which are likely to prove dangerous to public safety or public health may be subjected to severe restrictive regulations.)

1952 All 491 (Prs 14, 15, 16) [A I R V 39] : 1952 Cri L Jour 910 (DB), *In the matter of Phool Din.* (Provisions in the Legal Practitioners Act in respect of touts are saved by Art. 19 (6) — It is not in public interest to permit toutism —

NOTES 20 and 21.) When, however, a restriction is imposed on the right conferred by this clause, it has to be seen whether it is so drastic as to be destructive of the right itself.[3]

Clause (1) (g) and ART. 301 do not overlap. Though cl. (1) (g) of this article deals with "profession, trade or business" while ART. 301 deals with "trade, commerce and intercourse" and the subjects dealt with are therefore to that extent the same, the scope of the articles is different. Article 19 lays down the right of the citizen *personally*, while ART. 301 deals with how the trade, commerce and intercourse is to be carried on between one *place and another*, whether the places are situated in two States or inside the same State.[4]

The right to carry on business in motor transport on public streets is within sub-cl. (g) and the validity of legislation affecting this right must be determined with reference to cl. (6).[5]

73. "Any" profession, etc.—It has been held by the Allahabad High Court that the term "profession" in cl. (1) (g) will not include the activities of a law tout.[1] So also, it has been held by the Nagpur High Court that there is no guarantee that what is regarded as an object of trade will continue to be so regarded for ever and that when a certain article becomes contraband and ceases to be a legitimate object of trade, there can be no question of any Fundamental Right to trade in that article, apart from the provisions of cl. (6) validating any law which puts down such trade.[2] The right of *purohitgiri* in a village is covered by sub-cl. (g).[3] (See also NOTE 75.)

74. "Carry on" any occupation, etc. — Clause (1) (g) only guarantees the right to carry on any profession, occupation, trade or

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Society abhors it—Touts and lawyers who accept engagements through touts are looked down upon by society.)

[*See also* (1941) 313 U S 236 (243) : 85 Law Ed 1305 (1308), *Olsen* v. *Nebraska*. (In this case it was held that the business of employment agency is subject to control of public good.)

(1929) 278 U S 235 (239) : 73 Law Ed 287 (308), *Williams* v. *Standard Oil Co. of Louisiana*. (State Legislature can fix prices. etc., only when the business is affected with public interest.)]

[3] 1952 Mad 395 (404) (Prs 32, 33) [A I R V 39] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras*.

[4] 1951 All 257 (Pr 63) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Motilal* v. *Uttar Pradesh Govt.*

[5] 1953 Mad 279 (Prs 21, 24, 25, 26) [A I R V 40 C 102] : I L R (1953) Mad 304 (DB), *C. S. S. Motor Service* v. *Madras State*. (Validity of certain sections of Motor Vehicles Act considered.)

Article 19 — Note 73

[1] 1952 All 491 (Prs 14, 17) [A I R V 39] : 1952 Cri L Jour 910 (DB), *In the matter of Phool Din*. (Toutism may be prohibited altogether under Legal Practitioners Act.)

[2] 1951 Nag 58 (Prs 174, 175) [AIR V 38 C 20] : I L R (1951) Nag 646 : 52 Cri L Jour 1140 (FB), *Sheo Shankar* v. *M. P. State Govt.* (Prohibition of liquor trade.)

[3] 1953 Hyd 1 (3) [AIR V 40 C 1]: ILR (1953) Hyd 481 (FB), *Gopal Rao* v. *War Nasi*. (Exclusive right to perform *purohitgiri* in a village cannot be claimed as such claim seeks to negative the right of others to perform *purohitgiri* which is guaranteed under sub-cl. (g).)

business. This right includes the right to stop carrying on the business. Looking at the matter from another point of view, the article only confers a right and does not create a duty. Hence, there is no power in the State to order a citizen to continue a business against his will. Such an order and the law permitting it will be *ultra vires*. Even a temporary closure of business by a citizen cannot be prevented by law. However, the distinction must be drawn between the closure of the business, permanent or temporary, and declaring a lock-out.[1] To make a law relating to lock-outs and strikes falls within the limits of the jurisdiction of the State and even if putting restrictions on the power of an employer to declare lock-outs is regarded as a restriction on his right of carrying on his business in his own way, it might be sustained as a reasonable restriction imposed in public interest for avoiding unemployment, etc.

But when a law says a barber or a dhobi or a person carrying on a similar occupation must serve all persons equally and must not refuse his service to any one on the ground of his low caste, the law does not compel a person to carry on a business against his will and, therefore, it cannot be said to violate the Fundamental Right under this clause by depriving any person of his freedom to carry on or not to carry on a particular occupation. At the same time, even assuming otherwise, such a law will be upheld as a valid restriction placed upon the citizen's right under cl. (2) in the interest of the general public.[2]

75. Legal profession—Restrictions as to.—The legal profession is clearly a "profession" included within the ambit of cl. (1) (g) and hence the right to practise the legal profession is a Fundamental Right under the Constitution. We have already referred to the remarks of the Madras High Court in *Ananthakrishnan* v. *The State of Madras*[1] to the effect that the right to act and plead for a party in a Court of law is not a *right* but a *privilege* and that the profession of law can be practised otherwise than by acting and pleading for parties in a Court of law and that, therefore, acting and pleading for parties in a Court of law is not a matter of Fundamental Right of practising a profession within the meaning of cl. (1) (g). As already submitted, it is doubtful if this view is correct. (See NOTE 16.) This, however, does not mean that the State has no power to place restrictions on the exercise of the right. This is expressly provided for in cl. (6). So in different cases of such restrictions the question will be about the validity of the restrictions as being covered by the provisions of clause (6).

Article 19 — Note 74

[1] 1953 Mad 98 (101, 102) [A I R V 40 C 33] (DB), *Indian M. M. Corpn.* v. *Industrial Tribunal.*
[*See also* (1923) 262 U S 522 (541) : 67 Law Ed 1103 (1111), *Wolf Packing Co.* v. *Court of Industrial Relations.* (Act forcing business to be continued is *ultra vires.*)]

[2] 1951 Cal 167 (Prs 9, 10) [AIR V 38 C 30R] : 52 Cri L Jour 1399 (DB), *Banamali Das* v. *Pakhu Bhandari.*

Article 19 — Note 75

[1] 1952 Mad 395 (403) (Pr 30) [AIR V 39 C 105 (35)]: ILR (1952) Mad 933 (DB).

Besides, the State's power of taxation for the purpose of raising revenue is not affected by the Fundamental Rights under this article. Thus, the imposition of a stamp duty under the Stamp Act on the enrolment of an advocate is not invalid.[2]

Clause (6) also empowers the State to prescribe by law the professional or technical qualifications necessary for practising any profession. (See NOTE 83.)

The right of a lawyer to practise is not an absolute right. It is a right which is subject to the restrictions and limitations imposed by the law under which he is enrolled.[3] In *Ananthakrishnan* v. *State of Madras*,[4] Rajamannar, C. J., observed as follows:

> "Taking the profession of law, what does this right consist in? Is the effect of ART. 19 (1) to confer on every person who may be otherwise qualified the right to practise in any Court in the land? I see nothing in ART. 19 (1) (g) to justify the conclusion that this Court or any other High Court or Supreme Court cannot lay down rules for the admission of advocates who alone will be permitted to represent the suitors before them. On the other hand, the clauses in the Letters Patent granted to the Chartered High Courts . . . clearly confer on the High Courts the power to virtually prevent even qualified persons other than the advocates on their rolls to plead and act before them on behalf of suitors. This power of the High Courts has been continued under ART. 225 of the Constitution. The Bar Councils Act recognises this right and lays down that only the persons enrolled as advocates of a particular High Court have certain rights of audience."

In *Mulchand* v. *Mukund*,[5] the Bombay High Court observed as follows:

> "The right of a lawyer to practise is not an absolute right. The very charter which gives him the right to practise, controls, limits and circumscribes his right. Now, there are two charters which entitle a lawyer in this State to practise. One is the Bar Councils Act and the other is the Pleaders' Act. The first gives the right to a lawyer to practise as an advocate of this Court, the other gives him a right to practise as a District pleader. . . . . . Turning first to the Bar Councils Act, the *statutory right given to an advocate* who has been enrolled as such by this Court is under S. 14 (1) of the Bar Councils Act, and that right is to practise subject to the provisions of sub-s. (4) of S. 9, in the High Court of which he is an advocate,

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[2] 1952 Mad 395 (403) [A I R V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.*

[3] 1953 Mad 447 (448, 449) (Pr 2) [AIR V 40 C 170], *Rangaswami* v. *Industrial Tribunal.*

1952 Bom 296 (298) [A I R V 39] : I·L R (1952) Bom 766 (DB), *Mulchand* v. *Mukund.*

1952 Mad 395 (402) [AIR V 39 C 105 (35)] : ILR (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.*

[4] 1952 Mad 395 (402) [AIR V 39 C 105 (35)] : ILR (1952) Mad 933 (DB).

[5] 1952 Bom 296 (298) [AIR V 39] : ILR (1952) Bom 766 (DB).

Article 19
Note 75

and save as otherwise provided by sub-s. (2) or by or under any other law for the time being in force in any other Court in the Province and before any other Tribunal or person legally authorised to take evidence, and before any other authority or person before whom such advocate is by or under the law for the time being in force entitled to practise.

"Therefore, his right to practise is controlled by this important provision that any other law for the time being in force may restrict or take away his right. Therefore, if the Co-operative Societies Act were to provide that an advocate of the High Court of Bombay shall not practise before the arbitral tribunal set up under that Act, then the right of the advocate will be circumscribed by the provisions of that law. It should be remembered that it is not the fact that a man has passed a law examination or has acquired a law degree that entitles him to practise in courts of law; his right to practise depends upon his being enrolled as an advocate and he is enrolled as an advocate on terms and conditions laid down in the Bar Councils Act. Therefore, as I said before, his very charter which entitles him to practise lays down conditions and limitations, and one of the conditions and limitations is that he can only practise before such tribunals as the law permits him and he may not practise before such tribunals as the law lays down as being prohibited to lawyers."

In a Full Bench of the Hyderabad High Court,[6] the validity of S. 3 of the Hyderabad Legal Practitioners' Act (6 of 1318F) was canvassed and it was held that the section was void. In that case the question was whether an advocate of another High Court must get himself enrolled as an advocate of the Hyderabad High Court and obtain a sanad of the Hyderabad High Court as a condition precedent to his being allowed to appear before the Hyderabad High Court, or whether he might be allowed to appear before the Hyderabad High Court with the permission of the Chief Justice of the High Court, as was the practice in the other High Courts in India. This question arose because S. 3 of the Hyderabad Legal Practitioners' Act, above referred to, required enrolment and sanad in the Hyderabad High Court itself before such an advocate could appear in that Court. The Full Bench of the Hyderabad High Court held that Section 3 was void as being an unreasonable restriction on the Fundamental Right of the citizen to practise his profession. It was held by the majority of the Full Bench that the Hyderabad High Court has full power to grant permission to any advocate from outside the State, who is not on the rolls of the High Court, to appear and argue in a civil case.

The Legal Practitioners' Act prohibits alike a lawyer from accepting an employment through a tout and a citizen from engaging himself in 'toutism'. It is penal for a lawyer to accept an employment through

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6. 1951 Hyd 140 (Pr 72) [AIR V 38 C 57] : ILR (1951) Hyd 689 (FB), *Ramdayal* v. *Shankarlal*. (Per *Ansari J.* — No advocate can be on the rolls of two High Courts at the same time.)

a tout and for a citizen to act as a tout. This provision is obviously one in the interest of the general public and is valid.[7]

Section 36 (4) of the Industrial Disputes Act, 1947, as amended by Act 48 of 1950, is not void. Under that section a party to an industrial dispute may be represented before an industrial tribunal, by a legal practitioner with the consent of the other parties and the leave of the tribunal.

This does not violate the Fundamental Right of an advocate enrolled under the Bar Councils Act.[8] The reason is that his right to practise is governed by the provisions of the Bar Councils Act and one of the provisions makes his right to appear before Courts and tribunals other than the High Court subject to the provisions of any other law for the time being in force. On the same reasoning, a rule prohibiting lawyers from appearing before arbitrators under the Bombay Co-operative Societies Act, 1925, has been held not to be invalid.[9]

A provision in a Municipal Act to the effect that persons, who stand for election as municipal councillors, must not accept briefs for or against the municipality if they are lawyers is a reasonable restriction imposed in public interest and is quite valid.[10] Under S. 61 (3) of the Income-tax Act, 1922, if any lawyer is found guilty of misconduct in connection with any income-tax proceedings, the Commissioner of Income-tax may direct that he shall be thenceforward disqualified to represent an assessee. This provision is not an unreasonable restriction on the right to practise the legal profession.[11]

Under the Constitution of the United States of America, Amendment XIV, no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The right to practise law in the State Courts is not a privilege or immunity of a citizen of the United States.[12]

76. Licence, requirement of. — The imposition of a licence fee and requirement of a licence from persons desiring to carry on any occupation, trade or business is a restriction on the right to carry on

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[7] 1952 All 491 (Prs 14, 16) [A I R V 39] : 1952 Cri L Jour 910 (DB), *In the matter of Phool Din.* (The provisions contained in Ss. 13 (e), 22 (d) and 36 (6) concerning toutism in the Legal Practitioners Act are "reasonable restrictions in the interests of general public" within the meaning of Art. 19 (6) and therefore are not void—There is no comparison between the profession of a broker and that of a tout.)

[8] 1953 Mad 447 (448, 449) (Pr 2) [AIR V 40 C 170]. *Rangaswami* v. *Industrial Tribunal.*

1951 Tra-Co 203 (Pr 22) [AIR V 38 C 81] : I L R (1951) Tra-Co 458, *Nagalinga Nadar Sons* v. *A. T. H. L. Conveyance Workers Union.*

[9] 1952 Bom 296 (298) (Pr 4) [AIR V 39] : ILR (1952) Bom 766 (DB), *Mulchand* v. *Mukund.*

[10] 1952 Orissa 11 (Prs 12, 33) [AIR V 39 C 2] (DB), *Bishnu Charan* v. *State of Orissa.* (Section 16 (1) (IX) of the Orissa Municipal Act (XXIII [23] of 1950) does not restrict the right of a legal practitioner to carry on his profession.)

[11] 1951 Mad 897 (Pr 7) [AIR V 38 C 320]: ILR (1952) Mad 451 (DB), *Chandrasekhara* v. *I. T. Commissioner.*

[12] (1894) 154 U S 116 (117) : 38 Law Ed 929 (930), *Ex parte Lockwood.*

Article 19
Note 76

the occupation, trade, or business conferred by cl. (1) (g). Hence, the validity of such restriction is liable to be questioned and tested under the provisions of cl. (6).[1] There is a difference between a *tax* like an income-tax and a *licence fee* for carrying on a business. The licence fee acts as a restriction on the right to carry on the business, for without payment of such fee the business cannot be carried on at all.[2] But although the requiring of licence and imposition of a licence fee are a restriction on a Fundamental Right, they are not absolutely prohibited. Provided that such a requirement is reasonable and has been imposed in the interest of the general public, it would be valid.[3] Thus, it has been held that requiring a licence fee for running a rice-mill is not unreasonable where the public interest requires that the Government should retain control over the business.[4]

The license fee must not be unreasonably heavy.[5] Though ultimately the decision in each case must depend upon the particular facts of that case, certain general tests have been formulated by the Courts to decide whether a particular fee is reasonable in the circumstances. They are : (i) the licence fee may reasonably cover the costs of all special services necessitated by the duties and liability imposed on the authority in respect of the supervision and regulation of the particular

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Article 19 — Note 76

[1] 1952 S C 115 (Pr 7) [AIR V 39 C 22] : 1952 S C R 572 (SC), *Mohd. Yasin* v. *Town Area Committee, Jalalabad.* (AIR 1951 S C 97 (SC), Disting.)

[2] 1952 S C 115 (Pr 7) [AIR V 39 C 22] : 1952 S C R 572 (SC), *Mohd. Yasin* v. *Town Area Committee, Jalalabad.* (AIR 1951 S C 97 (SC), Disting.)
[*See also* 1952 Mad 395 (408) [AIR V 39 C 105 (35)]: I L R (1952) Mad 933 (DB), *Anantha Krishnan* v. *State of Madras.* (*Venkatarama Ayyar J.* — There is difference between profession tax and income-tax — Power of levying tax on income is absolute — But tax on right to carry on business (e.g., a professional tax) should not be such as to destroy it.)]

[3] 1953 Mad 279 (296) [AIR V 40 C 102] : I L R (1953) Mad 304 (DB), *C. S. S. Motor Service* v. *Madras State.* (Where the question arises with reference to Fundamental Rights, the validity of the decisions of the licensing authorities must be judged with reference to the provisions of Part III of the Constitution.)
('53) 57 Cal W N 229 (231), *Ram Padarat* v. *Commr. of Police.* (Licence for carrying on business of a Boarding House — Calcutta Police Act, 1886, S. 39 — Discretionary power conferred on Commissioner of Police under S. 39 should be exercised in a reasonable manner.)
1951 Cal 90 (Pr 10) [AIR V 38 C 26], *Anumathi Sadhu Khan* v. *A. K. Chaterjee.* (W. B. Rice Mills Control Order — Power to refuse or cancel licence without assigning reasons is arbitrary and void.)
[*See also* 1953 Assam 145 (146) [AIR V 40 C 63] (DB), *Mahboob Khan* v. *Deputy Commr.* (To hold a licence for the collection of tolls in a municipal market is not a citizen's Fundamental Right, it being limited by the rules that exist and is subject to the approval of the Municipal Board. To hold a licence or to trade under a licence, therefore, is not a Fundamental Right, nor is it one of the seven freedoms enjoined under the Indian Constitution.)

[4] 1952 Cal 72 (Prs 12, 13) [AIR V 39 C 24], *Ratan Chandra* v. *Adhar Biswas.*

[5] 1952 Mad 764 (Pr 12) [AIR V 39] : I L R (1953) Mad 217 (DB), *Vardachari* v. *State of Madras.* (Enhancement of licence fees leviable under Madras Manure Dealers' Licensing Order, 1949 — Discrimination between oil millers and other manure dealers — Enhanced fee held unconstitutional both as being unreasonable and as contravening Art. 14.)

trade or calling in respect of which the licence is issued; (ii) there must be some relation between the expenses incurred in the issue of licences and in regulating the licensed trade or other occupation and the amount of fees leviable. When the licensing authority issues a number of licences to persons engaged in different trades and occupations, it would be unreasonable if it so fixes the fees that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it is imposed on a particular trade or a few particular trades.[6]

The requirement of a licence in various cases has been held by the Supreme Court of the United States of America as falling within the power of the State under the due process clause of the Constitution of the United States, and provided the provision is not arbitrary and is justified as being necessary in public interest, it has been treated as valid.[7]

Where the law under which the licence is required and the licence fee is imposed is otherwise invalid, as for instance falling outside the legislative competence of the authority by which that law has been passed, no question of the reasonableness or otherwise of the provisions of the law under cl. (6) arises and, irrespective of any such question, the requirement as to licence and licence fees will not be binding on citizens.[8]

(a) Distinction between Permit and Licence

It is necessary to make a distinction between permit and licence. The law might confer on an administrative authority an absolute discretion to grant or withhold permits for carrying on business or it may empower it to issue a licence to the applicants imposing appropriate conditions for the conduct of business. The word 'permit' may appropriately be used for the former and the word 'licence' for the latter. While it is well established that a *permit* is unconstitutional so far as it relates to the exercise of Fundamental Rights, it is equally well settled that a system of licensing which has for its object the regulation of trades is not repugnant to ART. 19 (1) (g).[9]

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[6] 1952 Mad 764 (Prs 4, 5) [AIR V 39]: I L R (1953) Mad 217 (DB), *Varadachari* v. *State of Madras.* (AIR 1931 P C 217 and AIR 1930 Mad 55, Foll.)

[7] (1901) 180 U S 452 (467) : 45 Law Ed 619 (626), *W. W. Cargill Co.* v. *Minnesota ex rel. Rail road. & W. Com.*

(1928) 277 U S 350 (355) : 72 Law Ed 913 (915), *Ribnik* v. *McBride.* (That the State has power to require a license and regulate the business of an employment agent does not admit of doubt.)

(1912) 223 U S 288 (295, 296): 56 Law Ed 439 (444), *Collins* v. *Texas.* (Licensing and registering medical practitioners which do not contemplate inquiry into applicant's knowledge of therapeutics or materia medica does not infringe rights of a person holding a diploma from a school who has not attempted to secure a licence.)

(1900) 177 U S 183 (187) : 44 Law Ed 725 (728), *Gundling* v. *Chicago.* (Requiring license for selling cigarettes not bad — Mayor of Town given the power to issue licence to person of good character and reputation and providing that to every person fulfilling these conditions, license must be granted — Power is not arbitrary.)

(1847) 5 How 504 (577) : 12 Law Ed 256 (289), *(License Cases) Thurlow* v. *The Commonwealth of Massachusetts.* (Laws passed for discouraging use of intoxicating liquors by prohibiting their sale in small quantities and without licences obtained from State authorities held not inconsistent with the provisions of the Constitution of America.)

[8] 1952 S C 115 (Pr 8) [AIR V 39 C 22] : 1952 S C R 572 (SC), *Mohd. Yasin* v. *Town Area Committee, Jalalabad.* (Licence fee levied on wholesale sale of vegetables by a Town Area Committee under bye-laws framed under powers conferred by the U. P. Municipalities Act — Legality — Bye-laws not falling within competence of Town Area Committee—No question of reasonableness arises.)

(b) Distinction between income-tax, profession-tax and licence fee

It may be useful to note the distinction between profession tax on the one hand and licence fee and income-tax on the other.

When a person embarks on business the law may require him to take out a licence and charge a fee therefor. The idea behind the licence system is that the State has a right to control trade in the interests of the public and for that purpose impose suitable restrictions on the conduct of the business. The licence is a symbol of State regulation and the licence fee is intended to cover expenses which the State has to incur in maintaining an establishment for the purpose of regulating the trade. Licensing of trades, including the profession of law, is valid and a reasonable fee can be charged for the issue of a licence.

The income-tax is levied in accordance with the provisions of the Income-tax Act on incomes actually earned. Such a tax would be lawful and does not infringe the Fundamental Rights because what is guaranteed under Part III is freedom of trade and not freedom from taxation of profits made in that trade.

The profession tax differs from the licence fee in that it is a fiscal measure intended to bring revenue and not merely to regulate trade. It differs from income-tax in that it is not a levy on incomes earned but is a tax on the carrying on of a profession itself even before any income could be earned.[10]

77. Trade restrictions. — In NOTE 76 we have seen one kind of restriction on the right to carry on a trade, occupation or business. Such restrictions may be of many kinds. Price control is one such kind. This is dealt with in NOTE 78. The validity of all such controls and restrictions and regulations is liable to be tested in the light of the provisions of cl. (6). That test is a double test, namely, the restriction must be required in public interest and secondly must be a reasonable one. Thus, various provisions of the Essential Spplies (Temporary Powers) Act, 1946, have been held to be valid.[1]

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[9] 1953 Mad 279 (289) (Pr 27) [AIR V 40 C 102]: I L R (1953) Mad 304, *C. S. S. Motor Service* v. *Madras State.* (Such regulations have been sustained in America as a proper exercise of the Police Power and under the Constitution they will be upheld as falling within the scope of Art. 19 (6). What is prescribed under S. 42, Motor Vehicles Act, is in substance not a *permit* but a *licence* and hence the section is valid.)

[10] 1952 Mad 395 (404, 405) (Pr 39) [AIR V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Anantha Krishnan* v. *State of Madras.*

Article 19 — Note 77

[1] 1953 Cal 548 (Prs 35, 36) [A I R V 40 C 205], *Atulya Kumar* v. *Director of Procurement & Supply.* (Restrictions imposed by the general powers conferred by S. 3 (1) upon the Fundamental Rights conferred by Art. 19 (1) (f) or (g) of the Constitution are reasonable restrictions which are in the public interest.)

Article 19
Note 77

One important direction in which the power of the State to regulate trade and commerce is exercised is in regard to the movement of commodities.[2] Such regulation may either take the form of regulating export and import of goods,[3] or regulating or controlling movement of goods from one area to another within the country itself.[4]

The State may in public interest regulate also the manner in which trade and commerce must be carried on. For instance, it may prescribe the minimum amount of certain ingredients in prepared foods offered for sale.[5] Similarly, it may require that the ingredients of articles sold as edible articles should be disclosed on the labels.[6]

1952 Cal 502 (Pr 22) [A I R V 39], *Ramchandra* v. *Hiramba Kumar*. (Section 3 (f), (i) and (j), and S. 4 of the Essential Supplies (Temporary Powers) Act, 1946, and S. 3 (1) of the Bengal Foodgrains (Disposal and Acquisition) Order, 1947, do not impose unreasonable restrictions on the exercise of the rights guaranteed by Art. 19 (1) (f) and (g) of the Constitution and are not therefore *ultra vires* the Constitution.)

[*See also* 1953 Cal 187 (Pr 8) [A I R V 40 C 60] (DB), *Anumati Sadhukhan* v. *Asst. Regional Controller*. (The fact that the imposition of a control renders the running of the applicant's rice-mills uneconomical cannot be said to be an unreasonable restriction of the applicant's Fundamental Rights within the meaning of Art. 19 (1) (g).)

1952 Orissa 260 (Pr 19) [AIR V 39] : 1952 Cri L Jour 1354 (DB), *Jagadish* v. *P. T. Co. Etc.* (Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act (1 of 1947), S. 2 (a) — Orissa Kendu Leaves (Control and Distribution) Order, 1949, Cl. VII—Provisions are not unconstitutional.)]

[2] 1953 All 545 (Pr 3) [A I R V 40 C 266] : 1953 Cri L Jour 1269 (DB), *Har Murat* v. *State*. (U. P. Foodgrains Movement Control Order (1949), Cl. 3 (vii) —Even if Cl. 3 (vii) restricts the right guaranteed by Art. 19, the restriction is reasonable and therefore the provision is not unconstitutional.)

[*See* (1938) 304 U S 144 (147) : 82 Law Ed 1234 (1238), *United States* v. *Carolene Products Co.* (Power of Congress to regulate commerce extends to prohibition of shipments in such commerce.)]

[3] 1952 Mad 840 (Pr 8) [A I R V 39], *S. A. Khader & Co.* v. *Subramania*. (Under the provisions of the Imports and Exports (Control) Act, 1947, the notification issued thereunder and the general instructions forwarded to the officers, restrictions were imposed in the interests of the general public, having regard to the imperative necessity to control export trade for the economic stability of the country. Specific and reasonable instructions were given to the officers and an appeal also was provided to rectify the orders of the subordinate officers. It cannot be said that the restrictions imposed are not reasonable within the meaning of Art. 19 (6) of the Constitution of India, nor is the machinery provided for the implementation of the policy unsatisfactory.)

[4] 1952 Mad 409 (Pr 4) [AIR V 39 C 105 (36)] : I L R (1953) Mad 51 (DB), *Kandaswami* v. *Textile Commr*. (Notification S. R. O. No. 379, restricting export of goods, held is not invalid.)

[5] *See* (1916) 242 U S 153 (159) : 61 Law Ed 217 (222), *Hutchinson Ice Cream Co.* v. *Iowa*. (Regulating percentage of butter fat in ice-cream is valid and not unreasonable, although the ice-cream of commerce is not frozen cream but may even be made without cream or milk.)

[6] (1919) 249 U S 427 (431) : 63 Law Ed 689, *Corn Products Refining Co.* v. *Eddy*. (Requiring disclosure on label of ingredients of commercial product, like table syrup, is not infringement of constitutional right—Manufacturer or vendor has no constitutional right to sell goods without giving to purchaser fair information of what it is that is being sold.)

But where the regulations are unreasonable, they will be held to be void.[6a] Thus, it has been held that the power given to an officer to freeze stock without the necessity of giving reasons is unreasonable and arbitrary and the law conferring such a power is void.[7] Similarly, it has been held that a provision for permitting the requisitioning of foodgrains or directing their disposal at Government procurement rate, which is bound to be much lower than the ceiling price, would prevent people from carrying on trade or business which could be lawfully done at the ceiling price and that, therefore, such a provision is not reasonable and hence void.[8] But it has been held that the provision in law as to procurement of foodgrains for rationing purposes, requiring a person to deliver on demand such quantity of foodgrains as may be specified in the order making the demand, was not unreasonable and was one which imposed restriction on the Fundamental Right to acquire, hold and dispose of property in cl. (1) (f), in the interests of the general public.[9]

A provision that there should be no sale or purchase of cotton by any person in any area except the sale to any of the "nominees" of the Government in that area is unreasonable, as it has the effect of eliminating a large class of merchants and substituting in their place a close oligarchy of middlemen.[10]

See also the undermentioned cases.[11]

[6a] *See* 1953 Him Pra 41 (45) (Pr 19) [AIR V 40 C 19], *Hazari Lal* v. *State of H. P.* (The right to carry on cloth business or any other business or trade is a Fundamental Right, although it may be a controlled commodity and a person carrying on business can only do so under a license.)

[7] 1952 Raj 74 (77) (Pr 10) [A I R V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr. Civil Supplies.* (Clause 25 of the Rajasthan Foodgrains Control Order gives powers to various officers mentioned therein to freeze any stocks of foodgrains held by any person. The clause does not say that no reasons need be assigned; but it gives this power without the necessity of assigning any reasons for such action. It is thus possible for any of the officers named in the clause to freeze the stock of any dealer without assigning any reason, and thus completely paralyse his trade or business. Such power is an arbitrary power, and cannot be said to be a reasonable restriction on the Fundamental Right conferred by Art. 19 (1) (g) of the Constitution.)

[8] 1952 Raj 74 (77) (Pr 11) [A I R V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr. Civil Supplies.*

[9] 1952 Pat 220 (Prs 7,23) [AIR V 39 C 55 (22)]: ILR 31 Pat 203: 1952 Cri L Jour 710 (SB), *Mohd. Anzar Husain* v. *State of Bihar.* (Case as to the substantive provision in the Bihar Agriculturists Levy Order, 1950. It cannot be said that if under this Order arbitrary and unreasonable action may conceivably be taken, the Order must, on that ground, be held to be an invalid Order.)

[10] 1952 Mad 409 (Pr 6) [AIR V 39] : I L R (1953) Mad 51 (DB), *Kandaswami* v. *Textile Commr.* (Cotton Control Order (1950), Cl. 6 — Notification S. R. O. No. 388 held unconstitutional and void: AIR 1951 S C 118 and A I R 1950 S C 163, Rel. on.)

[11] 1953 Him Pra 41 (47) (Pr 29) [A I R V 40 C 19], *Hazari Lal* v. *State of H. P.* (Himachal Pradesh Cotton Cloth Dealers Licensing Order, 1948 — Person doing cloth business under retail dealers' licence — Being asked to do

78. Price control.—The control of prices of commodities by the State is in effect a matter affecting both the right to dispose of property under cl. (1) (f) (which necessarily must mean disposing of property on any terms one likes) and the right to carry on any occupation, trade or business under cl. (1) (g) (which necessarily must mean the right to carry on such trade, occupation or business in any manner and on any terms that a person may choose). But the exigencies of modern life have necessitated the investing of the State with power to control prices in public interest and so, as a matter of principle, the imposition of price control by the State is not regarded in itself as an unreasonable invasion of a citizen's Fundamental Rights.[1] Price control may also take the form of regulating the charges for services which are sold, or fares for transportation or carriage of goods.[2] The State may fix either the maximum prices (or ceiling prices) or the minimum prices. Maximum prices are fixed in the interest of consumers. The minimum prices are fixed so that commerce may not suffer owing to over competition.

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business through co-operative societies was held reasonable and in public interest.)

1953 Cal 548 (Pr 37) [A I R V 40 C 205], *Atulya Kumar* v. *Director of Procurement and Supply.* (The provisions of the West Bengal Foodgrains (Intensive Procurement) Order are reasonable and in the public interest : A I R 1952 Pat 220, Rel. on.)

1953 Nag 141 (144) (Pr 20) [A I R V 40 C 46] : 1953 Cri L Jour 801 (DB), *State Govt., M. P.* v. *Amrit Lal.* (C. P. and Berar Cotton Cloth Trade Regulation Order (1948), Cl. 3—Clause is within ambit of saving cl. (6) of Art. 19.)

1952 Trav-Co 260 (261) (Prs 4, 6) [A I R V 39], *Sankarasubramony* v. *State.* (Travancore Cotton Yarn Dealers Licensing Order (1124), Cl. 6—Scheme of distribution of yarn through licensed private yarn dealers and co-operative societies—Change in scheme envisaging distribution only through co-operative societies—No infringement of Fundamental Right of private yarn dealers.)

Article 19 — Note 78

[1] (1940) 310 U S 381 (396) : 84 Law Ed 1263 (1272), *Sunshine Anthracite Coal Co.* v. *Adkins.* (Congress can provide for price regulation for purpose of stabilizing industry.)

(1934) 291 U S 502 (520, 521) : 78 Law Ed 940 (947, 948), *Nebbia* v. *New York.* (Fixing higher price for milk when purchased from middleman than when purchased from producer—Equal protection clause is not violated — Due process —State regulation of milk prices held not unconstitutional.)

(1876) 24 Law Ed 77 (87, 88) : 94 U S 113, *Munn* v. *People of Illinois.* (Price control — Maximum charges for storage of grain may be fixed.)

[*See* (1927) 273 U S 418 (430, 445) : 71 Law Ed 718 (722, 728), *Tyson and Brother* v. *Banton.* (The power of the Government to fix prices does not ordinarily exist in respect to merely private property or business, but exists only where the business or property involved has become "affected with public interest" — Places of amusement or entertainment are not public utilities or so affected with public interest as to justify legislative regulation of their charges.)

(1914) 233 U S 389 (415) : 58 Law Ed 1011 (1023), *German Alliance Insurance Co.* v. *Lewis.* (Police Powers — Regulating fire insurance rates — A business may be so far affected with public interest as to permit legislative regulation of its rates and charges.)]

[2] *See* (1886) 116 U S 307 (325) : 29 Law Ed 636 (642), *("Railroad Commission cases") Stone* v. *Farmers Loan and Trust Co.* (State can limit railroad charges for transportation within its own jurisdiction.)

79. Monopolies. — Monopoly necessarily involves the elimination of free competition in business and also a restriction on the Fundamental Right to carry on any occupation, trade or business guaranteed by cl. (1) (g). Hence, if there is any law under which a monopoly can be created, such law is liable to be impugned as void unless it can be sustained as being reasonably required in public interest under cl. (6). Thus, in *Rashid Ahmed* v. *Municipal Board, Kairana,*[1] the Supreme Court of India held as void a municipal bye-law as vesting in the Municipal Board an unreasonable power of granting a monopoly of trade in the municipal market and as unduly restricting the right of citizens to trade in the municipal market.

Under cl. (6) (ii) express provision is made ensuring the validity of all laws relating to the power of the State to carry on either directly or through a corporation, owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. This provision necessarily excepts from the provisions of clause (1) (g) the cases where a monopoly is created in favour of the State or of any corporation owned or controlled by the State in regard to trade, business, industry or service. The question arises, however, whether this provision is sufficient to get over the objection as to denial of equality before law under Article 14 when such objection is raised with regard to special concessions and privileges for State businesses, conducted not as part of the normal functions of the State but purely as commercial pursuits. It must be noted in this connection that cl. (6) (ii) is expressly limited in its effect to cl. (1) (g) of this article. There is nothing in cl. (6) (ii) to exclude the applicability of ART. 14 to the State when it engages in purely commercial pursuits.[2] (See also ART. 14, NOTE 11.)

80. Labour laws. — Laws regulating relations between employers and employees in regard to wages, hours of work, etc., are also liable to be questioned as affecting the right of a citizen to carry on his business in his own way and on his own terms. In the under-mentioned case of the Supreme Court of Illinois, United States of America,[1] such a regulation concerning the right to wages of employees

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Article 19 — Note 79

[1] 1950 S C 163 (Pr 6) [AIR V 37 C 11]: 1950 S C R 566 (SC). (Bye-law 2 framed under U. P. Municipalities Act by Kairana Municipality prohibiting wholesale transaction in a commodity within the market without permission of the Board where no power has been given to the Board to grant a licence and bye-law 4 giving power to grant monopoly of trade to an individual are more than the reasonable restrictions permitted by Art. 19 (6) and are void under Art. 13 (1). The power of the Supreme Court under Art. 32 being much wider than the granting of mere prerogative writs, it can entertain the application of a person, who has been prevented from wholesale trade, for the enforcement of his Fundamental Right of trade and grant the relief prayed for under Art. 32.)

[2] 1951 All 257 (282, 305) (Prs 115, 248) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Moti Lal* v. *Uttar Pradesh Government.*

Article 19 — Note 80

[1] (1923) 28 A L R 610 (614), *People of the State of Illinois* v. *Chicago Milwaukee & St. Paul Railway Company.* (Requiring employers to allow

Article 19
Notes 80-81

was regarded as falling under the clause against deprivation of any citizen of his property without due process of law. But such legislation will obviously be covered by cl. (6) and, if reasonable and in public interest, will be treated as quite valid.[2]

81. Industrial Disputes Act.—It has been held by the Madras High Court that the law under which industrial disputes between employers and employees are compulsorily referred to arbitration is not *ultra vires*, as in such a case there is no restriction either on the right to acquire, hold and dispose of property or on the right to carry on any occupation, trade or business.[1] It has also been held that the Industrial Disputes Act is a reasonable enactment passed in public interest and as such valid under cl. (6).[1a] At the same time, the Madras

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employees time to vote without deduction of pay deprives them of their property without due process of law.)

[2] (1898) 169 U S 366 (398) : 42 Law Ed 780 (793). *Holden* v. *Hardy*. (State statute limiting period of employment of workmen in under-ground mines or in smelting, etc., to 8 hours a day is valid exercise of Police Power of State.)
[*See* 1952 All 773 (775) (Pr 15) [AIR V 39] (DB), *Matrumal* v. *Chief Inspector of Shops Etc., Kanpur.* (U. P. Shops and Commercial Establishments Act (22 of 1947) is valid. The regulation of the hours of work of the employees or the prescription of holidays and sick leave or the insistence on the observance of the legislative requirements to keep proper records of attendance, fines or overtime work, does not deny the freedom of profession. Its underlying purpose is to prevent what is called 'sweating of labour' by persons who by nature of their position as employers have a dominant voice and are apt to use it for their own benefit rather than for the benefit of their own employees.)]

Article 19 — Note 81

[1] 1951 Mad 191 (Prs 4, 5) [AIR V 38 C 19] : 52 Cri L Jour 744 (DB), *C. P. Sarathy* v. *State of Madras.* (It cannot be said that Industrial Disputes Act (14 of 1947), in so far as it makes the employers bound to act in accordance with the terms of an award, which was passed without the employers being consenting parties to the reference and in spite of the protests of the employers, is *ultra vires* by reason of Art. 19 (1) (f) and (g) of the Constitution. There is no restriction on the carrying on of a trade or business by the cinema employers as a result of the Industrial Disputes Act.)
[*See also* 1951 Mad 974 (Prs 7, 8, 9, 10, 13) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.* (*Obiter.* — The provisions of the Industrial Disputes Act and the award made in pursuance of the reference under the Act, re-instating a dismissed employee and granting additional bonus to the workers, are not inconsistent with the Fundamental Rights conferred by Part III of the Constitution. They do not contravene the Fundamental Rights declared by Arts. 14, 19 and 31 of the Constitution of India. Apart from the question whether a limited company incorporated under the Companies Act can be deemed to be a citizen within the meaning of Art. 19, Constitution of India, it is very much doubtful if there is anything in the Industrial Disputes Act or even in the award which affects adversely any right to acquire, hold and dispose of property or any right to carry on any occupation, trade or business.)

[1a] 1953 Mad 102 (103) (Pr 3) [AIR V 40 C 34], *D. S. M. Assn.* v. *Industrial Tribunal, Madurai.* (In the present social set up it is impossible to hold that the legislation, intended to bring about harmonious relationship between the employers and the employees in the interests of Industrial peace is an unreasonable restriction upon the Fundamental Right guaranteed under Art. 19(1)(g) of the Constitution. Indeed the Industrial Disputes Act by providing a machinery to smoothen out the disputes between the employers and employees enables the employer to carry out his trade or business more effectively than otherwise he could do. In

High Court has remarked upon the fact that industrial disputes are entrusted to Administrative Tribunals, under recent labour legislation, without enunciating even the general principle on which the disputes should be decided. The Madras High Court has expressed its opinion that such a state of things is fraught with risk of grave injustice being done to either party.[2] In the United States of America it has been held that "due process of law" is not denied by the provisions of the National Labour Relations Act of 1935 forbidding discrimination against employees because of union activities.[3] Compelling a business to be continued is *ultra vires.* But a lock-out may be ordered to be ended under the appropriate law.[4]

82. Clause (1) (g) — Illustrative examples of valid and invalid restrictions. — See the undermentioned cases.[1] See also NOTES 69 and 70.

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the interests of general public, and particularly when the freedom of contract has not been guaranteed by the Constitution, the provisions of the Act empowering the tribunals to decide a dispute between parties notwithstanding their prior agreement to the contrary cannot be held to be an unreasonable restriction on the Fundamental Right to carry on the trade.)

[2] 1951 Mad 974 (Prs 7, 8, 9, 10, 13) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.* (The essential object of all recent labour legislation has been not so much to lay down categorically the mutual rights and liabilities of employers and employees as to provide recourse to a given form of procedure for the settlement of disputes in the interests of the maintenance of peaceful relations between parties, without apparent conflicts such as are likely to interrupt production and entail other dangers. If the decision of the dispute were to depend entirely on the unfettered discretion of the tribunal there may be occasions when the very object of the legislation under which these tribunals function may not be achieved. It is for the Legislature to have regard to this aspect of the matter. But the Act cannot be held to be invalid because of this defect. When a big employer talks about his democratic right to individual freedom, meaning thereby a claim to socially irresponsible control over a huge industrial concern and over the lives of tens of thousands of human beings whom it happens to employ, he is talking in a dying language.)

[3] (1937) 301 U S 1 (43, 44) : 81 Law Ed 893 (915), *National L. R. Bd.* v. *Jones and Laughlin S. Corpn.*

[4] 1953 Mad 98 (Pr 15) [AIR V 40 C 33] (DB), *Indian M. & M. Corpn.* v. *Industrial Tribunal.*

Article 19 — Note 82

[1] 1953 S C 79 (82) [AIR V 40 C 22] : 1953 S C R 290 (SC), *T. B. Ibrahim* v. *Regional Transport Authority.* (Abolition of bus stands — Motor Vehicles Act (1939), S. 68 (2)—Madras Vehicles Rules (1940), R. 268 — Restriction placed on use of bus stand for the sake of convenience of public is valid—Whether abolition of bus stand was conducive of public inconvenience or not is a matter entirely for the transport authority to decide.)

1952 S C 115 (Pr 8) [AIR V 39 C 22] : 1952 S C R 572 (SC), *Mohd. Yasin* v. *Town Area Committee, Jalalabad.* (Bye-laws 1 and 4 framed by a Town Area Committee in U. P. under U. P. Municipalities Act (2 of 1916), imposing a charge on the wholesale dealer irrespective of any use or occupation by him of immovable property vested in or entrusted to the management of the Town Area Committee, held *ultra vires* the powers of the Committee under Ss. 293 (1) and 298 (2) of the Act—In the absence of any valid law authorising it, such illegal imposition must operate as an illegal restraint and must infringe the right of the wholesale dealer to carry on his profession under Art. 19 (1) (g).)

1951 S C 118 (Prs 6, 8) [AIR V 38 C 17] : 1950 S C R 759 : ILR (1951) Hyd 221 (SC), *Chintamanrao* v. *State of M. P.* (Total prohibition of bidi manufacture during agricultural season is invalid.)

1952 All 753 (758) (Prs 15, 16, 17, 39) [AIR V 39] (FB), *Buddhu* v. *Allahabad Municipality.* (U. P. Municipalities Act (2 of 1916), S. 298—Bye-law 1 (3) (Allahabad Municipality)—Bye-law prohibiting slaughter of cows is not unreasonable and is not hit by Art. 19 (1) (g).)

1953 Hyd 1 (3) (Prs 5, 6) [AIR V 40 C 1] : ILR (1952) Hyd 481 (FB), *Gopal Rao* v. *War Nasi.* (A suit for establishing exclusive right to carry on a particular profession in a village such as *purohitgiri* cannot be decreed as such a decree would amount to infringement of the right under cl. (1) (g).)

1953 All 95 (96) (Pr 2) [AIR V 40 C 38] : 1953 Cri L Jour 332, *Sadal* v. *The State.* (U. P. District Boards Act (10 of 1922), S. 174—Bye-laws under—Bye-law No. 1 of District Board, Rae Bareli — Municipal bye-law which does not totally prohibit the carrying on of offensive and obnoxious trade but only regulates it by prohibiting it to be carried on in particular places, not invalid.)

1953 Mad 279 (289, 290) (Prs 27, 28, 29, 30) [AIR V 40 C 102] : ILR (1953) Mad 304 (DB), *C. S. S. Motor Service* v. *State of Madras.* (Permit system for motor buses — Ss. 42, 43-A, 47 (1) (a), (b), (d) and (f), 48 (a) and (b) and 64-A of the Motor Vehicles Act are valid—Section 47 (1) (c) is in part valid and S. 47 (1) (e) is wholly void.)

1953 Mad 142 (143) (Prs 6, 7) [AIR V 40 C 42] : 1953 Cri L Jour 333, *In re Sundara.* (Article 19 (1) (f) and (g) are not infringed by requirement of licence for manufacture of explosives in residential locality under Explosives Act (1884) — Restrictions are permissible under Art. 19 (6).)

1952 Him Pra and B 41 (Pr 5) [AIR V 39], *Sihnu* v. *Lachman Dass.* (Restriction of right to carry on water mill not completely but within a radius of a few miles of another mill to whom the licence to run the mill had been already given —Valid.)

1952 Mad 120 (Prs 15, 16) [AIR V 39 C 58] : ILR (1953) Mad 636 (DB), *R. M. Seshadri* v. *Dist. Magistrate.* (Cinema business — Requiring compulsorily that certain films must be shown was held valid.)

1952 Nag 353 (354) (Pr 6) [AIR V 39] : ILR (1953) Nag 110 (DB), *S. T. Co.* v. *State of M. P.* (Permit system for plying motor buses on highways—Ss. 43, 58, 58A, Motor Vehicles Act (1939), regulating business of plying buses on highways are saved by Art. 19 (6), Constitution of India.)

1952 Orissa 42 (Prs 10, 11, 16) [AIR V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.* (The provisions of the Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carrier's Services) Act (36 of 1947) do not go beyond the limits of reasonable restrictions in the interests of the general public permitted by clause (6) of Art. 19. Thus the Orissa Act is saved by Art. 19 (6) and is not invalid: AIR 1951 S C 118 (SC), Foll.)

1951 Cal 167 (Prs 9, 10) [AIR V 38 C 30R] : 52 Cri L Jour 1399 (DB), *Banamali Das* v. *Pakhu Bhandari.* (W.B. Hindu Social Disabilities Removal Act, S. 3 (c)—Barber compelled to serve all Hindus alike and not to refuse his services to any one on the ground of his low caste—The Act does not prevent or restrict him from carrying on business —Even assuming the contrary the restriction is reasonable and in interest of general public.)

1951 Trav-Co 197 (Prs 8, 9) [AIR V 38 C 80] : ILR (1951) Trav-Co 496, *Krishnankutty* v. *State of Trav.-Co.* (Abkari Rules—Selection of site for liquor shop—An unfettered discretion on a statutory body to approve or not to approve a selected site for a liquor shop held not an unreasonable restriction on the exercise of any Fundamental Right and hence not void: A I R 1950 S C 211 (SC) and A I R 1950 Bom 363 (FB), Rel. on.)

(1917) 242 U S 526 (528, 529, 530) : 61 Law Ed 472 (474, 475), *Thomas Cusack Co.* v. *City of Chicago.* (It is within the Police Power of a city to exercise within the city limits a reasonable regulation and control over the construction of bill boards and other similar constructions.)

83. **Clause (6) (i) — Professional or technical qualifications.** — Any law imposing professional or technical qualifications necessary for practising any profession, or carrying on any occupation, trade or business, is valid notwithstanding that such a law may necessarily mean a restriction on the right declared by clause (1) (g) to practise any profession or to carry on any occupation, trade or business. Hence, it follows that it cannot be said that any citizen of India has, merely by virtue of his being such a citizen, the right to practise any profession, as for instance the profession of an advocate, or attorney of the High Court.[1] (See also NOTE 75.) Unless a citizen possesses the prescribed professional or technical qualifications, he will not be entitled to practise any profession. Under the Constitution of the United States of America also, the prescribing of professional or technical qualifications for the practice of any profession or the carrying on of any occupation is treated as quite a valid and constitutional procedure.[2]

As mentioned in NOTE 72, the sub-clauses as to professional and technical qualifications and as to carrying on by the State of any business are not subject to the condition as to the restriction being a reasonable one and hence the Courts will not be entitled to consider the reasonableness of any professional or technical qualifications[3] that

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(1915) 237 U S 171 (176, 177) : 59 Law Ed 900 (903), *Reinman* v. *City of Little Rock.* (Forbidding livery stable business in designated area not unreasonable.)

(1915) 59 Law Ed 735 (742) : 236 U S 585 (595), *Northern P. R. Co.* v. *North Dakota.* (A State may not compel a carrier to establish a rate which is less than reasonable, in order to build up a local enterprise.)

(1911) 55 Law Ed 112 (116, 117) : 219 U S 104, *Noble State Bank* v. *Haskell.* (Police Power under the American law extends to regulation of banking business (and even to its prohibition) except on such conditions as the State prescribes — Compulsory creation of depositors' guarantee fund by levy of assessment based on average daily deposits is valid.)

(1894) 152 U S 133 (139) : 38 Law Ed 385 (389), *Lawton* v. *Steele.* (State can take steps necessary to preserve fisheries of the State from extinction by prohibiting exhaustive methods of fishing or the use of such destructive instruments as are likely to result in the extermination of young as well as mature fish.)

See also cases under Notes 69 and 70.

Article 19 — Note 83

[1] 1952 Cal 178 (Pr 5) [AIR V 39 C 66] (SB), *Aswinikumar* v. *Arabindo.*

[2] (1926) 272 U S 425 (427) : 71 Law Ed 331 (334), *Graves* v. *Minnesota.* (Prescribing professional qualification for practising medicine or dentistry valid.)

(1898) 170 U S 189 (194) : 42 Law Ed 1002 (1004, 1005), *Hawker* v. *State of New York.* (Qualifications for medical profession.)

(1889) 129 U S 114 (123, 128) : 32 Law Ed 623 (626, 628), *Dent* v. *State of West Virginia.* (State statute requiring physicians to procure certificate not unconstitutional—The law was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State.)

[3] *See* (1873) 21 Law Ed 442 (445):16 Wall 130, *Bradwell* v. *The State of Illinois.* (The power of the State to prescribe qualifications for admission to the bar of its own courts is unaffected by the 14th Amendment, U. S. Constitution, and the Supreme Court of America cannot enquire into the reasonableness or propriety of the rules it may prescribe.)

may be prescribed by the State by means of any law with regard to any profession or occupation. But the State will have to confine itself to the power which it is actually given under the clause, namely, to prescribe the *professional* or *technical* qualifications. The Courts, it is conceived, will be entitled to examine whether any qualification prescribed by the State is a professional or a technical qualification or not and if it is found that the qualification does not come under the head of a professional or a technical qualification, it may be declared to be an unconstitutional restriction on a citizen's right to practise any lawful profession or carry on any lawful occupation he pleases.

It is conceived that the words "professional or technical qualification" refer to the personal fitness of a person to practise a profession or carry on an occupation, by reason of his education, knowledge, experience, ability, training, character, &c.[4] They do not seem to refer to the question whether a person has obtained a sanad or certificate or licence, etc. Hence, any requirement as to such a sanad, or licence, etc., will come under the head of a restriction merely and not under that of a professional or technical qualification. Therefore, the ruling of the Full Bench of the Hyderabad High Court,[5] referred to in NOTE 75, cannot be treated as not having considered the relevant aspect, namely, that of the provision as to professional qualifications in cl. (6) (i).

The provisions of S. 61 (3) of the Income-tax Act, 1922, can be regarded as laying down a rule as to professional qualifications and as such will be covered by cl. (6) (i). Apart from this, it has been held to be a reasonable restriction on the right of practising a profession imposed in public interest and, therefore, valid.[6]

84. Clause (6) (ii). — As already seen in NOTE 79, this clause has been introduced under the Constitution (First Amendment) Act, 1951, for making it clear that any scheme of nationalisation which the State may undertake would not be inconsistent with the right of a citizen guaranteed under cl. (1) (g). Hence the decisions,[1] which, prior to the amendment, held that the Fundamental Right under

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[But see (1921) 16 A L R 703 (708), *People of the State of Illinois* v. *Love*. (Regulation of the Department of Registration requiring chiropractors to accompany their application by letters of recommendation with regard to their moral and professional character from at least two reputable medical men or osteopathic physicians was held arbitrary and unreasonable.)

[4] (1866) 18 Law Ed 356 (361) : 71 U S 277, *Cummings* v. *Missouri*. (Qualification refers to the fitness or capacity of the party for a particular pursuit or profession—Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, office or employment or enables him to sustain any character with success.")

[5] 1951 Hyd 140 (Pr 72) [AIR V 38 C 57] : ILR (1951) Hyd 689 (FB), *Ramdayal* v. *Shakarlal*.

[6] 1951 Mad 897 (Prs 7, 8) [AIR V 38 C 320] : ILR (1952) Mad 451 (DB), *Chandrasekhara* v. *I.-T. Commissioner*.

Article 19 — Note 84

[1] 1951 All 257 (Prs 43, 44, 48) [AIR V 38 C 51] : ILR (1951) 1 All 269 (FB), *Motilal* v. *Uttar Pradesh Government*.

cl. (1) (g) cannot be infringed on the ground of nationalisation of any industry, or service, or trade, etc., must be regarded as superseded by the amendment. See also the undermentioned case.[2] (See also NOTE 79.)

85. Taxation powers of the State and Fundamental Rights. — Under ART. 265 no tax shall be levied or collected except by authority of law. Thus, the State has power under that article to make laws for the levy and collection of taxes. This power of the State is not affected by the Fundamental Rights declared in Part III of the Constitution. Hence, objection cannot be raised to any tax *bona fide* levied under the taxation powers of the State under ART. 265 on the ground that the tax is a restraint on the exercise of any of the Fundamental Rights. In other words, Fundamental Rights are not immune from taxation and taxation cannot be regarded as an abridgment of Fundamental Rights.[1] Thus, levying a stamp duty under the Stamp Act on enrolment as an advocate of a High Court cannot be said to be an abridgment of the Fundamental Right to practise a profession.[2] Similarly, the imposition of stamp duty on documents of transfer of property cannot be said to be an abridgment of the Fundamental Right to acquire or to dispose of one's property.[2a]

1951 Him Pra 36 (Pr 32) [AIR V 38 C 11], *B. T. S. Ltd.* v. *State of H. P.* (The right of carrying on transport business falls in the category of the Fundamental Rights mentioned in Art. 19 (1) (g). This Fundamental Right to carry on transport business, within the four corners of the provisions of the Motor Vehicles Act, 1939, cannot be infringed on the ground of nationalisation of transport in the State.)

[2] (1920) 18 A L R 929 (941), *Springfield Gas and Electric Co.* v. *City of Springfield.* (Private corporation, operating public utility like water, light, gas etc., in competition with one owned and operated by municipality, is not deprived of its property without due process of law by the fact that the control of rates is vested in the municipality as regards the municipal concern and not in the public utilities commission which controls the rates to be charged by the private corporation.)

Article 19 — Note 85

[1] 1952 Pat 359 (366) (Pr 17) [AIR V 39]: I L R 31 Pat 493 (SB), *Atmaram* v. *State of Bihar.* (A distinction must be made between taxation and restriction of the right of trade and commerce. It is only in the latter case that cl. (1) (g) will apply. The pith and substance of the legislation should be seen to determine whether it is taxation or restriction of trade and commerce. (1949) 249 U S 86 : 63 Law Ed 493, *United States* v. *Doremus*; (1923) 259 U S 20 : 66 Law Ed 817, Ref.)

1952 Mad 395 (Pr 31) [A I R V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.*

[*See also* (1919) 249 U S 86 (93, 94) : 63 Law Ed 493 (496), *United States* v. *Doremus.* (Exercise by Congress of its constitutional authority to levy excises is not invalidated merely because the same business may be regulated by the police power of the state.)]

[2] 1952 Mad 395 (Pr 25) [A I R V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.*

[2a] 1952 Mad 395 (403) (Pr 26) [AIR V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.*

Similarly, property taxes will not amount to an abridgment of the Fundamental Right to hold property. Instances like these can be multiplied.

But if under the guise of taxation the State really deprives a citizen of his Fundamental Right under this article, as for instance his Fundamental Right to property, such taxation can be impugned.[3] Similarly, it would seem that taxation laws can be impugned on the ground of violating the equality clauses of the Constitution embodied in ARTS. 14 and 15.

Under the above principles it is conceivable that professional tax can be questioned as being so heavy as to be actually prohibitive of the exercise of the right to practise a profession or carry on a trade or business.[4] Thus, any taxation on the exercise of Fundamental Rights which aims at unduly abridging or destroying such rights is unconstitutional. But if the taxation is only for legitimate revenue purposes, then it is not invalid merely because it may adversely affect any of the Fundamental Rights. This way of reconciling would leave room for judicial review in exceptional cases and a power in the Court to declare a particular instance of taxation as unconstitutional. But where it is not even suggested that the object of levying a tax is to deliberately abridge or destroy a Fundamental Right, as for instance a right to practise a prefession, or that the tax is so excessive and oppressive as to virtually abridge or destroy such right, the tax will be constitutional.[5]

A tax is not unreasonable merely because it is retrospectively imposed.[6] Hence, the levy of an additional duty on goods, already cleared by paying duty at the rate in force at the time of payment, is not necessarily an unreasonable exercise of the power of taxation.[7] A retrospective legislation to prevent loss of revenue by transactions between the date of a bill and its enactment is familiar to many countries.[8] The imposition of tax retrospectively on goods does not abridge the right to hold property under cl. (1) (f).[9] (See also NOTE 20.)

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[3] *See* (1916) 240 U S 1 (24, 25) : 60 Law Ed 493 (504), *Brushaber* v. *Union Pacific Railroad Company.* (The due process of law clause of U. S. Constitution, 5th Amendment, is not a limitation upon the taxing power conferred on the Congress unless under a seeming exercise of the taxing power, the taxing statute is so arbitrary as to compel the conclusion that it was not the exertion of taxation, but the confiscation of property, or is so wanting in basis for classification as to produce such a gross and patent inequality as inevitably to lead to the same conclusion.)

[4] *See* 1952 Mad 395 (Pr 32, 33) [AIR V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.*

[5] 1952 Mad 395 (Pr 32) [AIR V 39 C 105 (35)] : I L R (1952) Mad 933 (DB), *Ananthakrishnan* v. *State of Madras.* (*Grosjean* v. *American Press Co.,* (1936) 297 U S 233 : 80 Law Ed 660, Rel. on, and other U. S. A. cases discussed.)

[6] 1952 Nag 139 (142) (Pr 26) [AIR V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

(1916) 240 U S 1 (20, 21) : 60 Law Ed 493 (502, 503), *Brushaber* v. *Union Pacific Railroad Co.* ("The retrospective effect of income-tax provisions of the Act does not render the tax repugnant to the due process of law clause of U. S. Constitution, 5th Amendment.")

[7] 1952 Nag 139 (143) (Pr 27) [AIR V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

86 **Stamp duty — Levy of** — See NOTE 85.

87. **Right to strike.** — In Halsbury's LAWS OF ENGLAND, 2nd Edn. Vol. VI, p. 392, the right to strike, or the right of the subject to withhold his labour, so long as he commits no breach of contract or tort or crime, is enumerated as one of the important liberties of a British subject which may be regarded as of a fundamental character. But under our Constitution, the right to strike is not a Fundamental Right,[1] although it may be a legal right. Hence, the right to strike can be curtailed by ordinary legislation. But the prohibition of a strike or the right to strike may conceivably be regarded as an infringement of the right to form a union, which is guaranteed under clause (1) (c), inasmuch as the right to form a labour union may be rendered illusory by the union being prohibited from calling a strike, a strike being a potent weapon in the hands of labour for getting redress of grievances. But even on this hypothesis, a restriction of the right temporarily in the interests of industrial peace will be a reasonable restriction in the interest of public order and hence valid.[2] Thus, it has been held that S. 27 of the Industrial Disputes (Appellate Tribunal) Act, 1950, is not void and what the Legislature has rendered illegal under that Act is to go on strike during a limited period during which machinery of conciliation and arbitration is brought into operation and for some time thereafter.[3]

88. **Franchise.** — See NOTE 9.

89. **Right to stand for election.** — See NOTE 9.

90. **Preventive detention.** — See ART. 22.

91. **Freedom of contract.** — Under the Constitution of the United States of America, freedom of contract is treated as a Fundamental Right.[1] But under our Constitution it would seem that freedom of contract as such is not a Fundamental Right as it is not covered by any of the articles in Part III.

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8. 1952 Nag 139 (Pr 23) [AIR V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

9. 1952 Nag 139 (Pr 31) [AIR V 39] : I L R (1952) Nag 156 (DB), *Chhotabhai Jethabhai Patel & Co.* v. *Union of India.*

Article 19 — Note 87

1. 1951 Bom 105 (116) (Pr 23) [AIR V 38 C 22] : I L R (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.*

2. 1951 Bom 105 (Pr 23) [AIR V 38 C 22] : I L R (1951) Bom 318 : 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.*

3. 1951 Bom 105 (Prs 23, 24, 38, 39) [AIR V 38 C 22]: I L R (1951) Bom 318: 52 Cri L Jour 779 (DB), *Raja Kulkarni* v. *State of Bombay.*

Article 19 — Note 91

1. *See* (1896) 165 U S 578 (591) : 41 Law Ed 832 (836), *Allgeyer* v. *State of Louisiana.* (*Held* an Act of Louisiana which prohibited individuals within the State from making contracts of insurance with corporations doing business in New York was a violation of the 14th Amendment. In delivering the opinion of the Court, Mr. Justice Peckham remarked : "In the privilege of pursuing an

Article 19
Note 92

92. Compulsory vaccination.—Under the Constitution of the United States of America it has been held that an Act authorising compulsory vaccination would not deprive a person of his liberty under Amendment XIV to the Constitution, which provides that no one shall be deprived of his life, liberty or property without due process of law.[1]

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ordinary calling or trade and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction.")

(1923) 262 U S 522 : 67 Law Ed 1103 (1108), *Wolff Packing Co.* v. *Court of Industrial Relations.* (Act compelling those engaged in the manufacture of food and clothing and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the State, if they cannot agree — Act curtails the right of the employer and employee to contract about his affairs—This part of the liberty of the individual is protected by the guarantee of the due process clause of the 14th Amendment: *Meyer* v. *Nebraska,* (1923) 262 U S 390 : 67 Law Ed 1042, Rel. on.)

(1923) 261 U S 525 (545) : 67 Law Ed 785 (791), *Adkins* v. *Children's Hospital Columbia.* (The right to contract about one's affairs is a part of the liberty of the individual protected by the due process clause of the Federal Constitution. *Allgeyer* v. *Louisiana,* (1897) 165 U S 578 (591) : 41 Law Ed 832 (836); *New York L. Insurance Co.* v. *Dodge,* (1917) 246 U S 357 (373, 374) : 62 Law Ed 772 (781, 782); *Coptage* v. *Kansas,* (1914) 236 U S 1 (10, 14) : 59 Law Ed 441; *Adair* v. *U. S.,* (1907) 208 U S 161 : 52 Law Ed 436; *Lochner* v. *New York,* (1905) 198 U S 45: 49 Law Ed 937; *Muller* v. *Oregon* (1907) 208 U S 412 (421): 52 Law Ed 551 (555), Rel. on.)

(1918) 1 A L R 955 (963), *State of Wyoming Ex Rel Sampson* v. *City of Sheridan.* (Constitutional right to freedom of contract is infringed by an ordinance forbidding one without license and giving of bond to contract to lay concrete sidewalks.)

(1905) 198 U S 45 (64): 49 Law Ed 937 (944, 945), *Lochner* v. *New York.* (Limitation of employment in bakeries to sixty hours a week and 10 hours a day is an arbitrary interference with freedom of contract guaranteed by 14th Amendment.)

(1904) 193 U S 197 (351): 48 Law Ed 679 (706), *Northern Securities Co.* v. *United States.* (Constitutional guaranty of liberty of contract is not infringed by enforcement of provisions of Anti-trust Act.)

(1903) 187 U S 606 (609, 610) : 47 Law Ed 323 (327, 328), *Otis and Gassman* v. *Parker.* (Provision avoiding all contracts for sales of shares of corporate stock on margin and providing for recovery of money paid on such contracts held no unconstitutional interference with the right of contract, although the provision might be applied to *bona fide* as well as gambling contracts.)

(1898) 169 U S 366 (391) : 42 Law Ed 780 (791), *Holden* v. *Hardy.* (The right of contract however is subject to certain limitations which the State may lawfully impose in the exercise of its Police Power.)

(1848) 6 How 507 (532): 12 Law Ed 535 (545), *West River Bridge Co.* v. *Dix and the Towns of Brattleboro and Dummerston.* (The right of Eminent Domain in Government in no wise interferes with the inviolability of contracts. The most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.)

Article 19 — Note 92

[1] (1905) 49 Law Ed 643 (650) : 197 U S 11, *Jacobson* v. *Massachusetts.*

Article 19
Notes 92–93

It is obvious that this question is not covered by any of the sub-clauses of clause (1). The question will be whether the matter is covered by ART. 21 under which no person shall be deprived of his personal liberty except according to procedure established by law. Even assuming that the matter is covered by ART. 21, the right under that article is subject to the power of the Legislature to affect it.

93. **Compulsory military training.** — In a certain decision of the Supreme Court of the United States[1] it has been held that making military instruction compulsory in a State University does not unconstitutionally abridge the privileges or immunities of the citizens of the United States or deprive any person of his personal liberty without due process of law. It is conceived that even under our Constitution compulsorily imparting military training and education to youths will not amount to any abridgment of any Fundamental Rights. Even assuming that a question of deprivation of personal liberty is involved in such a case, so as to attract the applicability of ART. 21, the right under that article is not immune from legislative interference.

Protection in respect of conviction for offences.

20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

COGNATE PROVISIONS

Offence—Definition of—*See* ART. 367 (1) read with the General Clauses Act, 1897, S. 3 (38).

Synopsis

1. Analogous law.
2. Scope and applicability of the article.
3. Ex post facto laws — Clause (1).
    - (a) Introductory: Comparison with American Constitution.
    - (b) Ex post facto laws and their validity: General principles.
    - (c) "Law in force."
    - (d) Pre-Constitution laws.
    - (e) Continuing offence.
    - (f) Retrospective effect of laws creating offences (Clause (1), first part).
    - (g) Law enhancing punishment —Retrospective effect (Clause (1), part 2).
    - (h) Change in procedure.
    - (i) Reduction of punishment.
4. "Double jeopardy" for same offence—Rule against—Clause(2).

Article 19 — Note 93

[1] (1934) 293 U S 245 (261) : 79 Law Ed 343 (352), *Hamilton* v. *University of California.*

- (a) Scope and principle of clause (2): autrefois convict.
- (b) Both prosecution and punishment necessary.
- (c) "Prosecuted"—Meaning of.
- (d) Judicial proceeding necessary.
- (e) Civil action.
- (f) Preventive detention.
- (g) Security proceedings.
- (h) Departmental or disciplinary proceedings.
- (i) "Same offence."
- (j) Distinct offences.
- (k) Previous conviction before Constitution.
- (l) A.I.R. Commentary on Criminal Procedure Code, S. 403.

5. Accused not to be compelled to be witness against himself — Clause (3).
- (a) General principles.
- (b) Failure to give evidence in defence—Inference from.
- (c) "Person accused of any offence."
- (d) Statement of accused under Criminal P. C., S. 342—Inferences from.
- (e) "Compulsion" to be witness —What amounts to.
- (f) Evidence Act, S. 132, validity of.
- (g) American decisions.
- (h) Unreasonable searches and seizures.
- (i) Confessions of accused obtained under pressure.
- (j) Proceedings started before Constitution — Applicability of Clause (3).

1. Analogous law. — This article contains three clauses. The first clause corresponds to the provision against *ex post facto* legislation in the Federal Constitution of the United States of America. Article I S. 9 (3) of that Constitution provides: "no bill of attainder or *ex post facto* law shall be passed." Similarly, S. 10 (1) of the same article provides, *inter alia*, that "no State shall .... pass any bill of attainder, *ex post facto* law ...." As to the meaning of *ex post facto* laws, see NOTE 3.

Clause (2) of the article has its prototype in the Fifth Amendment to the Federal Constitution of the United States of America. Clause (3) also has its prototype in the same provision. The material portion of the Fifth Amendment runs as follows: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself ...." (See also NOTES 3, 4 and 5.)

2. Scope and applicability of the article. — Article 19 gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law. On the other hand, ARTS. 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society.[1]

This article enacts certain fundamental principles of criminal jurisprudence. Clause (1) of the article embodies the principle that no one should be made to suffer any punishment for an offence in regard to anything except according to the law in force at the time when the thing is done. The second clause embodies the fundamental principle that no one should be placed in jeopardy twice for the same offence

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Article 20 — Note 2

[1] 1950 S C 27 (Pr 171) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan v. State of Madras.* (Per *Mukherjea J.*).

and the third clause gives effect to the principle that no one should be compelled to give evidence against himself in a criminal case.

The article applies to all *persons* and not only to *citizens*. The proceedings contemplated in the article are proceedings of a criminal nature before a Court of law or a judicial tribunal.[2] (See also NOTE 4.)

(a) Introductory: Comparison with American Constitution

3. **Ex post facto laws — Clause (1).** — This clause corresponds to the provision against *ex post facto* laws in the Federal Constitution of America already referred to in NOTE 1. The clause consists of two parts. The first part provides that no one should be held guilty of an offence in regard to anything unless at the time when the thing is done it is an offence according to the law then in force. In other words, when a certain act is not an offence according to the law in force at the time when the act is done, the person who does that act must not be held guilty of offence merely because subsequently a law is made making such act an offence. The second part of the clause provides that where at the time when an offence is committed it is punishable with a certain amount of punishment, the person who has committed that offence must not be made to suffer a greater punishment for that offence. In other words, by subsequently making a law that for that offence a higher punishment must be awarded, a person who had committed the offence before the passing of that law should not be made liable for the higher punishment prescribed by the subsequent law.

The article provides that no person shall be *convicted*, etc., nor be subject to a penalty, etc. This does not mean that the clause permits a *law* which makes an offence something which was not an offence when it was done but only prohibits the *conviction* for such thing as an offence.[1] Similarly, the article does not merely prohibit the *actual infliction* of a greater punishment for an offence than was awardable at the time of the commission of the offence, but also prohibits a *law* under which such enhanced punishment is awardable. This conclusion clearly follows from the provisions of ART. 13.

There is a marked difference in the language used in the Indian and American Constitutions in this respect. Sections 9 (3) and 10 of Article I of the American Constitution merely say that "no *ex post facto* laws shall be passed" and "no State shall pass *ex post facto* laws. . . ." But in ART. 20 of our Constitution the language used is in much wider terms and what is prohibited is the conviction of a person or his subjection to a penalty under *ex post facto* laws. The prohibition under the article is not confined to the passing or the validity of the *law* but extends to the conviction or the sentence, under such law, and is based on its character as an *ex post facto* law.[2]

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[2] 1953 S C 325 (328, 329) (Pr 12) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay.*

Article 20 — Note 3

[1] 1951 Mad 1015 (Prs 3, 7) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commissioner of Police, Madras.* (Article 20 (1) means that *ex post facto* legislation is invalid.)

(b) Ex post facto laws and their validity: General principles

The general rule is that a statute can be made to operate retrospectively by express enactment to that effect or by necessary implication of law.[3] (See A. I. R. COMMENTARY on the Code of Civil Procedure, (1951) 5th Edn., Preamble, NOTE 3.) Hence under this principle, if an Act provides that a certain act shall be an offence and the Act is expressly made retrospective, even acts done before the Act was passed will become offences under the Act.[4] Prior to the Constitution there was no prohibition against such laws.[5] So also, if there is no constitutional impediment as that provided under this article, a statutory provision enhancing the punishment awardable for a certain offence may, by clear and unambiguous provision, be made to operate retrospectively so as to apply to offences committed before the passing of the statute.[6]

The effect of cl. (1) of this article is to prohibit both these types of laws and such laws if passed would be *ultra vires*.

Except as provided by this article, both the Parliament and the State Legislatures have plenary powers of legislation on the respective subjects within their jurisdiction and can make laws which are retrospective in their effect.[7]

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[2] 1953 S C 394 (398) (Pr 8) [A I R V 40 C 88] : 1953 Cri L Jour 1480 (SC), *Shiv Bahadur Singh* v. *State of V. P.* (Hence, though the *ex post facto* law was passed before the Constitution this article will apply to a conviction under such law after the Constitution.)

[*See also* (1913) 227 U S 150 (161) : 57 Law Ed 458 (463), *Ross* v. *Oregon.* (Article I, Section 10 is restraint upon legislative not judicial action — It concerns the making of laws not their construction by the Courts: *Calder* v. *Bull,* 3 Dall 386 : 1 Law Ed 648, Foll.)]

[3] (1848) 2 Exch 22 (33) : 154 E R 389, *Moon* v. *Durden.* (If the statute clearly expresses an intention to operate retrospectively, it will operate retrospectively.)

[4] 1951 Mad 1015 (Prs 3, 7) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*

[*See also* 1943 Pat 361 (362) [A I R V 30] : 45 Cri L Jour 301 (DB), *Gadai Sahu* v. *Emperor.* (A new Act or statute which penalises what otherwise is not an offence, must be so construed as to make it strike at future acts or omissions unless the Legislature has clearly said so.)]

[5] 1951 Mad 1015 (Prs 3, 7) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police Madras.* (Per *Govinda Menon J.*)

1950 Mad 324 (Prs 10, 12) [A I R V 37 C 148] : 51 Cri L Jour 754 (DB), *In re Valyudam.*

[6] (1943) 2 All E R 82 (85) : (1943) K B 405, *Buckman* v. *Button.*

(1941) 2 All E R 499 (507, 509): (1941) 2 K B 89, *Director of Public Prosecutions* v. *Lamb.*

See also Halsbury's Laws of England (2nd Edition) Vol. 31, pp. 513 — 516, Paragraph 670.

[7] 1952 Madh B 181 (187) [AIR V 39] (DB), *Shanta Devi* v. *Custodian, E. P.*

[*See* 1943 Cal 489 (501) [A I R V 30] : 45 Cri L Jour 37 (SB), *Sushil Kumar* v. *Emperor.* (Per *Khundkar J.* — Where British jurisprudence prevails, a man cannot be punished for an offence in a trial before a tribunal that had no jurisdiction, and thereafter the punishment cannot be validated by the supremely arbitrary postulation that the trial was held by some other tribunal which had jurisdiction.)]

Article 20
Note 3

It has already been stated that this clause is based on the same principle on which the prohibition against *ex post facto* legislation in the Constitution of the United States of America is based. The meaning of an *ex post facto* law has been explained in *Calder* v. *Bull*[8] by Justice Chase of the Supreme Court of America. He observed as follows in the above case :

> "The prohibition (against *ex post facto* laws), in the letter, is not to pass any law concerning and after the fact; but the plain and obvious meaning and intention of the prohibition is this, that the Legislatures of the several States shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts. The prohibition not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment in consequence of such law."

Mr. Justice Chase then proceeded to state what he considered *ex post facto* laws within the words and the intent of the prohibition. These were :

(1) every law that makes an action done before the passing of the law and which was innocent when done, criminal and punishes that action ;

(2) every law that aggravates a crime or makes it greater than it was, when committed ;

(3) every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed ;

(4) every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender.

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[8] (1898) 3 Dall 386 (390) : 1 Law Ed 648 (650).

[*See also* (1922) 22 A L R 1438, *Fairfield* v. *Huntington*. (Constitutional prohibition of *ex post facto* laws refers to those dealing with criminal matters only.)

(1898) 170 U S 343 (355) : 42 Law Ed 1061 (1068). *Thompson* v. *State of Utah*. (A substitution of a jury of 8 persons in place of a common law jury in case of a crime, committed before a change in the law, constitutes an *ex post facto* law.)

(1894) 152 U S 377 (382) : 38 Law Ed 485 (487), *Duncan* v. *State of Missouri*. (Meaning of *ex post facto* law— It is a law which imposes a punishment for an act which was not punishable at the time it was committed or an additional punishment to that then described, or changes the rule of evidence by which less or different testimony is sufficient to convict than was then required, or in relation to the offence or its consequences, alters the situation of a party to his disadvantage.)]

Mr. Justice Chase continued as follows :

> "All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: the former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigour of the criminal law; but only those that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime. The expressions '*ex post facto* laws' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers and authors."

It will be seen that out of the four categories of *ex post facto* laws given by Justice Chase, the two parts of cl. (1) practically cover the first three categories. The fourth category, namely, that about laws affecting rules of evidence and procedure, is not included in this article, so that rules of evidence and procedure may be made to operate retrospectively so as to apply to the prosecution for offences committed even before the passing of such rules and such rules will not be unconstitutional under this article, as they would be under Justice Chase's classification.

The article in its broad import has been enacted to prohibit convictions and sentences under *ex post facto* laws.[9] The underlying principle of the article is that of fairness and justice. As observed by the Supreme Court in *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*[10] : "There can be no doubt as to the paramount importance of the principle that such *ex post facto* laws which retrospectively create offences and punish them are bad as being highly inequitable and unjust." Mr. Justice Chase's exposition of the meaning of *ex post facto* laws in *Calder* v. *Bull*[11] has already been given above. The principles relating to the subject have also been explained by Willes, J., in the well-known case of *Phillips* v. *Eyre*,[12] where he discusses at length the subject of retrospective laws. Referring to retrospective Attainder Acts of earlier times, he observed as follows :

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[9] 1953 S C 394 (398) (Pr 8) [A I R V 40 C 88] : 1953 Cri L Jour 1480 (SC), *Shiv Bahadur Singh* v. *State of V. P.*

[10] 1953 S C 394 (398) (Pr 8) [AIR V 140 C 88] : 1953 Cri L Jour 1480 (SC).

> "The Retrospective Attainder Acts of earlier times when the principles of law were not so well understood or so closely regarded as in the present day, and which are now looked upon as barbarous and loosely spoken of as *ex post facto* laws, were of a substantially different character. They did not confirm irregular acts, but voided and punished what had been lawful when done. Mr. Justice Blackstone describes laws *ex post facto* of this objectionable class as those by which 'after an action indifferent in itself is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law ; he had, therefore, no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust'."

For the meaning of Bills of Attainder and *ex post facto* laws reference may also be made to the judgment of Justice Field in *Cumming* v. *Missouri*,[13] where he observed :

> "A Bill of Attainder is a legislative Act which inflicts punishment without a judicial trial. If the punishment be less than death, the Act is termed a Bill of Pains and Penalties . . . . In these cases, the legislative body in addition to its legitimate functions exercises the powers and office of judge ; it assumes, in the language of the text books, judicial magistracy ; it pronounces upon the guilt of the party without any of the forms or safeguards of trial ; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise ; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence. . . . By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed ; or imposes additional punishment to that then prescribed ; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."

This article contemplates criminal proceedings before a court of law or a *judicial tribunal*. The very wording of the article and the words used therein, "convicted", "commission of the act charged as an offence", "be subjected to a penalty", "commission of the offence", "prosecuted and punished", "accused of any offence", would indicate that the proceedings therein contemplated are in the nature of criminal proceedings before a court of law or a judicial tribunal.[14] In view of this, it would seem that the article is not directed against Bills of Attainder as explained above in Justice Field's judgment in *Cummings* v. *Missouri*.[15] But it would seem that such Bills of Attainder would come within the prohibitory line of ART. 14. In *Ram Prasad* v. *State of Bihar*[16] Patanjali Sastri, C. J., referred to the dissenting opinion of himself and Das, J., in *Charanjit Lal* v. *Union of India*[17] and observed as follows :

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[11] (1899) 3 Dall 386 : 1 Law Ed 648 (650).

[12] (1870) 6 Q B 1 (23, 25).

[13] (1866) 18 Law Ed 356 (363) : 71 U S 277.

> "Das, J. and I took the view that legislation directed against a particular named person or corporation was obviously discriminatory and could not constitutionally be justified even if such legislation resulted in some benefit to the public. In a system of government by political parties, I was apprehensive of the danger inherent in special enactments which deprive particular named persons of their liberty or property because the Legislature thinks them guilty of misconduct, and I said in my dissenting opinion: 'Legislation based upon mismanagement or other misconduct as the differentia and made applicable to a specified individual or corporate body is not far removed from the notorious parliamentary procedure formerly employed in Britain of punishing individual delinquents by passing Bills of Attainder, and should not, I think, receive judicial encouragement'."

There is a difference between the English law and the American law in the mode in which effect is given to the principle that *ex post facto* laws are bad. In the English system of jurisprudence, repugnance of such laws to universal notions of fairness and justice is treated as a ground not for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such *ex post facto* laws are themselves rendered invalid by virtue of ART. I, Ss. 9 and 10 of the American Constitution.[18]

Where a law merely authorises with retrospective effect, the restriction of a Fundamental Right but neither creates an *offence* nor imposes a punishment, cl. (1) of this article has no applicability.[19]

(c) "Law in force"

The term "law in force" in cl. (1) relates not to a law deemed to be in force but to a law factually in operation at the time of the commission of the act.[20]

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[14] 1953 S C 325 (328) (Pr 12) [A I R V 40 C 77] : 1953 Cri L Jour 1432 (S C), *Maqbool Hussian* v. *State of Bombay*.

[15] (1866) 18 Law Ed 356 (363) : 71 U S 277.

[16] 1953 S C 215 (217) [AIR V 40 C 52] : ILR 32 Pat 375 (SC).

[17] 1951 S C 41 (49) (Pr 29) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC).

[18] 1953 S C 394 (398) (Pr 8) [AIR V 40 C 88] : 1953 Cri L Jour 1480 (SC), *Shiv Bahadur Singh* v. *State of V. P.*

[19] 1952 S C 329 (331) (Pr 6) [A I R V 39] : 1952 S C R 654 : 1952 Cri L Jour 1373 (SC), *State of Bihar* v. *Shaila Bala Devi*. (Amendment of Art. 19 (2) with retrospective effect by Constitution (First Amendment) Act (1 of 1951) is not inconsistent with Art. 20.)

(d) Pre-Constitution Laws

The article prohibits all convictions or subjections to penalties after the Constitution, in respect of an *ex post facto* law whether such law was a post-Constitution or pre-Constitution law.[21] The reason is that, as already seen, the article, unlike the provisions against *ex post facto* laws under the American Constitution, is not aimed merely at the *passing* of *ex post facto* laws; but the article prohibits the conviction or imposition of a penalty under an *ex post facto* law irrespective of the question whether such law was passed after the Constitution or before. To hold that the article prohibits a conviction or imposition of penalty after the Constitution, under an *ex post facto* law passed prior to the Constitution, does not, therefore, amount to giving a retrospective effect to the article[22] and does not infringe the principle laid down by the Supreme Court in *Keshavan's case.*[23]

(e) Continuing offence

Where the act constituting an offence is of a continuous nature, it can be punished under a law passed during the continuance of the act, although at the commencement of the act it was not punishable and was not an offence.[24]

(f) Retrospective effect of laws creating offences (Cl. 1, first part)

The first part of cl. (1), as already stated, prohibits the retrospective operation of any law creating an offence so as to cover acts done prior to the passing of the law.[25] Thus, where under a law relating to public health the carrying on of a certain trade is declared to be an offence and this provision is made applicable to business established prior to the passing of the law, such a provision would be contrary to the first part of this article. Even apart from a provision in the Constitution like the first part of cl. (1), a provision declaring certain types of trade as offensive will not have retrospective operation except where such retrospective operation is given to it expressly or by necessary implication by the statute.[26]

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[20] 1953 S C 394 (398) (Pr 10) [AIR V 40 C 88]: 1953 Cri L Jour 1480 (SC), *Shiv Bahadur Singh* v. *State of V. P.* (Law passed in September 1949 — Provision that it shall be deemed to have been law since August 1948—Acts committed in February, March and April 1949 — Law cannot be said to have 'been in force' then.)

[21] 1953 S C 404 (409) [A I R V 40 C 81]: 1953 Cri L Jour 1621 (S C), *Kedar Nath* v. *State of West Bengal.*
1953 S C 394 (398) (Pr 8) [A I R V 40 C 88]: 1953 Cri L Jour 1480 (S C), *Shiv Bahadur Singh* v. *State of V. P.*

[22] 1953 S C 394 (398) (Pr 8) [A I R V 40 C 88]: 1953 Cri L Jour 1480 (S C), *Shiv Bahdur Singh* v. *State of V. P.* (All that it amounts to is that the future operation of the Fundamental Right declared in Art. 20 may also in certain cases result from acts and situations which had their commencement in the pre-Constitution period—Lord Denman in *The Queen* v. *St. Mary White Chapel*, (1848) 116 E R 811 (814): 12 Q B 120, Foll.)

[23] 1951 S C 128 (130) (Pr 7) [A I R V 38 C 20]: 1951 S C R 228: I L R (1951) Hyd 294: 52 Cri L Jour 860 (S C), *Keshavan* v. *State of Bombay.*

[24] 1952 Sau 98 (100) (Pr 5) [A I R V 39]: 1952 Cri L Jour 1645 (S B), *Abu Mohmed* v. *Chief Secy., Saurashtra.* (*Held* that the act of the petitioner's overstay was a continuous offence and could be dealt with under Ordinance 34 of 1948 and the Rules and Notifications issued thereunder though previous overstay could not be made a ground of removal: 2 Sau L R 212, Foll.)

[25] 1953 Cal 599 (600) (Pr 3) [A I R V 40 C 229]: 1953 Cri L Jour 1406, *Pulin Krishna* v. *Satyaranjan.* (West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 40—By virtue of Art. 20, Constitution of India, a person cannot be prosecuted under S. 40, for an act of taking pugree or selami committed in 1946, as the Calcutta Rent Ordinance, 1946, which was in force when the act was committed did not make the act an offence for which a person could be prosecuted but only provided for imposition of penalty.)

But where no new offence is created, this part of the clause will not apply. Thus, where a law relating to public health prohibits certain kinds of business but does not make it an offence to carry on such business, the prohibition may be made to apply to businesses established even before the passing of the law.[27] Such a provision will not contravene the first part of this clause.

Similarly, where a law makes it an offence to disobey the award of an Industrial Court and there is no change in the law in this respect but a law is simply made to cure the irregularities in certain awards and keep them alive for a certain period, there is no violation of the first part of this clause.[28] So also, the mere fact that there is a law as to change of place for the trial of an offence, which operates retrospectively so as to apply to offences committed previous to the passing of the law, does not make it repugnant to this clause.[29]

(g) Law enhancing punishment — Retrospective effect (Clause (1), Part 2)

Under the second part of this clause, retrospective effect cannot be given to a law enhancing punishment for an offence, so as to cover

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[26] (1913) 2 K B 401 (408, 411) : 82 L J K B 726, *Butchers' Hide, Skin and Wool Co. Ltd.* v. *Seacome.*

[27] 1933 Cal 732 (734) [AIR V 20] : 34 Cri L Jour 1228, *Chunilal* v. *Corporation of Calcutta.* (The reasonable construction to be put upon Section 386, Calcutta Municipal Act, is that power was given to the Calcutta Corporation, in the interest of public health, to prohibit the carrying on of a business which was, in the opinion of the Corporation, dangerous to health or likely to create nuisance, even though the business might have been established before the intention that no person shall use any premises for any of the purposes mentioned in S. 386, was expressed and before the intention was declared by the publication of the declaration in the "Calcutta Gazette" : *Butchers' Hide, Skin and Wool Co. Ltd* v. *Seacome,* (1913) 2 K B 401, Distinguished.)

[28] *See* 1951 Mad 191 (Pr 16) [A I R V 38 C 19] : 52 Cri L Jour 744 (DB), *C. P. Sarathy* v. *State of Madras.* (Assuming that Ss. 5 and 6, Industrial Disputes (Madras Amendment) Act (12 of 1949) are otherwise valid, they cannot be said to be inconsistent with Art. 20 of the Constitution. What the Amending Act did was not to create any new offence but to cure the illegalities that existed before and as such cannot be called retrospective legislation—The penal provision, viz.. S. 29 of the original Act remained the same and the Amending Act merely declared that it was not competent to call in question the award on the ground of its invalidity — It cannot be said that keeping current and valid awards which would otherwise have been invalid for one year from 14-6-1949, is an *ex post facto* legislation which violated Art. 20 of the Constitution.)

[29] 1951 Vindh Pra 17 (Prs 111, 112 & 113) [AIR V 38 C 8] : 52 Cri L Jour 561, *State of Vindhya Pradesh* v. *Shiva Bahadur Singh.* (A law which says that a man committing an offence in place *A*, may be tried in place *B*, is not a law which creates an offence and as such Art. 20 cannot in any manner affect its retrospective operation.)

Article 20
Note 3

offences committed prior to the making of the law.[30] The provision says that a person should not be subjected to a greater penalty than might have been inflicted under the law in force at the time of the commission of the offence. Where solitary confinement is prescribed by a new law, this would be treated as enhanced punishment and cannot be given retrospective effect so as to apply to offences committed before the Act was passed.[31] In seeing whether a certain law offends against this part of cl. (1), the standard of punishment awardable under the latter law, and not the punishment actually awarded, is the determining factor. In other words, the question will be what is the punishment that can be legally awarded under the new law for the offence and not what is the punishment that is actually awarded in a particular case. If the legally awardable punishment is greater than the legally awarded punishment under the previous law and the new law is made to apply to crimes committed before the law was passed, the law would be repugnant to this clause.[32] Thus, where under the previous law the Court was allowed a discretion to pass any sentence between the maximum and minimum sentences which were prescribed and under the new law the Court was required to award in all cases the maximum sentence only, this would be a case of inflicting greater penalty, and giving retrospective effect to the law, to cover offences already committed before the law was passed, would be repugnant to this article.[33]

The word 'penalty' shows that this clause applies only to *punishment* for offences. Hence, the clause does not apply to preventive detention. Where, therefore, the law is amended so as to legalise preventive detention for a longer period and such law is given retrospective effect so as to apply to persons already under detention under the previous law, there is no violation of this clause.[34]

Law under which a higher punishment is inflicted on a person on subsequent convictions for certain offences does not inflict additional punishment for the previous offences and such a law made after the commission of the previous offences is, therefore, not open to impeachment under this article.[35] An Act which authorises the impeachment of naturalisation certificates, where such certificates were fraudulently or illegally procured, is not unconstitutional, merely because the Act is

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(1890) 138 U S 157 (182, 183) : 34 Law Ed 906 (913), *Cook* v. *United States*..

30. 1953 Cal 561 (562) (Pr 6) [AIR V 40 C 207] : 1953 Cri L Jour 1347, *Mohari Lall* v. *Corporation of Calcutta.* (Prosecution under Calcutta Municipal Act of 1923—Greater penalty under new Calcutta Municipal Act is not justified.)

31. (1890) 137 U S 483 (495): 34 Law Ed 734 (738), *Holden* v. *State of Minnesota*.

32. *See* (1937) 301 U S 397 (401) : 81 Law Ed 1182 (1186), *Lindsey* v. *Washington*.

33. *See* (1937) 301 U S 397 (398):81 Law Ed 1182 (1184), *Lindsey* v. *Washington*.

34. 1952 Bom 1 (Pr 15) [AIR V 39 C 1] : I L R (1952) Bom 134 : 1952 Cri L Jour 81 (DB), *Pralhad Krishna* v. *The State of Bombay.* (In so far as S. 11 of the Preventive Detention Act, as it stands after its amendment, permits further detention after receiving the report of the Advisory Committee, it does not contravene Art. 20 of the Constitution.)

35. (1901) 180 U S 311 (313) : 45 Law Ed 542 (547), *McDonald* v. *Massachusetts*.

made retrospective so as to apply to naturalisation certificates already obtained.[36]

To enact that a person, who has been convicted of a crime, shall no longer be engaged in the practice of medicine is not an additional *punishment* for past offences or *ex post facto* law but only prescribes a professional qualification. This was the view taken by the Supreme Court of America in the undermentioned cases.[37] As seen above, this article only applies to criminal proceedings before a court of law or judicial tribunal. Hence, the question raised by the above American decisions cannot arise under this article.

Summary eviction under the provisions of rent control law is not a penalty within the meaning of this article and does not come within the prohibition of cl. (1), although the provision for such summary eviction is the result of a subsequent enactment and did not exist at the time when the act resulting in eviction was committed.[38]

(h) Change in procedure

An Act, which merely relates to evidence and procedure, may be retrospective so as to apply to prosecutions for crimes already committed and giving such retrospective effect to the Act will not be unconstitutional.[39] What is prohibited under this article is only conviction or sentence under an *ex post facto* law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no Fundamental Right to trial by a particular Court or particular procedure except in

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36. (1912) 225 U S 227 (241) : 56 Law Ed 1066 (1071), *Johannessan* v. *United States.*

37. (1898) 170 U S 189 (200) : 42 Law Ed 1002 (1007), *Hawker* v. *State of New York.* (Following (1888) 129 U S 114 (122) : 32 Law Ed 623 (626).)
(1888) 129 U S 114 (122) : 32 Law Ed 623, *Dent.* v. *State of West Virginia.* (Distinguishing *Cummings* v. *Missouri,* 71 U S 277 : 18 Law Ed 356 and *Ex parte Garland,* 71 U S 333 : 18 Law Ed 366.)

38. 1953 Mad 257 (259) (Pr 8) [AIR V 40 C 96], *Fathima Bi* v. *State of Madras.* (Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), S. 3 (8)—Section does not offend Art. 20 of the Constitution.)

39. 1953 Mad 337 (339) (Pr 8) [AIR V 40 C 114] : 1953 Cri L Jour 625, *Public Prosecutor* v. *Ayyappan Pillai.* (A statute merely regulating procedure and leaving untouched all the substantial protections with which existing law surrounds a person accused of crime is not within the constitutional inhibition of *ex post facto* laws : *Thompson* v. *State of Utah,* (1898) 170 U S 343; *Winston* v. *State,* 118 A L R 719, Foll.)
(1898) 43 Law Ed 204 (207) : 171 U S 380 (386, 387), *Thompson* v. *Missouri.* (Guarantee of life and liberty not impaired by such Act.)
(1894) 152 U S 377 (382, 383) : 38 Law Ed 485 (487), *Duncan* v. *State of Missouri.* (Prescribing of different modes of procedure and abolition of Courts and creation of new ones leaving untouched all the substantial protections, with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition against *ex post facto* laws.)
[*See also* (1937) 82 Law Ed 288 (289) : 302 U S 319 (320), *Palko* v. *Connecticut.* (A state statute permitting appeals in criminal cases to be taken by the State is not an infringement of the due process provisions of the 14th Amendment.

so far as any constitutional objection by way of discrimination or the violation of any other Fundamental Right may be involved.[40]

An Act, which relates entirely to the manner in which the sentence must be carried out and not altering the existing situation to the material disadvantage of the criminal, does not inflict a greater penalty than previously and hence the giving of retrospective effect to such an Act so as to apply to crimes already committed will not be repugnant to this article.[41]

(i) Reduction of punishment

The article only prohibits the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Hence, when the punishment that is awardable is, after the commission of the offence, reduced by the subsequent law, such a law is not within the prohibition of *ex post facto* laws.[42]

(a) Scope and principle of cl. (2) : autrefois convict

4. "Double jeopardy" for same offence—Rule against—(Clause 2). — This clause enacts as a matter of Fundamental Right the well-known principle of criminal jurisprudence that no one should

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(1901) 45 Law Ed 1015 (1019, 1020) : 181 U S 589 (597, 598), *Mallett* v. *North Carolina.* (Act creating a right of appeal by the State and applicable to cases in which trial had been had is not *ex post facto.*)]

Note. — The above position is clear under this article although under Justice Chase's classification of *ex.post facto* laws in *Calder* v. *Bull* given above, laws affecting *procedure* also are included in *ex post facto* laws.

[40] 1953 S C 394 (398) (Pr 9) [AIR V 40 C 88] : 1953 Cri L Jour 1480 (SC), *Shiv Bahadur Singh* v. *State of Vindhya Pradesh.*

[41] 1953 Mad 337 (339) (Pr 7) [AIR V 40 C 114] : 1953 Cri L Jour 625, *Public Prosecutor* v. *Ayyappan Pillai.* (Any change in the *mode of execution* is not bad for its being *ex post facto*; a statute merely regulating procedure and leaving untouched all the substantial protection with which existing law surrounds a person accused of crime is not within the constitutional inhibition of *ex post facto* laws; even a statute which changes the punishment that may be imposed for a crime theretofore committed would be *ex post facto* only if it prescribes or permits the imposition of a greater sentence, and not when it reduces the punishment. New provision in S. 15 (b) of the Madras General Sales-Tax Act amounts to nothing more than an alteration of procedure which does not make the act which was not an offence to be an offence or imposes a greater penalty than what was the case before. The recovery of the tax as if it were a fine does not impose a greater penalty than the two modes of recovery as an arrear of land revenue or by a suit as on a debt.)

(1905) 49 Law Ed 494 (497) : 196 U S 319 (326, 227), *Rooney* v. *North Dakota.* (Substitution of close confinement in penitentiary for not less than 6 and not more than 9 months from judgment in lieu of confinement in county jail for not less than 3 and not more than 6 months — Place of execution changed from county jail to penitentiary—Statute not *ex post facto*—*Held* that the Act did not alter the existing situation to the material disadvantage of the criminal.)

(1890) 34 Law Ed 734 (736, 737) : 137 U S 483 (491), *Holden* v. *State of Minnesota.* (An Act which prescribes the hour of the day before which and the manner in which the punishment by hanging shall be inflicted is not *ex post facto* as to offences committed before the passage of the Act.)

[42] 1953 Mad 337 (339) (Pr 7) [AIR V 40 C 114] : 1953 Cri L Jour 625, *Public Prosecutor* v. *Ayyappan Pillai.* (*People Ex Rel Pincus* v. *Adams,* 110 A L R 1303 and *Sekt* v. *Justices Court,* 167 A L R 833, Rel. on.)

Article 20
Note 4

be put in jeopardy twice for the same offence.[1] In *Maqbool Hussain* v. *State of Bombay,*[2] the Supreme Court observed as follows :

> "The Fundamental Right which is guaranteed in ART. 20 (2) enunciates the principle of '*autrefois convict*' or 'double jeopardy'. The roots of that principle are to be found in the well established rule of the Common Law of England 'that where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence'. (Per Charles, J., in *Reg.* v. *Miles*).[3] To the same effect is the ancient maxim '*Nimo bis debet puniri pro uno delicto*', that is to say, that no one ought to be twice punished for one offence or as it is sometimes written, '*pro eadem causa*', that is, for the same cause."

The corresponding provision in the Federal Constitution of the United States of America is contained in the Fifth Amendment which, among other things, provides : "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The principle on which this clause is based has already been given effect to by the Legislature in S. 403 of the Criminal Procedure Code and S. 26 of the General Clauses Act, 1897. Section 403 of the Criminal Procedure Code runs as follows :

> "(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237.
>
> "(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-section (1).
>
> "(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.
>
> "(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence consti-

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Article 20 — Note 4

[1] *See* 1953 S C 325 (328) (Prs 7, 11) [AIR V 40 C 77]: 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay.* (Article 20 (2) incorporated within its scope the plea of "*autrefois convict*" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution.)

[2] 1953 S C 325 (328) (Prs 7, 8) [AIR V 40 C 77]: 1953 Cri L Jour 1432 (SC).

[3] (1890) 24 Q B D 423 (A) : 59 L J M C 56.

tuted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

> "(5) Nothing in this section shall affect the provisions of S. 26 of the General Clauses Act, 1897, or S. 188 of this Code.
>
> *Explanation.* — The dismissal of a complaint, the stopping of proceedings under S. 249, the discharge of the accused or any entry made upon a charge under S. 273, is not an acquittal for the purposes of this section."

It will be seen that the above section is wider than this clause. It embodies both the principles known as *autrefois acquit* and *autrefois convict*. In other words, under S. 403 of the Criminal Procedure Code, a person, who has once been tried and *acquitted*, cannot again be tried for the same offence. But under this clause the prohibition is against a person being subject to *punishment* twice for the same offence. Hence, if at the previous trial a person was *acquitted*, there will not be a bar under this clause to his being tried again for the same offence.[4] In *Maqbool Hussain* v. *State of Bombay*,[5] the Supreme Court observed as follows :

> "It (ART. 20, cl. (2)) incorporated within its scope the plea of *autrefois convict* as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a *punishment* (italics ours) in the first instance in order to operate as a bar to the second prosecution and punishment for the same offence."

But this does not mean that notwithstanding S. 403 of the Criminal Procedure Code, a person, who has once been tried and acquitted of a criminal offence, can again be tried for the same offence. It only means that there is no *constitutional bar* to a legal provision under which such fresh trial is permissible. In other words, if there is a law under which, notwithstanding the previous acquittal of a person in regard to an offence, a fresh trial of such person in regard to the same offence is permissible, such a law would not be *ultra vires*, because such a law would be within the sanction of the Constitution. But cl. (2) only *permits* such legislation and does not prohibit a law which bars a fresh trial even where the accused was acquitted on the previous occasion and consequently there is no question of inflicting on him a double punishment for the same offence. Hence, S. 403 of the Criminal Procedure Code, which bars a fresh trial of an accused person for the same offence, both when he was convicted as well as when he was acquitted at the previous trial, is quite valid.

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[4] **1953 S C 131 (132) (Pr 9) [AIR V 40 C 35] : 1953 S C R 546 : 1953 Cri L Jour 668 (SC), *Kalawati* v. *Him. Pra. State.* (Article 20 (2) does not apply where there has been no previous "punishment"— Appeal by Government against acquittal is not barred.)**

[5] **1953 S C 325 (328) (Pr 11) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC).**

This clause may also be compared to S. 26 of the General Clauses Act. That section reads as follows :

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

Section 403 of the Criminal Procedure Code expressly provides in sub-sec. (5) of the section that nothing therein shall affect the provisions of S. 26 of the General Clauses Act, 1897, or S. 188 of the Criminal Procedure Code.

The question has, therefore, arisen about the scope of S. 26 of the General Clauses Act and as to the effect of sub-sec. (5) of S. 403 which provides that S. 403 of the Criminal Procedure Code does not affect the operation of S. 26 of the General Clauses Act. The question has been discussed in the A. I. R. COMMENTARIES on the Criminal Procedure Code, 1949 Edn., S. 403, NOTE 15. It has there been pointed out that under S. 26 of the General Clauses Act, where the same act constitutes an offence under two or more enactments and a person is tried for the offence under one of these enactments first and is acquitted, there is no bar to his being tried again for the offence under the other enactment and punished for that offence under such enactment, notwithstanding that the general rule under S. 403 of the Criminal Procedure Code is that a previous trial will bar a fresh trial even though the previous trial has ended in an acquittal and there is no question of an accused person being *punished* twice for the same offence.[6]

It will be seen that the provisions of S. 26 of the General Clauses Act as so construed resemble those of cl. (2) of this article and notwithstanding the fact that the section permits a second trial after a previous trial and acquittal, the section is not unconstitutional.

But both under General Clauses Act, S. 26, and under cl. (2) of this article, a double *punishment* for the same offence is prohibited. Hence, an Act under which such double *punishment* is permissible will be void as being repugnant to this article.[7]

Although as stated above there is an essential point of difference between S. 403 of the Criminal Procedure Code and this clause, the comprehensive statutory embodiment of the basic principle of jurisprudence which prohibits a person being put in peril twice for the same offence is contained in S. 403 of the Criminal Procedure Code. This clause is based on the identical principle. In *Devanugraham, In re*,[8] the Madras High Court observed as follows:

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[6] *See* 1944 Mad 369 (370) [AIR V 31] : 46 Cri L Jour 194, *K. B. Prabhu* v. *Emperor.*

[7] 1952 Cal 61 (Pr 10) [AIR V 39 C 19-20], *Indra Narayan* v. *State of West Bengal.* (The West Bengal Foodgrains (Movement Control) Order does not contravene Art. 20 (2) of the Constitution as it does not contain any provision that the person contravening the Order may be prosecuted and punished more than once for the identical offence.)

[8] 1952 Mad 725 (726, 727) (Pr 8) [AIR V 39] : 1952 Cri L Jour 1576.

> "The principle that no citizen should be put in jeopardy of his life or liberty more than once is so well-known that in almost every constitution one finds a provision against a person being put to trial in respect of the same offence more than once. Section 403, Criminal Procedure Code, is nothing more than an elaboration of this principle in all its niceties and distinctions. In this background, when we consider ART. 20 (2), it is seen that it is nothing more than a clause only against a fresh prosecution and punishment for the same offence and which was also the law previously. There is absolutely no scope on the wording of the article to suspect that the framers of the Constitution wanted to unsettle the settled law of the land."

On this reasoning it was held by the Madras High Court that under cl. (2) of this article as well as under S. 403 of the Criminal Procedure Code, in a case where the previous prosecution has ended in the *discharge* of the accused owing to the want of sanction for the prosecution required by law, a fresh trial of the accused for the same offence is not barred. The High Court proceeded to observe:

> "The only consequence of cl. (2), not providing for other cases known to the existing law either with reference to the permissibility of fresh prosecutions or with reference to the non-maintainability thereof, is probably this, that the criminal law of the land can hereafter be amended in the ordinary way for the purpose of altering the existing law subject to the provision in cl. (2) of ART. 20, which, being one of the Fundamental Rights, cannot be taken away or abridged or contravened."

Referring to the Madras decision cited above, it may be pointed out that even under S. 403 of the Criminal Procedure Code, if the accused was not *acquitted* but only discharged, or if the complaint was dismissed, a fresh trial would not be barred. To this extent, (although while under S. 403 of the Criminal Procedure Code the *acquittal* of the accused would bar a fresh trial, such an acquittal would not bar a fresh trial under this clause) there is similarity between the two provisions.

(b) Both prosecution and punishment necessary

The fundamental conditions for the applicability of cl. (2) are that (1) there must have been a previous prosecution, (2) the accused must have been punished at such prosecution, (3) the subsequent proceeding must also be one for the prosecution and punishment of the accused, and (4) proceedings on both the occasions must be in relation to the *same offence*. Thus, it is clear that it is essential for the applicability of the clause that the previous prosecution must have ended in the *punishment* of the accused. Otherwise the fresh prosecution of the accused will not be barred under this clause (though such prosecution may be barred under S. 403 of the Criminal Procedure Code, as already seen).[9] In other words, this article does not contain the principle of

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[*See also* 1953 Cal 316 (319) (Pr 33) [AIR V 40 C 110], *Suresh Chandra* v. *Himangshu Kumar*. (Clause (2) of this article is merely a reproduction of the principles underlying or laid down in S. 403, Criminal Procedure Code, and S. 26 of the General Clauses Act, 1897.)]

[9] 1952 Cal 319 (320) [AIR V 39 C 82] (DB), *Prithish Dey* v. *The State*.

autrefois acquit[10] which is contained in S. 403 of the Criminal Procedure Code.

This clause will not apply where at the previous trial the accused was not sentenced at all but, although convicted, was released on probation of good conduct instead of being sentenced to any punishment, under S. 562 of the Criminal Procedure Code. The reason is that in such a case the accused is not *punished* twice for the same offence. Under S. 562 of the Criminal Procedure Code it is expressly provided that "the Court may instead of sentencing him (accused) at once to any punishment, direct that he be released on his entering into a bond. . . . ." This clearly shows that when action is taken under S. 562, the accused, though convicted, is not punished. Hence, when a fresh prosecution is started against him, there is no question of his being punished twice for the same offence and the fresh prosecution will not be barred under this clause. But the fresh prosecution will be barred by reason of S. 403 of the Criminal Procedure Code because under that section only a previous *conviction or acquittal* is necessary to bar a fresh trial and previous *punishment* is not necessary for the purpose.[11] (See A. I. R. COMMENTARIES on the Criminal Procedure Code, 1949 Edn., S. 562, NOTE 7.)

Where the first prosecution was a nullity due to the want of sanction required by law for the prosecution and the conviction and sentence in that prosecution were set aside in appeal, a fresh prosecution will not be barred under this clause as there is no question of a fresh punishment on the accused in such a case.[12]

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[10] *See* (1944) 1944-1 All E R 270 (271) : 1944 K B 250, *Halstead* v. *Clark.* (Where the merits of the prosecution case are gone into and it is held that the evidence is insufficient to support a prosecution, a plea of *autrefois acquit* can be set up although some technical objection may be taken to those proceedings.)

[*See also* (1914) 2 K B 570 (574) : 83 L J K B 786, *R.* v. *Barron.* ("*Autrefois acquit* — Plea of — Essentials".)]

[11] *See* (1890) 24 Q B D 423 (430) : 59 L J M C 56, *R.* v. *Miles.* (Convicted for assault but *discharged* without any sentence, on giving security for good behaviour — He cannot be afterwards convicted on an indictment for same assault.)

[12] 1952 All 642 (Pr 4) [AIR V 39 C 129] : ILR (1952) 1 All 244 (DB), *Shri Ram Ghei* v. *Ram Kishan Das.* (A second complaint filed after the dismissal of the first complaint for complainant's absence is not, therefore, in contravention of Art. 20 (2) of the Constitution.)

1952 Mad 725 (726) (Pr 7) [AIR V 39] : 1952 Cri L Jour 1576, *In re C. Devanugraham.*

1952 Nag 170 (Pr 6) [AIR V 39] : ILR (1952) Nag 52 : 1952 Cri L Jour 845 (DB), *Gopalkrishna Naidu* v. *State of M. P.* (AIR 1926 Cal 69 and AIR 1939 F C 43 (FC), Foll.)

[*See also* (1950) 51 Cri L Jour 1597 (1598, 1599) (PC), *Kannagara Aratchige* v. *The King.* (A quashed conviction does not *acquit* the accused of the crime charged. It merely makes the previous conviction abortive. If it is intended to direct a judgment of acquittal it must be done in terms. If this step is not taken, a new trial may be ordered though the conviction has been quashed.)

(1912) 2 K B 362 (365) : 81 L J K B 957, *R.* v. *Marsham, Ex parte Pethick Lawrence.* (First conviction invalid — Second conviction not illegal.)

It will thus be seen that the words "prosecuted and punished" are not to be read distributively so as to mean prosecuted *or* punished. Unless *both* the factors co-exist this clause will not apply.[13] In other words, the mere fact that there was a previous prosecution without its ending in a punishment of the accused will not bar a fresh prosecution under this clause.[14]

A section providing for imprisonment in default of fine cannot be construed as providing for double punishment.[15] Summary eviction of a person under the provisions of the Rent Control law does not amount to a punishment for an offence.[16] Similarly, the imposition of restrictive precautions under the Madras Restriction of Habitual Offenders Act (6 of 1948) does not amount to a prosecution and punishment for the purpose of this clause.[17] But the confiscation of property under Sea Customs Act, 1878, S. 167, is "punishment". The question whether the person from whose possession it was taken was the owner is immaterial.[18]

(1824) 9 Wheaton 579 (580) : 6 Law Ed 165 (165, 166), *United States* v. *Josef Perez*. (Jury discharged before giving verdict in capital case — Fresh trial not barred.)]

13. 1953 S C 325 (328) (Prs 6, 11) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay*. (Confiscation under S. 167 of Sea Customs Act does not involve a "prosecution" and hence criminal prosecution of the person from whose possession the property was confiscated is not barred.)

1953 S C 131 (132) (Pr 9) [AIR V 40 C 35] : 1953 S C R 546 : 1953 Cri L Jour 668 (SC), *Kalawati* v. *Him. Pra. State*.

[See however 1952 Him Pra 81 (85) (Pr 11) [AIR V 39] : 1952 Cri L Jour 1720, *Ranjit Singh* v. *State*. (*Obiter* : The word 'and' in 'prosecuted and punished should be interpreted disjunctively so as to mean "or," as otherwise the provision which should be applicable to cases of acquittal also would become inapplicable to them—Not good law after Supreme Court decisions in AIR 1953 S C 131 (SC) and AIR 1953 S C 325 (SC).)]

14. 1953 S C 131 (132) (Pr 9) [AIR V 40 C 35] : 1953 S C R 546 : 1953 Cri L Jour 668 (SC), *Kalawati* v. *Him. Pra. State*. (Trial ending in acquittal—Appeal by Government — Appeal is not barred as there has been no punishment—Further, appeal is only continuation of the same prosecution and not a fresh prosecution.)

1952 Mad 725 (727) (Pr 8) [AIR V 39] : 1952 Cri L Jour 1576, *In re C. Devanugraham*.

1952 Nag 170 (Pr 5) [AIR V 39] : ILR (1952) Nag 52 : 1952 Cri L Jour 845 (DB), *Gopalkrishna Naidu* v. *State of M.P.*

15. 1953 Mad 595 (599) (Pr 9) [AIR V 40 C 233] : 1953 Cri L Jour 1142 (DB), *Loomchand* v. *Official Liquidators*. (Section 282-A of the Companies Act cannot be construed as providing for a double punishment. It is only an alternative punishment arising when default is committed. Section 282-A does not offend against Art. 20 (2) of the Constitution.)

16. 1953 Mad 257 (259) (Pr 8) [AIR V 40 C 96], *Fathima Bi* v. *State of Madras*.

17. 1953 Mad 664 (671) (Pr 17) [AIR V 40 C 254] : ILR (1953) Mad 937 : 1953 Cri L Jour 1174 (DB), *P. Arumugham* v. *State of Madras*.

18. 1953 S C 325 (328) (Pr 6) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay*. (To be deprived of right of possession of valuable goods may well be regarded in certain circumstances, as by itself a 'punishment' — But the proceedings in regard to confiscation are not a "prosecution" and so do not attract applicability of cl. (2) of this article and criminal prosecution is not barred.)

(c) "Prosecuted" —Meaning of

The proceeding in both the cases must be a *prosecution* and the two proceedings must be distinct ones. Thus, if the subsequent proceeding is but a part of the previous proceeding and not a distinct proceeding, as for instance an appeal, neither the principle of this clause nor that of S. 403 of the Criminal Procedure Code will operate as a bar to the proceeding.[19]

(d) Judicial proceeding necessary

The words "before a Court of law or judicial tribunal" are not to be found in cl. (2). But if regard be had to the whole background of the article, it is clear that in order that the protection of cl. (2) may be invoked by a citizen, there must have been a prosecution and punishment in respect of the same offence before a *court of law or a tribunal*, required by law to decide the matters in controversy judicially on evidence on oath which it must have been authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath.[20] The very wording of ART. 20 and the words and phrases used therein : "convicted", "commission of the act charged as an offence", "be subjected to a penalty", "commission of the offence", "prosecuted and punished", "accused of any offence", would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.[21]

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[19] 1953 S C 131 (132) (Pr 9) [AIR V 40 C 35] : 1953 S C R 546 : 1953 Cri L Jour 668 (SC), *Kalawati* v. *Him. Pra. State.* (Appeal against acquittal wherever appeal is provided by the procedure is in substance a continuation of the prosecution. So there is no *fresh* prosecution and the appeal is not barred under cl. (2).)

1952 Him Pra 81 (86) (Pr 11) [AIR V 39] : 1952 Cri L Jour 1720, *Ranjit Singh* v. *State.*

[*See* (1905) 50 Law Ed 292 (295) : 199 U S 521 (529), *Trono* v. *United States.* (Appellate Court acquitting of murder and convicting for assault included in the crime — No violation of double jeopardy clause.)]

[20] 1953 S C 325 (328) (Pr 12) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay.*

1931 Pat 369 (376) [AIR V 18] : 32 Cri L Jour 1256 (FB), *In re Ram Govind.*

1953 Cal 316 (319) (Pr 34) [AIR V 40 C 110], *Suresh Chandra* v. *Himangshu Kumar.*

1953 Mad 664 (671) (Pr 17) [AIR V 40 C 254] : ILR (1953) Mad 937 : 1953 Cri L Jour 1174 (DB), *P. Arumugham* v. *State of Madras.* (Words, "prosecuted and punished" have definite meaning and significance in the administration of criminal justice and imposition of restrictive precautions under Madras Restriction of Habitual Offenders Act, 1948, is not covered by the expression.)

1952 Mad 725 (726) (Pr 8) [AIR V 39] : 1952 Cri L Jour 1576, *In re C. Devanugraham.*

[*See* 1953 Cal 85 (87) (Pr 16) [AIR V 40 C 25]: 1953 Cri L Jour 294 (DB), *Pulin Krishna* v. *Sishupati.* (Words "prosecution" and "offence" as used in the Constitution are not defined and they must be given their ordinary meaning—Going to Rent Controller and asking him to fine a man for an act is really a prosecution — *Note* : — This decision will have to be reconsidered in the light of the Supreme Court decision in AIR 1953 S C 325 (SC).)]

A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites :

(1) the presentation (not necessarily orally) of their case by the parties to the dispute;

(2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence;

(3) if the dispute between them is a question of law, the submission of legal argument by the parties, and

(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law.[22]

Applying the above tests, it has been held by the Supreme Court that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act, 1878, does not constitute a judgment or order of a court or a judicial tribunal necessary for the purpose of supporting a plea of double jeopardy.[23]

(e) Civil action

A civil action is not a "prosecution" within the meaning of this clause and therefore a civil suit for penalty against one previously convicted may be brought without violating this clause.[24] *A fortiori*, an acquittal on a criminal charge would not bar a civil action by the State arising out of the same facts.[25] Although this latter proposition is not directly covered by this article, inasmuch as there is no previous punishment in such a case, so as to involve a double punishment for the same offence, yet it shows that a civil action is not a "prosecution" for the purpose of this clause.

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[21] 1953 S C 325 (328, 329) (Pr 12) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay.*

[22] 1953 S C 325 (329) (Pr 13) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay.*

1950 S C 188 (207) (Pr 56) [AIR V 37 C 15] : 1950 S C R 459 (SC), *Bharat Bank* v. *Employees of Bharat Bank.*

(1937) 2 K B 309 (340) : (1937) 2 All E R 726 (740), *Cooper* v. *Wilson.* (Quoting Report of the Ministers' Powers Committee at p. 73.)

[23] 1953 S C 325 (330) (Pr 18) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay,* (Hence, when the Customs Authorities confiscate the gold brought in India in contravention of a notification of the Government of India, neither the proceedings taken before the Sea Customs Authorities constitute a prosecution of the person from whom it is confiscated nor does the order of confiscation constitute a punishment inflicted by a Court or judicial tribunal on that person. Such person cannot be said by reason of these proceedings before the Sea Customs Authorities to have been "prosecuted and punished" for the same offence with which he is later on charged before the Magistrate, in the complaint which is filed against him under S. 23 of the Foreign Exchange Regulation Act, 1947 : AIR 1922 Bom 30, Ref.)

[24] (1943) 317 U S 537 (548) : 87 Law Ed 443 (451), *United States Ex Rel. Marcus* v. *Hess.*

[25] (1938) 303 U S 391 (397) : 82 Law Ed 917 (921), *Helvering* v. *Mitchell.*

(f) Preventive detention

Detention under the Preventive Detention Act does not amount to prosecution and punishment of the person detained. In such a case, there is no question of inflicting a penalty for an offence, the action being purely preventive. Hence, there is no bar to the detention of a person under the Preventive Detention Act, although such detention may have reference to matters which have already formed the subject of a criminal charge against the detenu and although he has been acquitted or discharged in the criminal case and the order of preventive detention against him would amount to nullification of the previous discharge or acquittal by the criminal Court in his case.[26] It will be seen that, so far as this clause is concerned, whether it is held that the proceeding under the Preventive Detention Act is not a prosecution within the meaning of this clause, or that there is no question of a double punishment because the accused was acquitted or discharged in the previous proceeding, the result is the same, namely, that the preventive detention is not barred. But for the purpose of S. 403, Criminal Procedure Code, the bar to the subsequent proceedings would arise although the previous proceeding ended in an acquittal. But it is only the subsequent *trial* that will be barred under S. 403. As proceedings under Preventive Detention Act do not amount to a trial for an offence, such proceedings will not be barred in the case taken in the above illustration.

(g) Security proceedings

Similarly, security proceedings under Chap. VIII of the Criminal Procedure Code do not constitute prosecution for an offence, and, therefore, cannot bar a prosecution for an offence under this article or under S. 403 of the Criminal Procedure Code.[27]

(h) Departmental or disciplinary proceedings

Departmental proceedings against public servants are not criminal prosecution and so such proceedings can be taken against a person who has already been prosecuted, convicted and sentenced in a criminal case. *A fortiori*, where the person was acquitted at the previous trial in the criminal Court, there is no question of his being *punished* twice at all and the subsequent departmental action against him is not barred under this clause.[28] The reason is that, as already seen, "prosecution" means a

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[26] 1952 Cal 26 (Prs 15, 16) [AIR V 39 C 10]: 1952 Cri L Jour 204 (DB), *Raman Lal* v. *Commissioner of Police*. (The principle of *autrefois acquit* under S. 403 of the Code of Criminal Procedure has no application because the satisfaction of the Government under the Preventive Detention Act is not a "trial." The constitutional protection against double jeopardy under Art. 20 (2) of the Constitution is also inapplicable because satisfaction under the Preventive Detention Act is not a "prosecution." There is and can be no identity of offence or of prosecution between detention under the Preventive Detention Act and trial and conviction by a court of law. Hence, an order of detention under the Preventive Detention Act is not illegal merely because it nullifies a previous order of discharge or acquittal by a Court in a criminal or a quasi-criminal case.)

[27] 1952 Trav-Co 556 (557) (Pr 5) [AIR V 39] : 1950 Trav-Co L R 596 : 1953 Cri L Jour 49, *Mathai Manjuran* v. *State*.

[28] 1953 Cal 316 (319) (Prs 33, 34) [AIR V 40 C 110], *Suresh Chandra* v. *Himangshu Kumar*.

Article 20
Note 4

judicial proceeding before a court or judicial tribunal.[29] In other words, the word "prosecuted" has been used to make it clear that it relates to punishment by a court of law and not to other kinds of punishment besides a judicial penalty, for example, departmental proceedings in the case of public servants, or disciplinary proceedings under the Legal Practitioners Act in the case of lawyers.[30]

On the above principles, it has been held by the Supreme Court that disciplinary action against detenus under the Preventive Detention Act, 1950, by the Superintendent of the Jail under the rules made under the above Act by the Government of the Punjab, does not amount to prosecution and punishment so as to preclude under this clause a criminal trial of the detenus in respect of the same matter.[31] But proceedings under the Prisons Act, 1894, for prison offences will bar, under ART. 20 (2), a prosecution for the same acts under the Penal Code, if the accused had been punished by the Superintendent of the prison in the previous proceedings under the Prisons Act.[32]

It may be noted in this connection that the Prisons Act provides for the examination of persons by the Superintendent and also punishment by him.[33] But it must be shown that the accused was actually *punished* in the previous proceeding.

It has also been held that where the Rent Controller has convicted and fined under the Rent Control law the landlord for not allowing the tenant to use the privy and water tap, a subsequent prosecution in a criminal Court based on the same facts will be barred by this article.[34]

[*See also* 1953 S C 325 (328) (Pr 12) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (S C), *Maqbool Hussain* v. *State of Bombay*. (Departmental or administrative enquiry is not prosecution.)]

29. 1953 S C 325 (328) (Pr 12) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (S C), *Maqbool Hussain* v. *State of Bombay*.

1953 Cal 316 (319) (Pr 34) [AIR V 40 C 110], *Suresh Chandra* v. *Himangshu Kumar*.

30. 1931 Pat 369 (376) [AIR V 18]: 32 Cri L Jour 1256 (FB), *In re Ram Gobind*. (Under the Legal Practitioners Act, there is no question of any indictment or trial for the same offence under any other law and there is no question of punishing pleaders over again for those offences; the question always is whether the acts committed by the pleaders concerned bring them within the disciplinary jurisdiction of the Court of which they are officers under the Legal Practitioners Act.)

1953 Cal 316 (319) (Pr 34) [AIR V 40 C 110], *Suresh Chandra* v. *Himangshu Kumar*.

1952 Mad 725 (726) (Pr 8) [AIR V 39] : 1952 Cri L Jour 1576, *In re C. Devanugraham*.

31. 1953 S C 325 (331, 332) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (S C), *Maqbool Hussain* v. *State of Bombay*. (It was pointed out that the position is different in the case of action under Prisons Act (1894) — But the subsequent criminal prosecution before a Magistrate was held barred under the Jail Rules — They provided that after Jail Superintendent had inflicted punishment for a jail offence he could not refer case to criminal Court.)

32. 1952 Cal 319 (Pr 4) [AIR V 39 C 82] (DB), *Prithish Dey* v. *The State*.

33. *See* 1953 S C 325 (332) (Pr 23) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (S C), *Maqbool Hussain* v. *State of Bombay*.

34. 1953 Cal 85 (87) (Pr 13) [AIR V 40 C 25] : 1953 Cri L Jour 294 (DB), *Pulin Krishna* v. *Sishupati*. (Case under West Bengal Premises Rent Control (Temporary

Article 20
Note 4
(i) "Same offence"

The final requirement which may be pointed out, for the applicability of cl. (2), is that the offence in respect of which action is taken on both the occasions must be the same.

The word 'offence' has not been defined in the Constitution and so, in accordance with ART. 367, must be taken in the sense of the definition in S. 3 (38) of the General Clauses Act, 1897.[35] According to that definition, an 'offence' shall mean any act or omission punishable by any law for the time being in force. It is clear that by the words "same offence" is meant the same act or omission which is made punishable under the law. Hence, for instance, if the same act or omission constitutes an offence under two enactments, the offence would be one and the same and not two different offences.

In view of this, it is questionable whether sub-section (4) of S. 403 of the Criminal Procedure Code would be valid after the coming into force of the Constitution. Under that clause, a person acquitted or *convicted* of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. As pointed out in the A. I. R. COMMENTARIES on the Code of Criminal Procedure, 1949 Edn., S. 403, NOTE 3, the above sub-section contemplates the possibility of the same acts constituting different offences. Hence, for the purpose of the above sub-section, the words "same offence" must be construed to have a special meaning different from the meaning of the words for ordinary purposes when a special meaning is not required by the context. But, as there is nothing in the context in which the words occur in this article, to require any such special meaning to be attributed to the words "same offence", an offence constituted by the same acts would be same offence notwithstanding that the acts may be made punishable by more than one provision of law. Hence, there seems to be an inconsistency between S. 403 (4) of the Criminal Procedure Code and cl. (2) of this article, in that under S. 403 (4) of the Criminal Procedure Code a second prosecution in respect of the same

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Provisions) Act, 1950—The words "prosecution" and "offence" as used in the Constitution are not defined and they must be given their ordinary meaning—Going to the Rent Controller and asking him to fine a man for an act is really a prosecution of that man and the act is an offence against the statute and is a criminal offence because it is punishable by a fine which is a punishment of a criminal nature. *Note*—This decision should be re-considered in the light of the Supreme Court decision in AIR 1953 S C 325 (S C)).

[35] 1953 S C 325 (327) (Pr 4) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (S C), *Maqbool Hussain* v. *State of Bombay*. (Act of importing gold in contravention of notification under Foreign Exchange Regulation Act, 1947, was made punishable both under S. 167 (8) of the Sea Customs Act as also under S. 23 of the Foreign Exchange Regulation Act.)

1953 Cal 85 (87) (Pr 16) [AIR V 40 C 25] : 1953 Cri L Jour 294 (DB), *Pulin Krishna* v. *Sishupati*. (West Bengal Premises Rent Control (Temporary Provisions) Act, 1950—Act punishable by Rent Controller by fine under the Act is "offence.")

acts would be competent although the accused has once been tried and convicted for such acts at a previous trial, while such a second prosecution would be incompetent under the provisions of this clause. This clause makes no reference to the *competency* of the Court which tried the previous case, to try the offence subsequently charged, while such competency is the decisive factor under S. 403 (4) of the Criminal Procedure Code.

Similarly, it may be a question whether sub-sec. (3) of S. 403 of the Criminal Procedure Code would be held to be valid after the coming into force of this Constitution. Under that clause, a person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

The fact that under the above sub-section, if the consequences had happened and were known to the Court to have happened at the time of the previous conviction, the subsequent trial would have been barred, is itself an indication that essentially the offence in such a case is identical, although the act without the consequences may itself fall under one definition of law creating an offence, and the act together with the consequences may fall under another definition of the law defining an offence. Such being the case, and the sub-section permitting a fresh trial notwithstanding a previous conviction and treating the matter as one of different offences entirely, because of the special but adventitious circumstances of the consequences not having happened or not having been known to have happened at a particular time, the sub-section seems to be repugnant to this article which broadly prohibits a second prosecution and punishment of an accused person for the same offence and takes no account of the consequences of his acts having happened or having been known to have happened at the time of his previous conviction.

It is apprehended that if S. 403, sub-sections (3) and (4) are amended so as to apply only to cases of an *acquittal* in the previous trial, they could be rendered invulnerable from the constitutional point of view.

(j) Distinct offences

The words "same offence" would not include "distinct offences" although committed in the same transaction. The test to determine whether the offences charged at two trials are distinct is whether if the offences were charged at the same trial, separate sentences could be passed in respect thereof under S. 71 of the Penal Code.

For tests as to what are distinct offences see A. I. R. COMMENTARIES on the Criminal Procedure Code, 1949 Edn., S. 403, NOTE 5. As shown there, where anything, which is an offence, consists of parts, any of which parts is itself an offence, the offences are not distinct. Thus, where a person receives or retains different items of stolen property at the same time, he does not commit so many distinct offences. Similarly, where a person gives another fifty strokes with a cane, he does not commit fifty offences but only one offence. (Penal Code, S. 71, Ill. (a).) Similarly, where several acts, of which one or more than one would by itself or by themselves constitute an offence, constitute, when combined, a different offence, the offences are not distinct. In all such cases, the offence will be the "same" for the purpose of this clause.

(k) Previous conviction before Constitution

The prohibition of double jeopardy under this article applies although the previous prosecution and punishment took place before the coming into force of the Constitution.[36]

(l) A.I.R. Commentary on Criminal Procedure Code, S. 403

It will be seen from the above discussion that under S. 403 of the Criminal Procedure Code, a fresh trial of the accused is permitted in certain cases, notwithstanding a previous conviction and punishment for the same act or omission, while under this clause such fresh prosecution will be barred. In spite of this, it would be useful to refer to the A. I. R. COMMENTARIES on the Code of Criminal Procedure, 1949 Edn., S. 403, and to the case-law which has been exhaustively dealt with there to note the trends which have a bearing on the question whether a person is being unjustly punished twice for the same offence.

(a) General Principles

5. Accused not to be compelled to be witness against himself — Clause (3). — Under cl. (3) no person accused of any offence shall be compelled to be a witness against himself. This provision embodies a fundamental principle of British jurisprudence and also has its counterpart in the Federal Constitution of the United States of America. Under Amendment V to the above Constitution, it is expressly provided that no person shall be compelled in any criminal case to be a witness against himself. It has also been held that the due process clause in Amendment XIV, under which no State shall deprive any person of life, liberty or property without due process of law, is wide enough to include the prohibition against compelling the defendant in a criminal prosecution to testify, by fear of hurt, torture, exhaustion or any other type of coercion, against himself.[1]

Under the Indian law, it is expressly provided in S. 342 (4) of the Criminal Procedure Code that no oath shall be administered to the accused person. Similarly, S. 5 of the Indian Oaths Act, 1873, which provides for the compulsory administration of oaths or affirmation to witnesses, expressly states in its last paragraph : "Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person . . . ." The taking of oath or making of an affirmation being an indispensable prerequisite for any person giving evidence in a court of law as a witness, the above provisions clearly show that under the Indian law, apart from the present provision in the Constitution, an accused person is not a competent witness in his own case. This necessarily means that an accused person cannot be compelled to be a witness against himself in a criminal case. Hence, cl. (3) of this article does not create any new right but only gives effect to an old established principle.[2]

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[36] 1953 S C 394 (398) (Pr 8) [AIR V 40 C 88] : 1953 Cri L Jour 1480 (S C), *Shiv Bahadur Singh* v. *State of V. P.*

Article 20 — Note 5

[1] (1947) 332 U S 46 (54) : 91 Law Ed 1903 (1910), *Adamson* v. *California*.

But there is a difference between this clause and the provisions of Indian law above referred to. Under this clause an accused person cannot be *compelled* to be a witness against himself.[2a] This necessarily means that if the accused volunteers to give evidence in his own defence in a criminal case and wishes to be examined as a witness in a criminal case against himself, there is no bar to his being allowed to do so, so far as this clause is concerned. But as he is not a competent witness under the Indian law as it now stands, and as that law is not rendered void by this clause, an accused person will not be able to examine himself as a defence witness in a criminal case against himself even after the enactment of this clause. In the case of cl. (2), we have seen that that clause does not make S. 403 of the Criminal Procedure Code (under which even if an accused was acquitted in a previous trial, a second trial against him for the same offence will be barred) void, although under cl. (2) itself such a second trial would not be barred. Similarly, under this clause also an accused person may be permitted, if he so chooses, to give evidence as a witness in his own defence in a criminal case against himself. But the clause will not make void a law under which an accused is not competent to be a witness either for the defence or for the prosecution in a criminal case againt himself.

It is highly desirable that the Indian law should be brought into line with the English law and it should be made possible for an accused person, if he so chooses, to be a witness in his own favour in a criminal case against himself. Such a provision is already contained in an Indian law, namely, S. 7 of the Prevention of Corruption Act, 1947.

Under S. 120 of the Evidence Act, it is provided that in criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. This seems impliedly to exclude the accused himself as a competent witness under S. 120 of the Evidence Act. The corresponding provision under the English law is contained in the Criminal Evidence Act of 1898 (61 and 62 Vic. C. 36). Under that Act, every person charged with an offence and the wife or the husband of the person so charged are competent witnesses for the defence. It is highly desirable that S. 120 of the Evidence Act is simi-

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2. 1951 Cal 101 (Pr 31) [AIR V 38 C 30] : 52 Cri L Jour 946 (FB), *Satya Kinkar* v. *Nikhil Chandra.*

2a. *See* 1953 S C 131 (132) (Pr 8) [AIR V 40 C 35] : 1953 S C R 546 : 1953 Cri L Jour 668 (S C), *Kalawati* v. *Him. Pra. State.* (Cl. (3) of Article 20 does not apply at all to a case where the confession is made without any inducement, threat or promise. It is true that a retracted confession has only little value as the basis for a conviction, and that the confession of one accused is not evidence against co-accused tried jointly for the same offence, but can only be taken into consideration against him; but this deals with its probative value and has nothing to do with any repugnancy to the Constitution.)

larly recast, so as to bring it into line with the provision of the English Act, and also that necessary amendments may be made in S. 342 (4) of the Criminal Procedure Code and S. 5 of the Oaths Act. Such an amendment would be absolutely permissible under cl. (3) of this article, as this article, as already stated, is only against *compelling* an accused person to give evidence against himself and not against *allowing* an accused person to give evidence in his own favour, if he is so minded.

(b) Failure to give evidence in defence — Inference from

Where, under the law, the accused can give evidence in his own favour in a criminal case against himself, as for instance, under the English law or the American law, and he fails to do so, it has been held by a decision of the Supreme Court of the United States of America that his failure to examine himself as a witness in his own defence must not give rise to a presumption against him and the prosecution should not comment upon his failure to be a witness in his own behalf. The reason is that if an adverse presumption is drawn against an accused on the ground of his not examining himself in his own defence that would amount to virtually compelling him to be a witness against himself.[3]

(c) "Person accused of any offence"

The expression "person accused of any offence" must have the same meaning as the word "accused" in S. 342 (4) of the Criminal Procedure Code. "Accused" in that provision means the accused then under trial and under examination.[4] (See further on this point S. 342, NOTE 31 in A. I. R. COMMENTARIES on the Criminal Procedure Code, 1949 Edn.).

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3. (1893) 149 U S 60 (66, 67) : 37 Law Ed 650 (652), *Wilson* v. *United States.*

4. 1937 Nag 17 (22, 23) [AIR V 24]: 38 Cri L Jour 237 (FB), *Amdumiyan Guljar* v. *Emperor.* (The word 'inquiry' in the section does not include an investigation.)
1947 Pat 284 (288, 289) [AIR V 34 C 105] : I L R 25 Pat 539 (DB), *Province of Bihar* v. *Bhim Bera.*
1940 Nag 410 (413) [AIR V 27] : 41 Cri L Jour 697, *Sheoshankar Dhondbaji* v. *Emperor.*
1938 Bom 481 (482, 483) [AIR V 25] : 40 Cri L Jour 118, *Emperor* v. *Karamalli Gulamalli.*
1935 Bom 186 (188) [AIR V 22]: 36 Cri L Jour 937, *Keshav Vasudeo* v. *Emperor.* (Persons not sent up for trial—Mere inclusion of their names in police charge-sheet does not make them accused.)
1925 Oudh 227 (227) [AIR V 12] : 25 Cri L Jour 1194, *Makhdum* v. *Emperor.* (Accused in case before Sub-Magistrate making false statements in application before District Magistrate is not protected.)
1925 Rang 122 (125) [AIR V 12] : 26 Cri L Jour 492, *A. V. Joseph* v. *Emperor.* (Co-accused tried separately is a competent witness for or against the other.)
1920 Nag 255 (256) [AIR V 7]: 21 Cri L Jour 769, *Govinda Sambuji* v. *Emperor.*
1919 Cal 1021 (1022) [AIR V 6]: 19 Cri L Jour 663 (DB), *Akhoy Kumar Mukerjee* v. *Emperor.*
1916 Bom 229 (231, 235) [AIR V 3] : 17 Cri L Jour 256, *Govind Balvant* v. *Emperor.*
('02) 15 C P L R 112 (114), *Emperor* v. *Vinayak Jageshwar.*
('01) ILR 28 Cal 709 (714) (DB), *Lolit Mohan* v. *Surja Kanta.*
('99) ILR 21 All 107 (109), *Queen-Empress* v. *Babu Lal.*
('99) ILR 23 Bom 213 (219), *Empress* v. *Durant.*
('92) ILR 16 Bom 661 (668), *Queen-Empress* v. *Mona Puna.* ("Accused" means a person over whom the Magistrate or other Court is exercising jurisdiction.)
('96) ILR 23 Cal 493 (494), *Jhoja Singh* v. *Queen-Empress.* (Do.)

In order that this clause may apply, there must be a person accused of an offence and such person must be facing a prosecution in connection with that charge, and there must be a question of compelling him to give evidence against himself. The words "accused of an offence" seem to indicate, according to the common usage of words, an accusation made in a *criminal prosecution* and not in any and every proceeding in which it may be alleged that a certain person has committed an offence.[4a]

In a case in the Supreme Court of the United States of America, it was held in connection with the 5th Amendment to the Federal Constitution that a proceeding to forfeit a person's goods for an offence against the laws, though civil *in form*, was a "criminal case" within the meaning of the 5th Amendment.[5] It is highly doubtful whether this view will be tenable in regard to the applicability of this clause. It seems that this clause contemplates a proceeding under the *criminal* law for the prosecution of an offender and his punishment and does not contemplate any civil proceeding.

(d) Statement of accused under Criminal P. C., S. 342 — Inferences from

Under S. 342 (2) of the Criminal Procedure Code it is provided that the Court and the jury (if any) may draw such inference from the refusal of the accused to answer questions or his giving false answers, as the Court or the jury think just. Similarly, S. 342 (3) provides that the answers given by the accused may be taken into consideration in the inquiry or trial in which such answers are given and put in evidence for or against him in any other enquiry into, or trial for, any other offence which such answers may tend to show he has committed. It has been held in the undermentioned case[5a] that as it is entirely a matter of option with the accused to answer or not when he is questioned under S. 342, Criminal Procedure Code, and as an oath cannot be administered to him as to a witness and his testimony cannot be put in evidence in the trial or enquiry, S. 342 is not repugnant to cl. (3) of this article.

As already seen, it has been held in the United States of America that to draw an adverse inference against an accused person from his failure to examine himself in his defence in a criminal case, although the law allowed him to do so, is virtually compelling an accused person to be a witness against himself. On similar reasoning, it is questionable whether the provisions of S. 342 (2) and (3) of the Criminal Procedure Code are not open to attack as virtually compelling an accused to be a witness against himself, and so, as being contrary to the spirit, if not of the letter, of cl. (3). For the effect of S. 342 (2) and (3) and for the extent to which criminal Courts are entitled to

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('87) 1887 Pun Re No. 38 (Cr) page 85 (90) (DB), *Mal Singh* v. *Empress*.

[4a] *See* 1953 S C 325 (328, 329) (Pr 12) [AIR V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay*. (Proceedings comtemplated by the article are of the nature of criminal proceedings before a court of law or judicial tribunal.)

[5] (1886) 116 U S 616 (633, 634) : 29 Law Ed 746 (752), *Boyd* v. *United States*.

[5a] 1952 Him Pra 81 (86) (Pr 12) [A I R V 39] : 1952 Cri L Jour 1720, *Ranjit Singh* v. *State*.

make inferences against an accused person by reason of his failure to give proper explanations of the circumstances against himself, see A. I. R. COMMENTARIES on the Criminal Procedure Code, (1949 Edn.) S. 342, NOTES 21, 22 and 23.

(e) "Compulsion" to be witness — What amounts to

The question arises as to whether an accused person may be said to be compelled to be a witness against himself, if he is summoned to produce any document or other object. Under S. 139 of the Evidence Act, a person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness. This provision will apply also to accused persons. Similarly, the provisions of Ss. 94 and 96 of the Criminal Procedure Code apply to the case of an accused person who is on his trial. The words "any person" in S. 94 are wide enough to cover a person accused of an offence. Compelling an accused person under Ss. 94 and 96 of the Criminal Procedure Code does not amount to compelling him to be a witness against himself and, therefore, is not against cl. (3). Hence, construing S. 94 of the Criminal Procedure Code, so as to make it applicable to an accused person, will not make it *ultra vires* under this article.[6] (See A. I. R. COMMENTARIES on the Criminal Procedure Code, 1949 Edn., S. 94, NOTES 9, 10 and 13; S. 96, NOTE 6; and also S. 165, NOTE 7.)

Under S. 51 of the Criminal Procedure Code, when a person is arrested and is not released on bail on such arrest, he may be searched and all articles other than necessary wearing apparel found upon his person may be placed in safe custody. Similarly, under S. 53 of the Criminal Procedure Code, on the arrest of a person, any offensive weapons which he has about his person may be taken from him. These provisions do not amount to making an accused person compulsorily a witness in his own case and the validity of such provisions of law is not affected by this clause.[7]

Evidence obtained from an exhibition of the accused person, such as testimony as to the fitness of a piece of dress which he was forced to put on, is not excluded by the principle prohibiting the compulsion of a person to be a witness against himself in a criminal case.[8] Similarly, taking of the thumb impressions of an accused person in Court would not amount to compelling him to be a witness.[9] Under S. 73 of the Evidence Act, the Court may direct any person, including an accused person present in court, to write any words or figures or to give his thumb impressions. This provision does not offend the principle of this clause. Similarly, S. 5 of the Identification of Prisoners Act (33 of 1920) enables the Court to direct the measurements, including thumb impressions of any person to be taken for purpose of any proceedings under the Criminal Procedure Code. This provision also does not offend this clause. (See also A. I. R. COMMENTARIES on the Criminal Procedure Code, (1949 Edn.), S. 342, NOTE 30.)

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[6] 1951 Cal 101 (Prs 15, 17, 28, 31 & 34) [A I R V 38 C 30] : 52 Cri L Jour 946 (FB), *Satya Kinkar* v. *Nikhil Chandra*. (Section 94 merely contemplates compelling an accused person to produce a document for what it is worth. What use will be made of that document and how it will be proved are not matters in which the accused can be compelled to assist. He gives no evidence of any sort and he cannot be made to say anything concerning the document which is produced. The document may of course prejudicially affect him later, but it does not prejudice by reason of the accused being compelled to give evidence against himself.)

[*See also* (1918) 63 Law Ed 470(473) : 249 U S 47 (50), *Schenck* v. *United States*. (Documentary evidence is not rendered inadmissible in criminal case merely because it was obtained upon a search warrant valid so far as appears.)]

[7] *See* (1934) 150 L T 438 (439) : 2 K B 164, *Elias* v. *Pasmore*. (Right of searching an arrested person exists—On lawful arrest police are entitled to take and detain property in possession of arrested person which forms material evidence on the prosecution of any criminal charge: *Bassell* v. *Wilson*, 20 L T Rep (O S) 223 and *Dillon* v. *O'Brien and Davis*, 20 L R Ir 300, Ref. to.)

Under S. 132 of the Evidence Act:

> "A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind: Provided that no such answer which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or shall be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

This section enacts a rule which is different from that which obtains under English law and in the United States of America on this point. Under both the latter systems, a witness is given exemption from answering self-incriminating questions, but this immunity is taken away by S. 132 of the Evidence Act under the Indian law, although the witness is protected from criminal prosecution for any offence disclosed by his answers from the witness box.

(f) Evidence Act, S. 132, validity of

The question may arise whether S. 132 of the Evidence Act, under which a witness is not given any exemption from answering incriminating questions, conflicts with cl. (3) of this article. Clause (3) of this article, however, contemplates cases in which the person deposing is being prosecuted and is an *accused person.* The clause does not embrace proceedings *aliunde* in which a person may be examined as a witness and may be compelled to answer questions, although his answers to such questions may be self-incriminating. The position with regard to this point is exactly similar to that as to Criminal Procedure

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[8] (1910) 218 U S 245 (252, 253): 54 Law Ed 1021 (1030), *Holt* v. *United States.*

[9] 1924 Rang 115 (116, 117) [A I R V 11]: 26 Cri L Jour 108 (FB), *Emperor* v. *Nga Tun Hlaing.*

1928 Pat 129 (131, 132) [A I R V 15]: 28 Cri L Jour 850 (DB), *Basgit Singh* v. *Emperor.*

1928 Pat 103 (104) [A I R V 15]: 28 Cri L Jour 1028 (DB), *Zahuri Sahu* v. *Emperor.* (Court can direct accused to give his thumb impression in Court.)

[*See also* 1923 Mad 178 (179) [A I R V 10]: 23 Cri L Jour 694 (DB), *Public Prosecutor* v. *Virammal.*

1926 Cal 531 (533) [AIR V 13]: 27 Cri L Jour 409 (DB), *Emperor* v. *Kiran Bala Dasi.*]

Code, S. 342 (4). With regard to that provision, it is settled law, as will be seen in A. I. R. COMMENTARIES on the Criminal Procedure Code, 1949 Edn., S. 342, NOTE 31, that the provision against administering an oath to an accused person under S. 342 (4) applies only to cases in which the person in question is an accused person in the very proceedings in which the question about administering the oath to him arises. But even assuming otherwise, it is interesting to note that it has been held in a case before the Supreme Court of the United States of America that an Act of the Congress exempting a witness from any prosecution on account of any transaction to which he may testify before the Inter-State Commerce Commission, sufficiently satisfies the constitutional guarantee of protection against being compelled in any criminal case to be a witness against himself.[10] A similar provision having been made in the Proviso to S. 132 of the Evidence Act, it would seem that under Indian law also, in spite of a witness not being exempt from answering incriminating questions, he would not be deemed as being compelled to be a witness against himself in a criminal case. Hence, the validity of S. 132 of the Evidence Act does not seem to be open to challenge under cl. (3).

(g) American decisions

In the absence of any provision exempting a witness from answering incriminating questions from a witness box, decisions of the Supreme Court of the United States of America,[11] as to the nature and extent of this exemption are only of academic interest.

(h) Unreasonable searches and seizures

Under the Constitution of the United States of America, there is a provision in Amendment IV which runs as follows: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."[12] There is no such specific provision in our Constitution.

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[10] (1896) 40 Law Ed 819 (820, 821) : 161 U S 591, *Brown* v. *Walker*. (Act of Congress of February 11, 1893 (27 Stat. at L. 443).)

[11] (1906) 201 U S 43 (66) : 50 Law Ed 652 (662), *Hale* v. *Henkel*. (Statutory immunity from self-incriminating statements.)

[*See* (1944) 322 U S 694 : 88 Law Ed 1542 (1545, 1546), *United States of America* v. *White*. (The Custodian of a labour Union's records has no constitutional rights to refuse to produce such records upon the ground that they might tend to incriminate the Union or himself. The privilege against self incrimination is purely personal and therefore cannot be utilized on behalf of any organization. Similarly, the privilege against the self-incrimination is personal to the individual called as a witness making it impossible for him to set up the privilege of a third party as an excuse for a refusal to answer or produce documents.)

(1911) 55 Law Ed 771 (777, 779) : 221 U S 361, *Wilson* v. *United States*. (A corporation cannot resist upon the ground of the constitutional protection against self-crimination the compulsory production of its books and papers, before the grand jury. Privilege against self-crimination afforded by 5th Amendment does not protect the officer of a corporation in resisting the compulsory production before the grand jury of the letter-press copy books of such corporation in his possession, because the contents thereof may tend to incriminate him even though the inquiry before the grand jury was not directed to the corporation itself.)]

[12] (1886) 29 Law Ed 746 (748) : 116 U S 616, *Boyd* v. *United States*. (It is equivalent to compulsory production of papers to make their non-production a

(i) Confessions of accused obtained under pressure

There are provisions in the Evidence Act and in the Criminal Procedure Code prohibiting confessions of accused persons being proved against them when such confessions have been obtained by pressure or coercion against them. Though the use of such confessions against the accused will not technically amount to compelling him to be a *witness* in his own case, it is obnoxious to all fundamental principles of criminal justice.[13] In the United States of America, the use by the State of an improperly obtained confession to procure conviction of crime has been held to constitute a denial of the "due process of law" guaranteed by 14th Amendment under which no State shall deprive any person of life, liberty or property without due process of law.[14]

(j) Proceedings started before Constitution — Applicability of cl. 3

The prohibition in cl. (3) is applicable to *all* cases in which it is sought, after the Constitution, to compel an accused person to testify as a witness against himself, including cases which originated before the Constitution and were pending at the time of the coming into force of the Constitution.[15]

Protection of life and personal liberty

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Synopsis

1. Analogous law.
2. Scope of the article.
3. "Life."
4. "Deprivation" of personal liberty.
5. This article and Art. 19.
   (a) Whether Art. 19 applies to laws relating to preventive and punitive detention.
   (b) Power of Court to enquire into validity of laws affecting personal liberty: Some anomalies.
   (c) "Personal liberty", meaning of.
6. This article and Art. 22.
7. 'Personal liberty'—Meaning of.
8. "Procedure established by law."
   (a) Phrase means positive State-made law.
   (b) "Due process of law"—Meaning of, under American Constitution.
   (c) "Procedure" meaning of.
   (d) Can the right under Art. 21 be called a Fundamental Right?

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confession of the allegations which it is pretended they will prove—The compulsory production of private papers of a party to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the 4th Amendment.)

[13] *See* 1953 S C 131 (132) (Pr 8) [AIR V 40 C 35] : 1953 S C R 546 : 1953 Cri L Jour 668 (SC), *Kalawati* v. *Him. Pra. State.* (Article 20 (3) does not apply at all to a case where a confession is made without any inducement, threat or promise—Retracted confession is of little value as basis of conviction. But this only affects the probative value of the confession, not its repugnancy to the Constitution.)

(1944) 322 U S 143 (155) : 88 Law Ed 1192 (1200), *Ashcraft* v. *Tennessee.*

[14] (1940) 309 U S 227 (228) : 84 Law Ed 716 (718), *Chambers* v. *Florida.*

[15] 1953 S C 394 (398) (Pr 8) [AIR V 40 C 88] : 1953 Cri L Jour 1480 (SC), *Shiv Bahadur Singh* v. *State of V. P.*

(e) Right to personal liberty apart from Constitution.
(f) Has Article 21 marked an advance ?
(g) Power of Court under article.
(h) Detention by executive order.
(i) Onus of proof.
9. Preventive detention.

1. Analogous law. — This article has its prototype in the Fifth and the Fourteenth Amendments of the Constitution of the United States of America. Under the Fifth Amendment no person shall be deprived of life, liberty or property without due process of law and under the Fourteenth Amendment no State shall deprive any person of life, liberty or property without due process of law.

The article also has its prototype in ART. 31 of the Japanese Constitution of 1946. In fact the words 'procedure established by law' have been borrowed from ART. 31 of the Japanese Constitution.[1]

2. Scope of the article.—This article clarifies and crystallises the general principle that no person shall be deprived of his life or personal liberty except according to procedure established by law.[1]

Part III of the Constitution relating to Fundamental Rights is divided into several sections each with a separate heading and containing provisions that relate to a particular subject. Articles 19, 20, 21 and 22 form one group entitled "Right to Freedom". These articles have to be taken together and considered as one group when determining the constitutional guarantees as to freedom. Article 19 specifies certain important rights which may be viewed as essential hall-marks of free citizenship in democratic countries. Article 20 deals with certain Fundamental Rights of a person accused of a crime and embodies certain important principles of criminal jurisprudence. Article 21 guarantees the most essential of all rights, the right to life and personal liberty, which the article says cannot be taken away except according to procedure established by law. Article 22 gives certain constitutional rights to arrested persons and also lays down certain fundamental rules as to preventive detention. It may be noted that this provision as to preventive detention is peculiar to the Indian Constitution because it visualises the resort to preventive detention in peace time while preventive detention is usually a method resorted to only in emergencies like war.[2]

Article 21 — Note 1

[1] 1950 S C 27 (Pr 181) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (The language employed by Art. 31 of the Japanese Constitution is "no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.")

Article 21 — Note 2

[1] 1951 Mad 1015 (Pr 10) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras*.

[2] 1950 S C 27 (Prs 22, 133) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (Per *Kania, C. J.*—It may be noticed that neither the American nor the Japanese Constitutions contain provisions permitting preventive detention, much less laying down limitations on such right of detention, in normal times, i. e., without a declaration of emergency. Preventive detention in normal times, i. e., without the existence of an emergency like war,

This article unlike ART. 19 applies to all persons and not only to citizens.[3]

The scope and effect of the article came in for consideration by the Supreme Court in the first case relating to the Constitution that went up before the Supreme Court after the coming into force of the Constitution.[4] The question in that case was about the validity of the Preventive Detention Act, 1950, and in determining the question the Supreme Court had occasion to discuss the scheme of the Constitution and the effect of different articles, especially ARTS. 19, 21 and 22.

Articles 21 and 22 apply to all persons including members of Legislatures and they can be deprived of their personal liberty "according to procedure established by law."[5]

3. "Life." — This article guarantees the most Fundamental Right of living. In *Gopalan* v. *State of Madras*[1] Patanjali Sastri, J., (as he then was) observed as follows :

> "The right to live, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of a declaration that no person shall be deprived of it save by due process of law or by authority of law."

In *Munn* v. *People of Illinois*,[2] Justice Field of the Supreme Court of America observed as follows :

> "By the term 'life' as here used (Due Process Clause in the American Constitution corresponding to this article) something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life but of whatever God has given to everyone with life for its growth and enjoyment is prohibited by the provision in question if its efficacy be not frittered away by judicial decision."

4. "Deprivation" of personal liberty. — According to Kania C. J., the word 'deprivation' conveys the idea of total loss of personal

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is recognised as a normal topic of legislation in List 1 Entry 9 and List 3 Entry 3 of Sch. VII of our Constitution. — Per *Mukherjea, J.* : - Preventive detention laws are repugnant to democratic constitutions and they cannot be found to exist in any of the democratic countries of the world.)

[3] 1950 S C 27 (71) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[4] 1950 S C 27 (Pr 2) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[5] 1952 Cal 632 (635) (Prs 23, 25) [A I R V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*

Article 21 — Note 3

[1] 1950 S C 27 (Pr 106) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[2] (1877) 24 Law Ed 77 (90) : 94 U S 113.

liberty as contrasted with mere restriction on personal liberty.[1] But if it be held that 'personal liberty' in Art. 21 includes not only the totality of the rights of personal liberty but also any of them, the deprivation of personal liberty would include the deprivation of any of these rights, although it is a debatable question whether Art. 21 guarantees as independent rights the several rights making up personal liberty. (See Art. 19, Note 7).

The article provides that no person should be deprived of his personal liberty except according to procedure established by law. The article applies not only to the initial deprivation of personal liberty but also to the continuation of such deprivation. And hence the continuation of deprivation of his personal liberty also must be according to procedure established by law.[2]

(a) Whether Article 19 applies to laws relating to preventive and punitive detention

5. This article and Art. 19.—The relative scope of this article and Art. 19 has already been discussed in Note 7 on Art. 19. The question was very fully discussed by all the learned Judges, except Mahajan, J., who took part in the famous decision of *Gopalan* v. *State of Madras*.[1]

In that case the validity of the Preventive Detention Act 4 of 1950) was attacked. One of the grounds on which the validity of the Act was attacked was that it affected the Fundamental Right of a citizen under Art. 19 (1) (d) to move freely throughout the territory of India and was not a reasonable restriction on such right imposed in public interest so as to be held valid under Art. 19 (5).

This ground of attack was based on two arguments. The first was that personal liberty was in the eye of the law nothing more nor less than the freedom of *locomotion*. (In this connection, Blackstone's

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Article 21 — Note 4

[1] 1950 S C 27 (Pr 12) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[2] 1951 Bom 30 (Pr 5) [AIR V 38 C 12] : I L R (1951) Bom 190 : 52 Cri L Jour 366 (FB), *Pandurang, In re*. (In order that the detention should be valid and should be upheld by the Court not only must the order of detention be valid, but there must be a substantial compliance with all the provisions of the statute. Therefore even though when the detenu was deprived of his personal liberty that deprivation was according to procedure established by law, if the Court finds that that deprivation was continued contrary to the procedure established by law, the Court must hold that Art. 21 has been contravened. Hence if after a person has been detained grounds are not furnished within a reasonable time, his detention becomes invalid as he is being deprived of his liberty contrary to the procedure established by law.)

1951 Assam 169 (Pr 6) [AIR V 38 C 77] : I L R (1951) 3 Assam 494 : 52 Cri L Jour 1453 (SB), *Kishorilal* v. *The State*. (Where a detenu's case is considered only by two members and not by all the three members of the Advisory Board as contemplated by Ss. 8 and 10 ; Preventive Detention Act (as amended), it follows that the fundamental right of the detenu as guaranteed by Art. 21 has been infringed, and that he is entitled to be released forthwith : A I R 1931 P C 248 : 1931 App Cas 662 (P C); AIR 1948 Pat 135 (FB), AIR 1950 Mad 162; AIR 1950 East Punj 222 and (1881) 6 Q B D 376, Ref.)

Article 21 — Note 5

[1] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

COMMENTARIES were cited.) It was argued that, therefore, when a person was incarcerated under the Preventive Detention Act, what really happened was that his right of *locomotion* was taken away and it was this right of free locomotion that was guaranteed under ART. 19 (1) (d). Hence the incarceration of a person under the Preventive Detention Act was a direct blow at that person's Fundamental Right under ART. 19 (1) (d).

The second plank of the argument was that even assuming that the right to move freely throughout the territory of India conferred under ART. 19 (1) (d) was not *identical* with personal liberty and therefore it could not be said that when a person was incarcerated under the Preventive Detention Act his Fundamental Right under ART. 19 (1) (d) alone was hit and hit directly, such right was necessarily violated when a person was deprived of his personal liberty and incarcerated under the Preventive Detention Act. Hence, it was argued that the Preventive Detention Act was liable to be examined under ART. 19 (5) with a view to find out whether it was a reasonable restriction on the Fundamental Right conferred by ART. 19 (1) (d). The contention in regard to both branches of the argument was that the Preventive Detention Act was not a reasonable provision covered by ART. 19 (5).

Both the arguments were rejected by the majority of the Judges of the Supreme Court who considered the question. Mahajan, J., as already stated, did not take part in the discussion of this aspect of the case as he preferred to rest his decision entirely on a different ground, namely, that the Preventive Detention Act was invalid under ART. 22. Fazl Ali, J., agreed with the contention that the Act was liable to be challenged as violating the provisions of ART. 19.

As regards the grounds on which the majority of the Judges rejected the contentions about the Preventive Detention Act being invalid under ART. 19, the gist of their views was that ART. 19 and ART. 21 were two entirely distinct provisions dealing with distinct topics,[2] that the question of total deprivation of personal liberty was, as between the two articles, exclusively within the purview of ART. 21 and not that of ART. 19;[3] that ART. 19 dealt with certain important individual rights of personal liberty in the case of citizens of India and the restrictions that could be validly placed upon such rights;[4] and that the rights enumerated in ART. 19 did not form the subject-matter of ART. 21.[5]

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2. 1950 S C 27 (Prs 12, 172) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

3. 1950 S C 27 (Prs 12, 102) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

4. 1950 S C 27 (Prs 171, 225) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*
[*See also* 1952 Punj 309 (316) (Pr 20) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*]

5. 1950 S C 27 (Pr 12) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

In this connection, the following observations of Das, J., in *State of Bihar* v. *Kameshwar Singh*[6] may also be quoted:

> "As I explained in *A. K. Gopalan* v. *State of Madras*[7] and again in *Charanjit Lal's case*,[8] our Constitution protects the freedom of the citizen by ART. 19 (1) (a) to (e) and (g) but empowers the State, even while those freedoms last, to impose reasonable restrictions on them in the interest of the State or of public order or morality or of the general public as mentioned in cls. (2) to (6). Further, the moment even this regulated freedom of the individual becomes incompatible with and threatens the freedom of the community the State is given power by ART. 21 to deprive the individual of his life and personal liberty in accordance with procedure established by law subject, of course, to the provisions of ART. 22."

Their Lordships in *Gopalan's case*[8a] rejected the contention that in the context of Part III of the Constitution "personal liberty" under ART. 21 was identical with the right of freedom of movement throughout the territory of India under ART. 19 (1) (d).[9] They further held that although the right to freedom of movement under ART. 19 (1) (d) as also the other rights mentioned in ART. 19 (1) except ART. 19 (1) (f) were automatically abridged or taken away on the incarceration of a person, ART. 19 did not apply to a case where a person was incarcerated and was totally deprived of his personal liberty. In such a case, ART. 21 alone applied and the validity of the law under which the person was deprived of his personal liberty could not be tested in the light of the provisions of ART. 19.[10]

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[6] 1952 S C 252 (290) (Pr 106) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC).

[7] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[8] 1951 S C 41 [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

[8a] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[9] 1950 S C 27 (Pr 11) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[10] 1950 S C 27 (Prs 12, 51, 105, 177, 178) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*
[*See* 1951 Assam 106 (Pr 68) [AIR V 38 C 54] : I L R (1951) 3 Assam 161 : 52 Cri L Jour 966 (DB), *Israilkhan* v. *The State.* (Article 21 allows certain guarantees regarding life and personal liberty to all persons. The citizens of India have further right so far as their freedom to move freely throughout India is concerned. Even if externment may be regarded as amounting to deprivation of personal liberty inasmuch as it prevents the individual externed to move freely throughout the territory of India, the individual concerned, if he happens to be the citizen of India, has got an additional right where his freedom to move freely throughout the territory of India is taken away. Assuming that the case of externment under S. 17 of the Assam Opium Prohibition Act can be brought within the scope of Art. 21, it would be open to a citizen to claim that the impugned legislation should be examined in the light of tests laid down by cl. (5) of Art. 19 : AIR 1950 Bom 363; AIR 1950 Bom 374 (FB), AIR 1950 Pat 322 (FB) and AIR 1950 S C 211, Rel. on.)]
[*See also* 1951 S C 270 (Prs 5, 6) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.* (It, therefore, clearly follows

Their Lordships also rejected the contention that ART. 21 did not contain the substantive law as to the Fundamental Right of freedom and that it only dealt with *procedure*, while the substantive law was contained in ART. 19. Their Lordships pointed out how, if the contention was accepted, there would be no Fundamental Right under the Constitution, to "life" or to numerous items of personal liberty not covered by ART. 19 (1). Their Lordships, therefore, held that both Article 19 and Article 21 were substantive provisions dealing with Fundamental Rights and each of the articles had a distinct scope and subject-matter.[11]

Their Lordships also dealt with the concept of 'personal liberty' under the Constitution and held that while certain important individual attributes of freedom were dealt with separately in ART. 19, ART. 21 dealt with the total deprivation of personal liberty.[12]

Their Lordships also held that ART. 19 dealt with rights of a citizen so long as he was free, and did not apply to a person who had ceased to be free and had been incarcerated either under preventive or punitive legislation.[13] They further held that ART. 19 only applied where a legislation directly hit the rights enumerated in the article and not where the loss of the rights mentioned in the article was the result of the operation of a legislation relating to punitive or preventive detention.[14]

In view of the majority decision in *Gopalan's case*,[15] as explained above, it must be taken as settled law that *any* law, providing for total

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that the order of detention under S. 3 of the Preventive Detention Act, 1950, with a view of preventing certain person from making speeches prejudicial to the maintenance of public order, is valid even though it has the result of abridging his right under Art. 19 (1) (a) by such detention : AIR 1950 S C 27 (SC), Foll.)]

11. 1950 S C 27 (Prs 12, 106, 172) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*.
[*See* 1951 S C 301 (Pr 43) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC), *S. Krishnan* v. *State of Madras*. (Per *Bose, J.*—Arts. 21 and 22 confer a Fundamental Right and give a fundamental guarantee. It is therefore the duty of the Court to see that the right is kept fundamental and that the fullest scope is given to the guarantee. It is the duty of the Court to ensure that the right and the guarantee are not rendered illusory and meaningless. Therefore, wherever there is scope for difference of opinion on a matter of interpretation in this behalf, the interpretation which favours the subject must always be used because the right has been conferred upon him and it is the right which has been made fundamental, not the fetters and limitations with which it may be circumscribed by legislative action.)]

12. 1950 S C 27 (Pr 12) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

13. 1950 S C 27 (Pr 10) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

14. 1950 S C 27 (Prs 7, 8) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (Preventive Detention Act (1950) does not directly hit Art. 19 (1) (d) — Hence not questionable under that clause.)

15. 1950 S C 27 (Prs 8, 176, 225) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

deprivation of personal liberty, is not open to challenge under ART. 19.[16] This view of the Supreme Court in *Gopalan's case*[17] was further clarified and re-affirmed in *Ram Singh* v. *State of Delhi*.[18] In that case, in spite of the fact that the detention of a person under the Preventive Detention Act, 1950, had been expressly ordered for the purpose of preventing him from making speeches, it was held that ART. 19 (1) (a) did not apply and that the case was entirely governed by ART. 21.

(b) Power of Court to enquire into validity of laws affecting personal liberty—Some anomalies

It is submitted with the utmost respect that certain doubts arise on the judgments of the Supreme Court in the above cases. If the proposition that any legislation providing for punitive or preventive *detention* cannot be questioned under ART. 19 is taken to be an unqualified one, there arise certain problems. Take for instance S. 124A of the Penal Code (Sedition). This section is, beyond question, a legislative provision relating to total deprivation of personal liberty as it provides a punishment of imprisonment up to three years. Can the validity of this section be questioned under ART. 19 on the ground of its infringing the right of freedom of speech and expression guaranteed under ART. 19 (1) (a)? Other instances may be multiplied, of provisions of law relating to imprisonment and at the same time operating as a *direct* inhibition on the important rights enumerated in ART. 19 (1). In fact, in such cases the imprisonment is provided as punishment for the doing of something which is only a form of exercise of the Fundamental Rights under ART. 19 (1). Are such provisions open to question as violating the Fundamental Rights under ART. 19 (1) or are they not? If it be the correct view that legislation dealing with incarceration or imprisonment cannot be tested under ART. 19, will it not be a very easy method of circumventing the provisions of ART. 19 to provide punishment by imprisonment for certain forms of the exercise of the right mentioned therein? Can it be said that in such cases, the Fundamental Rights under ART. 19 (1) are not abridged, restrained or restricted, merely because the restriction takes the form of imprisonment on the exercise of Fundamental Right in particular ways? In fact, is not *imprisonment* a much more drastic form of restriction than other forms?

Falshaw, J., of the Punjab High Court (with whom Khosla, J., concurred) drew attention to this kind of difficulties in *Ram Singh's case*,[19] above referred to. He pointed out the anomaly of holding that while the State Government could not ban the circulation of a newspaper or impose pre-censorship on it, the Government could, for the same object, place a person under preventive detention. Although Patanjali Sastri. J., (as he then was) in the Supreme Court took rather strong exception to the remarks of Falshaw, J., the anomaly, it is submitted with respect, seems to be undeniable.

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[16] 1953 S C 10 (16) (Pr 23) [AIR V 40 C 4] : 1953 S C R 254 : ILR (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh*. (Abducted Persons (Recovery and Restoration) Act (1949) not liable to be questioned as violating Art. 19 (1) (d) and (e)—On appeal from AIR 1952 Punj 309.) ('51) ILR 29 Pat 502 (509, 533) (FB), *L. K. Burman* v. *The State*.

[17] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[18] 1951 S C 270 (272) [AIR V 38 C 45]:1951 S C R 451: 52 Cri L Jour 904 (SC).

[19] 1951 S C 270 (271) (Pr 4) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi*.

Can it be said, again, that in such cases the Fundamental Rights affected are not the Fundamental Rights of *free* citizens, the freedom of the citizen being taken away from him, only because he has dared to exercise his Fundamental Right in the forbidden way? It is clear that in such a case, the restriction on the Fundamental Right does not *result* from the imprisonment, but the imprisonment itself results from the exercise of the right and, therefore, acts as a restriction on the exercise of the right.

If the provisions of the articles themselves are any guidance on this question, we may refer to ART. 19 (2). In that clause, defamation, incitement to an offence, and contempt of Court are specifically included as matters in relation to which the law can provide reasonable restrictions on the freedom of speech. Under the Penal Code, S. 500, imprisonment is one of the punishments prescribed for defamation. Therefore, S. 500 is a provision for total deprivation of personal liberty. If, on the score of the section being such a provision, it must be treated as not liable to be questioned under ART. 19, it must be held that the word 'defamation' in ART. 19 (2) does not include *penal* provisions about defamation, as otherwise that clause, to that extent, will be otiose. The question is, can it be said that 'defamation' in cl. (2) of ART. 19 does not include the provisions of the Penal Code under which imprisonment is provided as a punishment for defamation? Similarly, the question arises as to what is the purpose of including decency, morality, contempt of Court and incitement to offence, as matters in respect of which reasonable legal provisions will be exceptions to the Fundamental Right of freedom of speech conferred by ART. 19 (1) (a). Is it to be held that in all these cases, legal provisions inflicting imprisonment as a punishment are not intended to be covered by the clause? With utmost respect, it seems to us that on the *wording* of ART. 19 (2), there is no reason to exclude penal laws from its purview.

Further, there are many sections in the Penal Code relating to the matters mentioned in cl. (2) of ART. 19, which provide both for imprisonment and fine, e. g., S. 124A, S. 500, etc. The question arises as to the position in such cases. It seems to be possible to argue that the result of the majority decision in *Gopalan's case*[20] is that the validity of the *same* provisions can be questioned as contravening ART. 19 in so far as they provide for the imposition of *fine* but will be immune from being so questioned in so far as they provide for imprisonment. Can such a result be held to be contemplated by the majority of the Supreme Court?

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[20] **1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC),** ***Gopalan* v. *State of Madras.***

It is difficult to suggest a satisfactory solution for the problem above indicated. But can it be the true view that the test, whether Article 19 applies to a piece of legislation or not, is not whether that legislation provides for imprisonment either punitively or as a precautionary and preventive measure, but whether the piece of legislation *directly* hits the exercise of the rights mentioned in ART. 19 (1)? If it does so, then it can be questioned under ART. 19, irrespective of the question whether or not it provides for *imprisonment* also.

In this view, the validity of provisions like S. 124A of the Penal Code will fall within the ambit of Article 19, as perhaps it was the intention of the Constituent Assembly, if we may judge from the language of ART. 19 (2). It is also submitted that a law authorising *preventive detention* for the purpose of preventing a person from exercising his right of freedom of expression or speech or other Fundamental Right guaranteed under Article 19 should be held open to challenge under that article. The mere fact that it is a law relating to *detention* ought not to save it, so long as it directly hits a Fundamental Right under Article 19. As pointed out by Fazl Ali, J., in *Gopalan's case*,[21] no calamity would happen to the country if laws abridging the liberties of citizens are allowed to be questioned before Courts.

It will be seen in NOTE 8 that the "law" contemplated by this article is a *valid* law and that if it infringes any Fundamental Right it will be invalid and will not make the deprivation of personal liberty constitutional under this article. Patanjali Sastri, C. J., has himself observed as follows in *Kathi Raning* v. *State of Saurashtra*:[22]

> "It is not correct to say that ART. 14 provides no further constitutional protection to personal liberty than what is afforded by ART. 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification, ART. 14 remains an important bulwark against discriminatory procedural laws." (See also notes on ART. 14).

The majority view in *Gopalan's case*[23] involves the position that ART. 19 is an *exception* to the rule that a "law" under which personal liberty can be taken away must not contravene any Fundamental Right.

But we wish to make it quite clear that the above discussion is only intended as an *academic* matter. As already stated, the law is *settled* on the point that any legislation providing for *imprisonment*, punitive, preventive, protective or otherwise, is outside the purview of Article 19 and falls to be considered only under Article 21.

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[21] 1950 S C 27 (Pr 53) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[22] 1952 S C 123 (126) (Pr 7) [AIR V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC).

[23] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

In *Ram Singh's case*,[24] Patanjali Sastri, J., observed as follows :

> "The anomaly, if anomaly there be in the resulting position, is inherent in the structure and language of the relevant articles, whose meaning and effect as expounded by this Court, by an overwhelming majority in the cases referred to above, must now be taken to be settled law, and Courts in this country will be serving no useful purpose by discovering supposed conflicts and illogicalities and recommending parties to reagitate the point thus settled."

(See also NOTE 8).

(c) "Personal liberty", meaning of

As regards the meaning of 'personal liberty' in this article, the Judges in *Gopalan's case*[25] were not uniform in their views. According to Das, J., the words 'personal liberty,' taken by themselves, do not mean only liberty of the *person* but mean liberty or the rights *attached* to the person *(jus personarum)*. Thus, the words are capable of including the rights mentioned in ART. 19. But the Constitution treats the two rights as distinct and provides for them separately in two different articles. Hence, ART. 19 does not apply to a law authorising the deprivation of personal liberty, although the rights under ART. 19 are lost in the process of such deprivation.[26] Kania, C. J., and Patanjali Sastri, J., are also of the same view.[27] Fazl Ali, J., also gives a wide and comprehensive meaning to the words 'personal liberty,' but holds that laws authorising deprivation of personal liberty are covered by ART. 19 also, inasmuch as the rights under that article are also lost in such cases. Further, according to Fazl Ali, J., 'personal liberty' was identical with freedom of *locomotion* and hence laws for the deprivation of personal liberty came directly under ART. 19 (1) (d). Fazl Ali, J., quotes Blackstone's COMMENTARIES in this connection.[28] Mukherjea, J., draws a distinction between the expression 'freedom' used in ART. 19 and the words 'personal liberty' in ART. 21. He says:

> "The right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birth rights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things. There is also no question of imposing limits on the activities of individuals so far as the exercise of these rights is concerned."

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[24] **1951 S C 270 (Pr 6) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ramsingh* v. *State of Delhi*.**

[25] **1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.**

[26] **1950 S C 27 (Prs 219, 220) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.**

[27] **1950 S C 27 (Prs 11, 12, 105) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*. (*Kania, C. J.* — Personal liberty includes right to eat, sleep when one likes, or to work or not to work as and when one pleases and several such rights.)**

[28] **1950 S C 27 (Prs 45, 46, 59, 60, 61, 65) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.**

At another place in his judgment Mukherjea, J., observed as follows :

> "In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sensei s the antithesis of *physical restraint or coercion.* According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification : *vide* Dicey on CONSTITUTIONAL LAW, Edn. 9, pp. 207, 208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory."

His Lordship also pointed out how the Constituent Assembly deliberately rejected the word 'liberty' as being a wider word and adopted what it considered to be a narrower expression.[29]

From the above, it will be seen that there was a sharp cleavage of opinion among the Judges in *Gopalan's case*,[30] about the meaning of words 'personal liberty' in ART. 21, although the majority of them agreed that ART. 19 was not applicable to deprivation of personal liberty which was provided for by ARTS. 21 and 22. At least three different meanings of "personal liberty" emerge from their Lordships' judgments :

1. 'Personal liberty' includes not only freedom from *bodily* restraint but also all rights of the human personality. [*Per* Kania, C. J. and Das, J. Patanjali Sastri, J.'s concurrence with this view is clear from his judgment in *Ram Singh's case.*[31] But in *Gopalan's case*,[32] Patanjali Sastri, J., was content merely to show that 'personal liberty' in ART. 21 did not include the freedoms mentioned in ART. 19.]
2. 'Personal liberty' means freedom of locomotion. (Fazl Ali, J.)
3. 'Personal liberty' means liberty of the *person* or body, i. e., freedom from imprisonment and *physical* coercion. (Mukherjea, J.).

The exact meaning to be attached to the words 'personal liberty' in this article has a bearing upon the question as to whether various rights which are incidents of personal liberty, and which, in the words of Das, J., will be included in the phrase '*jus personarum*' are, independently and apart from the freedom from incarceration, guaranteed by ART. 21. If the wide view of the meaning of the words 'personal liberty' is accepted, then the question will arise if ART. 21 has the effect of making every one of these rights, such as the right to drink, smoke, play, work, etc., an independent Fundamental Right. But if the view of Mukherjea, J., is taken, and the words 'personal liberty' are given the narrow construction which Dicey places upon them, namely, of freedom from incarceration and physical coercion, then this article would only have the effect of making freedom from *physical* imprisonment and coercion and the right to life, Fundamental Rights. The other rights will only be *ordinary* legal rights.

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[29] 1950 S C 27 (Prs 169, 170) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[30] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[31] 1951 S C 270 (Pr 5) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.*

[32] 1950 S C 27 (Pr 105) [AIR V 37 C 6] : 51 Cri L Jour 1383 : 1950 S C R 88 (SC), *Gopalan* v. *State of Madras.*

It is true that in the view which the Supreme Court in *Gopalan's case*[33] has taken about the meaning of the words 'procedure established by law,' the question whether Art. 21 makes a certain right a Fundamental Right or only leaves it as an ordinary legal right becomes largely only a matter of theoretical or academic interest, because even freedom from incarceration and the right to life, which are undoubtedly Fundamental Rights under the Constitution, have practically only the status of ordinary legal rights and do not have that supreme characteristic of a Fundamental Right which, as pointed out by Patanjali Sastri, J., consists in *paramountcy* to State-made laws. As pointed out by Patanjali Sastri, J., even ordinary legal rights cannot be interfered with by the *Executive* with impunity but can only be affected by *laws.*[34] But in spite of this, it cannot be denied that if a right is held to be covered by this article, it will enjoy a greater degree of protection than otherwise. (See Note 8.)

6. This article and Art. 22. — This article applies also to *preventive detention.*[1]

In *Gopalan* v. *State of Madras*,[2] Kania, C. J., observed as follows:

> "It is obvious that Art. 22 (1) and (2), prescribe limitations on the right given by Art. 21. If the procedure mentioned in those articles is followed the arrest and detention contemplated by Art. 22 (1) and (2), although they infringe the personal liberty of the individual, will be legal because that becomes the established legal procedure in respect of arrest and detention."

It is submitted with respect that both Art. 21 and Art. 22 place restriction on the *power of the State* and not on the liberty of a person. As pointed out by Mukherjea, J., in the same case,[3] there is a significant difference in the wording of Arts. 19, 20, 21 and 22. Under Art. 19 certain freedoms are declared and certain restrictions on those freedoms are permitted. But under Arts. 20, 21 and 22 the restriction is not on the freedom or the liberty of the person but on the power of the State to take away the liberty.[4] Thus, there is a difference between the point of view in ART. 19 and that in ARTS. 20, 21 and 22. Hence, before the arrest and detention of a person can be regarded as permitted by the Constitution it must be clearly established that the State has not exceeded its power in any manner and this will not be possible unless every one of the requirements of the procedure established by law is satisfied and not merely one or some of them. [See also NOTE 2.]

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[33] 1950 S C 27 (Pr 77) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[34] 1950 S C 27 (Pr 115) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

Article 21 — Note 6

[1] 1950 S C 27 (40, 75) (Prs 22, 118) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (The argument was that Art. 22 provides a complete Code as regards preventive detention and that Art. 21 does not apply to such detention — Argument rejected.)

[2] 1950 S C 27 (Pr 21) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[3] 1950 S C 27 (Pr 93) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

7. "Personal liberty" — Meaning of. — This topic has been discussed in NOTE 5 in connection with the relative scopes of this article and ART. 19.

(a) Phrase means positive State-made law

8. "Procedure established by law."—Under this article no one shall be deprived of his life or personal liberty except according to procedure established by law. This article, as observed by Patanjali Sastri, J., in *Gopalan* v. *State of Madras*,[1] is an example of the fusion of substantive and procedural law. It contains a negative as well as a positive aspect. The form of the article is negative, namely, that no one shall be deprived . . . . . etc. But the necessary implication arising out of this negative form is that a person can be deprived of his life or personal liberty according to procedure established by law.

In *Gopalan's case*[2] it was contended that this article only deals with *procedure* and does not contain any *substantive* provision relating to a Fundamental Right. This contention was repelled by the Supreme Court. It was held that the article enacts the substantive fundamental law as regards the right to live and the right to personal liberty. The provision that no one can be deprived of these rights except according to procedure established by law, itself clearly amounts to a substantive provision of law and the mere fact that it states that a certain procedure must be followed if the right to life or personal liberty is to be affected does not render the article a merely procedural enactment.[3]

The meaning of the expression 'procedure established by law' was very vigorously canvassed before the Supreme Court in *Gopalan* v. *State of Madras*;[4] but the Supreme Court held by majority that the expression connoted an enacted law and not law in the abstract or the principles of natural justice. The contention before the Supreme Court was that the expression 'procedure established by law' corresponded to the phrase 'due process of law' in the Fifth and the Fourteenth Amendments of the Federal Constitution of the United States of America and must be understood in the same wide and flexible sense as comprising broadly the fundamental principles of natural justice. After a thorough discussion of the question Kania, C. J., Patanjali Sastri, Mukherjea and Das, JJ., who formed the majority of the Court, turned down the contention and held that the expression 'procedure established by law' in this article was not to be given the wide and rather fluid meaning of the expression 'due process of law' under the Federal Constitution of the United States of America, but meant only State-made law of statutory origin. In doing so their Lordships pointed out that the Constituent Assembly had deliberately rejected the expression 'due process of law' and preferred to adopt the expression 'procedure established by law' which was borrowed from ART. 31 of the Japanese Constitution of 1946. Fazl Ali, J., however, took the opposite view and held that the expression 'procedure established by law' was only intended to convey what was meant by the phrase 'due process of law' under the American Constitution.

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[4] *See also* 1950 S C 27 (Pr 227) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *Das, J.* — Art. 21 throws an obligation on the State to follow a procedure before depriving a man of his life and personal liberty.)]

Article 21 — Note 8

[1] 1950 S C 27 (Pr 106) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC).

[2] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[3] 1950 S C 27 (Prs 12, 106, 172) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[4] 1950 S C 27 (Prs 18, 109, 196, 228) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

The view of the majority of the Judges in the Supreme Court may be best put in the words of Patanjali Sastri, J. (as he then was), who observed as follows :

> "Giving full effect to these principles,[5] however, I am unable to agree that the term 'law' in ART. 21 means the immutable and universal principles of natural justice. 'Procedure established by law' must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as 'the immutable and universal principles of natural justice.' In my opinion 'law' in ART. 21 means positive or State-made law.[6]"

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[5] His Lordship refers in the previous paragraph (Para 108) to the fact that the people of India have adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality.

[6] 1950 S C 27 (Pr 109) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[*See also* 1952 Nag 118 (Pr 19) [AIR V 39 C 45 (10)]: ILR (1952) Nag 14 : 1952 Cri L Jour 646 (DB), *Jagjiwanrao* v. *The State.* ("Law" in the expression "procedure established by law" in Art. 21 of the Constitution means State-made or enacted law and not the general principles of natural justice. "Procedure established by law" thus means procedure prescribed by the Legislature.)]

[But see 1951 Mad 1015 (Pr 19) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.* (Per *Govinda Menon, J.* — The expression "according to procedure established by law" means a procedure fixed in accordance with legislative enactment passed by the Parliament or the State Legislature which does not offend, or is revolting to, notions and ideas of dignity of the human being and is neither indecent, unconscionable or repugnant to civilized beliefs. This was a decision before the decision of the Supreme Court in A I R 1950 S C 27 and must be regarded as overruled.)

1951 Orissa 86 (Pr 15) [AIR V 38 C 28] (DB), *Ismail* v. *State of Orissa.* (Per *Ray, C. J.* — The provisions of Orissa Maintenance of Public Order Act (10 of 1950) are void as being inconsistent with Art. 21 of the Constitution as they do not provide for the essentials of a legal procedure. *Note* — This case related to

Thus 'law' in ART. 21 means not *jus*, i.e., law in the abstract in the sense of the principles of natural justice as mentioned in the standard works of jurisprudence, but *lex*, i.e., enacted law.[7] The mere fact that the word 'law' occurs both in the expression 'due process of law' under the American Constitution and in the expression 'procedure established by law' in this article does not make the same meaning applicable to both the expressions and does not require that the meaning of the word 'law' under the decisions on the American Constitution must be imported into the interpretation of this article.[8]

As pointed out by Kania, C. J., in *Gopalan's case*,[9] the word 'established' itself suggests an *agency* which fixes the limits, and as pointed out by Mukherjea, J., in the same case, if the word 'established' (which, according to the ordinary meaning of that word given in the dictionary, means fixed or laid down) is to be understood as referring not to any particular piece of law but the indefinite and indefinable principles of natural justice which underlie positive systems of law, it would not at all be appropriate to use the expression 'established'.[10]

In *Tinsa Maw Naing* v. *Commissioner of Police, Rangoon*[11] the meaning of the words 'save in accordance with law' in S. 16 of the Constitution of the Union of Burma came to be considered by the Supreme Court of Burma. Section 16 of the Constitution of the Union of Burma corresponds to ART. 21 of the Constitution of India and provides that no citizen shall be deprived of his personal liberty save in accordance with law. The learned Judges of the Supreme Court of Burma also came to the conclusion that 'law' in S. 16 of the Constitution of the Union of Burma only meant an enactment by Parliament or other competent legislative body. According to their Lordships S. 16 of the Constitution of the Union of Burma could be paraphrased as follows: No citizen shall be deprived of his personal liberty except in such circumstances and under such conditions as Parliament or other competent Legislature by an enactment made in due form specifies, provided that in so specifying the circumstances and conditions Parliament or other Legislature has not acted beyond the limitations which the Constitution has set. The Judges of the Supreme Court, in arriving at their decision as above, pointed out that the term 'law' had been used in Burma before the framing of the Constitution only

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internment and not to preventive or punitive detention—Hence, the reference to Art. 21 is inexplicable, in the light of the decision in *Gopalan's case* in A I R 1950 S C 27. Further, the observations of Ray C. J. are against the meaning of the words "procedure established by law" in Art. 21; the Supreme Court decision is not referred to by Ray, C. J.)

[7] 1950 S C 27 (Pr 13) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[8] 1950 S C 27 (Pr 16) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[9] 1950 S C 27 (39) (Pr 18a) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[10] 1950 S C 27 (Prs 18, 192) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[11] ('50) 1950 Bur L R (S C) 17 (24, 25, 26).

in the sense of enacted law and that the term 'law' had been used in S. 16 of the Constitution of the Union of Burma by people who had lived and who had been trained under a system of law in which customary laws, the Common Law of England and the principles of justice, equity and good conscience were not applied by their inherent force but were made applicable by an enactment as was clear from the provisions of S. 13 of the Burma Laws Act, 1898.

But Patanjali Sastri, J. (as he then was), in *Gopalan's case*,[12] although he agreed with the view that the expression 'procedure established by law' was not to be taken in the fluid sense of the words 'due process of law' as referring to the fundamental principles of natural justice, was not prepared to accept that any and every piece of legislation could be covered by the expression 'procedure established by law.' He felt that the word 'established' was significant and was not simply used as synonymous with 'prescribed.' According to him the word 'established' implies some degree of firmness, permanence and general acceptance, while it does not exclude origination by statute. He, therefore, suggested that the 'procedure' under ART. 21 must be one established by a general law of procedure and must not be a mere change in the law made *ad hoc* for any special purpose or occasion.[13] His Lordship observed :

> "'Procedure established by law' may well be taken to mean what the Privy Council referred to in *Emperor* v. *Benoari Lal*[14] as the ordinary and well-established criminal procedure ; that is to say, those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code which is the general law of criminal procedure in the country."

His Lordship concluded as follows on this part of the subject :

> "The only alternative to the construction I have indicated above, if a constitutional transgression is to be avoided, would be to interpret the reference to 'law' as implying a constitutional amendment *pro tanto*, for, it is only a law enacted by the procedure provided for such amendment (ART. 368) that could modify or override a Fundamental Right without contravening ART. 13 (2)."

It is necessary in this connection to explain what is the 'constitutional transgression' meant by Patanjali Sastri, J., in the words last quoted. His Lordship felt that if 'procedure established by law' meant procedure established by any and every piece of law that the Legislature might choose to make, the result would be that the protection conferred by the article would not deserve the name of a Fundamental Right inasmuch as, as his Lordship pointed out, the essential characteristic of a Fundamental Right is its paramountcy to State-made laws.

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[12] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[13] 1950 S C 27 (Pr 115) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

✓[14] 1945 P C 48 (52) [AIR V 32] : 1945 F C R 161 (175) : I L R (1945) Kar (PC 97 : 72 Ind App 57 : 46 Cri L Jour 589 (PC).

Hence his Lordship felt that inasmuch as ART. 21 was indisputably an article conferring a Fundamental Right, 'it would be against all principle to construe that article as only conferring a right as against the Executive and not possessing that quality of paramountcy to State-made laws which is the essential feature of a Fundamental Right. But the other Judges of the Supreme Court did not feel it necessary to limit the connotation of the word 'law' in any such manner.

Hence, it may now be taken as the settled position that the expression 'procedure established by law' refers to the procedure prescribed by *any* law of the Legislature which is duly made.[15] The expression is not confined to the procedure contained in any particular statute such as the Civil or Criminal Procedure Codes.[16] Moreover, it is open to the Parliament or other legislative body to alter the prescribed procedure and such altered procedure also will be procedure established by law within the meaning of this article.[17]

(b) "Due Process of Law"—Meaning of, under American Constitution

It has been seen above that the Supreme Court has rejected the contention that the expression 'procedure established by law' in this article must be given the same meaning as the words 'due process of law' in the Fifth and the Fourteenth Amendments of the American Constitution. But it will not be out of place to refer briefly to the meaning of the expression under the American Constitution and one or two features of the concept involved in that expression.

Kania, C. J., in *Gopalan's case*[18] pointed out four marked points of distinction between the 'due process' clause in the American Constitution and this article. He observed :

> "Four marked points of distinction between the clause in the American Constitution and ART. 21 of the Constitution of India may

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[15] 1952 Punj 309 (334) (Pr 151) [AIR V 39] : ILR (1952) Punj 331 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*
1953 Cal 522 (524) (Pr 7) [AIR V 40 C 198] : 1953 Cri L Jour 1187 (DB), *Raj Bahadur* v. *Legal Remembrancer.*
1953 Hyd 145 (149) (Pr 14) [AIR V 40 C 64] : ILR (1951) Hyd 895 : 1953 Cri L Jour 785, *Abdul Munim Khan* v. *State of Hyderabad.*
[*See also* (1924) 2 Ir R 104, *The King* v. *The Military Governor of the Hair Park Camp.* (Article 6 of the Irish Constitution providing that "liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law" — "In accordance with law" was interpreted to mean not rules of natural justice but as the law in force at the time.)]

[16] 1951 Mys 72 (Pr 38) [AIR V 38 C 33] : ILR (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (The expression is employed in a general sense to mean the steps to be taken in an orderly trial. There is neither vested right to any particular form of trial or procedure, nor to a right of appeal; they being the creation of the statute should be governed by the statute with which a particular offender is tried. The expression "procedure established by law" means the law of the land having statutory origin.)

[17] 1951 S C 301 (Pr 27) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC), *S. Krishnan* v. *State of Madras.* (Thus where the detention of the petitioners is by virtue of S. 12 of the Preventive Detention (Amendment) Act, a new detention under the amended Act, the procedure prescribed by the amended Act is the procedure established by law within the meaning of Art. 21.)

[18] 1950 S C 27 (Pr 15) [AIR V 37 C 6] ; 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

> be noticed at this stage. (1) The first is that in the U. S. A. Constitution the word 'liberty' is used *simpliciter* while in India it is restricted to personal liberty. (2) In the U. S. A. Constitution the same protection is given to property while in India the Fundamental Right in respect of property is contained in ART. 31. (3) The word 'due' is omitted altogether and the expression 'due process of law' is not used deliberately. (4) The word 'established' is used and is limited to 'procedure' in our ART. 21."

The history of the 'due process' clause in the American Constitution is also given in the judgments of some of the Judges of the Supreme Court in *Gopalan's case.*[19] Patanjali Sastri, J., observed as follows in the course of his judgment[20]:

> "No doubt, the American Judges have adopted the other connotation in their interpretation of the due process clause in the Fifth and Fourteenth Amendments of the American Constitution ("Nor shall any person be deprived of life, liberty or property without due process of law"). But that clause has an evolutionary history behind it. The phrase has been traced back to 28 Edw. III, Chap. 3 and Coke in his INSTITUTES identified the term with the expression 'the law of the land' in the Great Charter of John. Even in England where the legislative omnipotence of Parliament is now firmly established, Coke understood these terms as implying an inherent limitation on all legislation, and ruled in *Dr. Bonham's case,*[21] that 'the common law will control Acts of Parliament and sometimes adjudge them to be utterly void when they are against common right and reason.' Though this doctrine was later discarded in England as being 'a warning rather than an authority to be followed' (*Per* Willes, J., in *Lee* v. *The Bude and Torrington Junction Ry. Co.*[22]), it gained ground in America, at first as a weapon in the hands of the Revolutionists with which to resist the laws of Parliament and later as an instrument in the hands of the Judges for establishing the supremacy of the judiciary (see *Calder* v. *Bull*[23]). In the latter half of the 19th century, this doctrine of a transcendental common law or natural justice was absorbed in the connotation of the phrase "due process of law" occurring in the Fifth and Fourteenth Amendments. By laying emphasis on the word 'due', interpreting 'law' as the fundamental principles of natural justice and giving the words 'liberty' and 'property' their widest meaning, the Judges have made the due process clause into a general restriction on all legislative power. And when that power was threatened with prostration by the excesses of due process, the equally vague and

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19. 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

20. 1950 S C 27 (Prs 109, 110) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

21. (1610) 8 Co Rep 113b (118a) : 77 E R 646.

22. (1871) L R 6 C P 576 (582) : 19 W R (Eng) 954.

23. (1798) 3 Dall 386 : 1 Law Ed 648.

expansive doctrine of 'Police Powers', i.e., the power of Government to regulate private rights in public interest, was evolved to counteract such excesses. All this has been criticised as introducing great uncertainty in the state of the law in that country, for no one could be sure how due process of law would affect a particular enactment. A century after the phrase had been the subject of judicial interpretation, one learned Judge observed in 1877 that it was incapable of precise definition and that its intent and application could only be ascertained by "the gradual process of inclusion and exclusion"; *Davidson* v. *Admrs. of New Orleans*,[24] and, as recently as 1948, another Judge referred to the difficulty of 'giving definiteness to the vague contours of due process' and 'of spinning judgment upon State action out of that gossamer concept'; *Haley* v. *State of Ohio*.[25]"

Mukherjea, J., also traced the history of the expression 'due process of law' in his judgment[26]:

> "In the history of Anglo-American Law, the concept of 'due process of law' or what is considered to be its equivalent 'law of the land' traces its lineage far back into the beginning of the 13th century A. D. The famous 39th Chapter of the Magna Charta provides that
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> > 'no free man shall be taken or imprisoned or disseized or outlawed or exiled or in any way destroyed; nor shall we go upon him nor send upon him but by the lawful judgment of his Peers and by the *law of the land*.'
>
> Magna Charta as a charter of English liberty was confirmed by successive English monarchs and it is in one of these confirmations (28 Ed. III, Chap. 3) known as 'Statute of Westminster of the liberties of London', that the expression 'due process of law' for the first time appears. Neither of these phrases was explained or defined in any of the documents, but on the authority of Sir Edward Coke it may be said that both the expressions have the same meaning. In substance, they guaranteed that persons should not be imprisoned without proper indictment and trial by Peers, and that property should not be seized except in proceedings conducted in due form in which the owner or the person in possession should have an opportunity to show cause why seizure should not be made: *vide* Willoughby on THE CONSTITUTION OF THE UNITED STATES, Vol. III, p. 1087. These concepts came into America as part of the rights of Englishmen claimed by the colonists. The expression in one form or other appeared in some of the earlier state constitutions and the exact phrase 'due process of law' came to be a part of the Federal Constitution by the Fifth Amendment which was adopted in 1791 and which provided that 'no person shall ..... be deprived of life, liberty or property without due process of law.' It was

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[24] (1878) 96 U S 97 : 24 Law Ed 616.

[25] (1948) 332 U S 596 : 92 Law Ed 224.

[26] 1950 S C 27 (Prs 182, 183) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

imposed upon the State Constitution in almost identical language by the Fourteenth Amendment in the year 1868.

"What 'due process of law' exactly means is difficult to define even at the present day. The Constitution contains no description of what is 'due process of law', nor does it declare the principles by application of which it could be ascertained. In *Twining* v. *New Jersey*,[27] the Court observed:

> 'Few phrases in the law are so elusive of exact apprehension as this. This Court has always declined to give a comprehensive definition of it and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.'

It is clear, however, that the requirement of 'due process of law' in the United States' Constitution imposes a limitation upon all the powers of Government, legislative as well as executive and judicial. Applied in England only as protection against executive usurpation and royal tyranny, in America it became a bulwark against arbitrary legislation: *vide Hurtado* v. *People of California*.[28] As it is a restraint upon the legislative power and the object is to protect citizens against arbitrary and capricious legislation, it is not within the competence of the Congress to make any process a 'due process of law' by its mere will; for that would make the limitation quite nugatory. As laid down in the case cited above, 'it is not any act legislative in form that is law; law is something more than mere will exerted as an act of power.' It means and signifies the general law of the land, the settled and abiding principles which inhere in the Constitution and lie at the root of the entire legal system. To quote the words of Daniel Webster in a famous argument before the Supreme Court: *vide Dartmouth College case*.[29]

> 'By the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.' "

Reference may also be made to the judgment of Mr. Justice Miller of the Supreme Court of America in *Davidson* v. *Board of Admrs. of New Orleans*[30] in which he also traces the history of the meaning of the expression 'due process of law' in the American Constitution.

It will be seen that, as pointed out by the Judges of the Supreme Court in *Gopalan's case*,[31] the phrase 'due process of law' has not a definite connotation and expresses a very elastic conception. The best description of the expression would be to say that it means in each particular case such an exercise of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[32]

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[27] (1908) 211 U S 78 : 53 Law Ed 97.

[28] (1884) 110 U S 516 (532) : 28 Law Ed 232.

[29] (1819) 4 Wheaton 518 : 4 Law Ed 629, *The Trustees of Dartmouth College* v. *Woodward*.

[30] (1878) 24 Law Ed 616 (618) : 96 U S 97.

[31] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

Kania, C. J., also points out how the phrase 'due process of law' does not have a definite connotation under the American Constitution and according to the decisions of the Supreme Court of America how it has been given diverse meanings at different times and under different circumstances, so much so that the conclusion reached by Willis and Cooley in their books on Constitutional Law of America is that the expression means reasonable law according to the view of the majority of the Judges of the Supreme Court holding office at a particular time.[33]

In spite of the indefiniteness of the expression 'due process of law' in the American Constitution, Prof. Willis in his CONSTITUTIONAL LAW OF THE UNITED STATES (1936) points out at p. 662 that 'due process,' as a matter of *procedure* requires certain inherent elements of justice in the determination of questions rather than that any certain form be used in arriving at the decision. He points out that as recognition of this, were developed as the modern essentials of due process (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) an orderly course of procedure. Prof. Willis then proceeds to discuss these requirements.

Fazl Ali, J., in his judgment[34] sets out certain quotations from some of the decisions of the American Supreme Court construing the word 'law' as used in the expression 'due process of law' in so far as it bears on the question of legal procedure. We are giving below the quotations:

> "(1) Although the Legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient land-marks, or take away certain Fundamental Rights which have been always recognized and observed in judicial procedures: *Bardwell* v. *Anderson.*[35]
>
> "(2) By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society: *Dartmouth College case.*[36]

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[32] 1950 S C 27 (Pr 185) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *Mukerjea J.*—Citing Cooley's Constitutional Limitations, Vol. II, p. 741.)

[33] 1950 S C 27 (Pr 16) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[34] 1950 S C 27 (Pr 71) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[35] (1890) 44 Minn 97 : 9 L R A 152. (Cited in AIR 1950 S C 27 (58).)

[36] (1819) 4 Wheaton 518 : 4 Law Ed 629, *The Trustees of Dartmouth College* v. *Woodward.*

> "(3) Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the Government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the Government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and enforce justice, Courts possess the right to inflict the very wrongs which they were created to prevent: *Hovey* v. *Elliott*.[37]
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> "(4) It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his say in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered: *Galpin* v. *Page*."[38]

Patanjali Sastri, J.,[39] sets out certain basic requirements which, it was contended, were implied in the phrase 'due process of law' and these were: (1) an objective and ascertainable standard of conduct to which it is possible to conform, (2) notice to the party of the accusation against him, (3) a reasonable opportunity for him to establish his innocence, and (4) an impartial tribunal capable of giving an unbiased judgment.

Numerous are the decisions of the Supreme Court of America bearing on the meaning of the words "due process of law."[40] But in view of the decision of the Supreme Court of India in *Gopalan's case*[41] these decisions have no more than an academical interest in the context of ART. 21 and so they are not being noticed in detail here. The general nature of the evolution of the due process clause and its interpretation under the American Constitution is made sufficiently clear by the judgments in *Gopalan's case*[42] from which we have set out certain important passages above.

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[37] (1897) 167 U S 409 (417): 42 Law Ed 215.

[38] (1873) 18 Wall 350 : 21 Law Ed 959.

[39] 1950 S C 27 (Pr 107) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[40] (1949) 337 U S 773 : 93 Law Ed 1686, *Gibbs* v. *Burke*.
(1948) 332 U S 596 : 92 Law Ed 224, *Haley* v. *Ohio*.
(1936) 297 U S 278 : 80 Law Ed 682, *Brown* v. *Mississippi*.
(1937) 302 U S 300 : 82 Law Ed 276, *Natural Gas Pipeline Co.* v. *Slattery*.
(1932) 287 U S 45 : 77 Law Ed 158, *Powell* v. *Alabama*.
(1927) 273 U S 510 : 71 Law Ed 749, *Tumey* v. *Ohio*.
(1923) 261 U S 86 : 67 Law Ed 543, *Moore* v. *Dempsey*.
(1908) 211 U S 78 : 53 Law Ed 97, *Twining* v. *New Jersey*.
(1908) 209 U S 123 : 52 Law Ed 714, *Ex parte Young*.
(1900) 176 U S 581 : 44 Law Ed 597, *Maxwell* v. *Dow*.
(1897) 167 U S 409 : 42 Law Ed 215, *Hovey* v. *Elliot*.
(1884) 110 U S 516 . 28 Law Ed 232, *Hurtado* v. *People of California*.

(c) "Procedure" meaning of

The above discussion more or less is devoted to the meaning of 'law' in the phrase 'procedure established by law'. The next question is about the significance of the word '*procedure*'. It has already been seen at the beginning of this note that the use of this word does not make this article a merely procedural provision.

In *Gopalan* v. *State of Madras*,[43] Justice Patanjali Sastri observed: "'Process' or 'procedure' in this context connotes both the act and the manner of proceeding to take away a man's life or personal liberty." It was observed by Mukherjea, J., in the same judgment[44] that the expression 'procedure' means the manner and form of enforcing the law. Das, J.,[45] observed that the word 'procedure' in ART. 21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. Undoubtedly, the word 'procedure', when construed as covering also the act of taking away a person's life or personal liberty, seems to be subject to a rather strange construction and the meaning attributed to that word by Mukherjea and Das JJ. seems to be more natural. But it is feared that in the context in which that word occurs in ART. 21, the meaning given by Patanjali Sastri, J., is to be preferred as otherwise we are left in the position that the article will not cover a substantive law like the Penal Code and will practically lead to a stalemate by providing only for the validity of procedural enactments and leaving out of account enactments of substantive law with reference to which alone procedural enactments can have any operation. This is a further reason for holding that the article is not a mere procedural provision but is also a substantive provision.

(d) Can the right under Art. 21 be called a Fundamental Right ?

The effect of holding that the word 'law' in this article means only enacted law and that ART. 19 does not apply to the subject of the deprivation of life or personal liberty (see NOTE 5) is that the reasonableness or otherwise of statutory provisions under which the lives and liberties of persons can be taken away are not subject to judicial review as in the case of legal provisions imposing restrictions on the exercise of the Fundamental Rights under Art. 19.[46] No doubt this is an anomalous result. While, for instance, in the case of a right to move freely from one part of the country to another, which is, as pointed out by Kania, C. J.,[47] a comparatively minor right the Constitution enacts that any legislative interference with the right must be reasonable and must be capable of being scrutinised by the Courts, in the case of the most Fundamental Right of living and that of personal liberty, the Constitution leaves the whole matter to the tender mercies of the Legislature and the Courts of the land are not given any power to examine the reasonableness or the justice of the provisions of law under which human liberties and human lives may be placed in jeopardy at the will of the Legislature. Nevertheless, there is no doubt as to the position that the final word to determine the law on the subject of the right to life and personal liberty is given to the Legislature.[48] Such a result may not be logical in the context of a Constitution which is given a place superior to laws. To adapt the words of Kania, C. J.,[49] one may like that a right conferred by Art. 21 must cover a larger area than is actually the case but to give such a right is not the function of the Court; it is the function of the Constitution. Whether it is logical or not in the context of the Constitution, the meaning of Art. 21 in the light of the Supreme Court decision is clear. (See also Note 5.)

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[41] 1950 S C 27 [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[42] 1950 S C 27 [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[43] 1950 S C 27 (Pr 106) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[44] 1950 S C 27 (Pr 180) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[45] 1950 S C 27 (Pr 228) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

Undoubtedly, there is the possibility of the abuse of legislative power. But as pointed out by the Supreme Court of America,[50] the possibility of abuse of legislative power does not disprove its existence.

It has already been mentioned that Patanjali Sastri, J., felt it to be a constitutional transgression to construe Art. 21 in such a way that the right conferred by it would not be paramount to State-made laws but would only be a protection against executive tyranny. But although the other learned Judges equally felt it an embarrassing situation to have to decide that Art. 21 conferred a Fundamental Right and at the same time that that Fundamental Right was not immune from *legislative* interference but could only be set up against executive misgovernment, yet they felt themselves helpless in the face of what they held to be the clear provision of the article and came to the conclusion that the article conferred nothing more than protection against executive authority and not against legislative authority.

Mukherjea, J.,[51] considered also the aspect whether a right of such a type could at all be worthy of the name of a Fundamental Right. Apart from the fact that the Constitution unequivocally treated it as a Fundamental Right whatever its limitations, Mukherjea, J., considered that even a protection solemnly declared by the Constitution against executive action could be considered a Fundamental Right. Mukherjea, J., admitted the force of the argument that a right which can be taken away at the sweet will and pleasure of the Legislature did not deserve to be called a Fundamental Right. He said : "To quote the words of an American Judge, it would sound very much like the Constitution speaking to the Legislature that the latter could not infringe the right created by these articles unless it chose to do so : *vide* per Bronson, J., in *Taylor* v. *Porte.*[52]" But he pointed out that the Court was not concerned with the policy of the Constitution. He proceeded to observe as follows :

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[46] 1950 S C 27 (Prs 113, 114, 116) [A I R V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[47] 1950 S C 27 (Pr 12) [A I R V 37 C 6] : 1950 SCR 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[48] 1950 S C 27 (Pr 19) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[49] 1950 S C 27 (Pr 18) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[50] (1888) 127 U S 678 (686) : 32 Law Ed 253, *Powell* v. *Pennsylvania.*

[51] 1950 S C 27 (Prs 194, 196) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

> "The Fundamental Rights not merely impose limitations upon the Legislature, but they serve as checks on the exercise of executive powers as well, and in the matter of depriving a man of his personal liberty, checks on the high-handedness of the executive in the shape of preventing them from taking any step which is not in accordance with law, could certainly rank as Fundamental Rights. In the Constitutions of various other countries the provisions relating to protection of personal liberty are couched very much in the same language as in ART. 21. It is all a question of policy as to whether the Legislature or the judiciary would have the final say in such matters and the Constitution-makers of India deliberately decided to place these powers in the hands of the Legislature."

His Lordship went on to point out that ART. 21 is modelled on ART. 31 of the Japanese Constitution of 1946 which is worded in the same fashion. It will be seen that Mukherjea, J's. approach on this aspect of the subject is different from that of Patanjali Sastri, J., which has already been referred to above.

Although no doubt the power of the Legislature overrides and controls the right conferred by this article and to that extent cannot but be felt as an infirmity in the provision, as was undoubtedly felt by the Judges in the Supreme Court case, yet it must also be remembered that the position in point of law in England is not different and there, in spite of the supremacy of Parliament, the Parliament has not been known to legislate against well-recognised principles of natural justice accepted as such in all civilised countries.[53] It may be hoped that the Indian Parliament and State Legislatures of India will emulate the example of the British Parliament in this matter. Further, as pointed out by Patanjali Sastri, J. in *Gopalan's case*,[54] in a free democratic republic like that of India, drastic changes in the normal law of procedure to the detriment of the rights of the people, though theoretically possible, would be difficult to bring about, and that practical difficulty will be the measure of the protection afforded by ART. 21.

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[52] 4 Hill 140. (Cited in AIR 1950 S C 27 (102).)

[53] 1950 S C 27 (Pr 30) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *Kania C. J.*)

[54] 1950 S C 27 (Pr 116) [A I R V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

(e) Right to personal liberty apart from Constitution

The meaning and effect of the phrase 'except according to procedure established by law' in this article have been explained above and it has been shown that the article only affords protection against executive' authority. In this connection it has to be stated that independently of any Fundamental Rights provided by any written constitution, it is an established principle of law that the Executive cannot take away the life and the liberty of a person on its own responsibility unless it has the support of some legal provision for doing so and is acting within the bounds of the law.[55] It is well-known that under the Code of Criminal Procedure, S. 491, the High Court has power to order that a person illegally or improperly detained in public or private custody within the limits of the jurisdiction of the Court be set at liberty. So, independently of any provision in any written constitution, before the Executive can take away the life or liberty of a man, it has to show that it is acting within the limits of the law.

Dicey in his INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (9th Edn., page 188), gives as the first conception involved in the supremacy of the Rule of Law, which is characteristic of the British system of jurisprudence, the following : "That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land." The above shows that the Executive as such has no power to curtail the right of personal liberty of any man or take away his life and that the matter is solely one of a person being punished after trial in due course of law by the Courts of the land. But in emergencies like war the Executive in England as well as in India before the advent of the Constitution has enjoyed the power of detaining persons without adopting a normal procedure of trial for offence by them. But never has it been doubted that the Executive must act within the limits of the *law* and Courts are always free to see whether the action of the Executive is protected by law although the coverage afforded by such protection of the law for executive action may be very wide indeed. In *Eshugbayi* v. *Government of Nigeria*,[56] Lord Atkin observed as follows :

> "The Governor, acting under the Deportation Ordinance, acts solely under executive powers, and in no sense as a Court. As the Executive he can only act in pursuance of the powers given to him by law. In accordance with British Jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of

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55. 1931 P C 248 (252) [AIR V 18] (PC), *Eshugbayi* v. *Govt. of Nigeria.*
56. 1931 P C 248 (252) [AIR V 18].

British Justice that Judges should not shrink from deciding such issues in the face of the Executive."

In *Sitao Jholia* v. *Emperor*,[57] Niyogi, J., of the Nagpur High Court emphatically asked the question, "can it be reasonably said that because there is no express provision anywhere in that Act (Government of India Act, 1935) affecting the personal liberty of the subject that it can be invaded otherwise than by the authority of law?" He observed as follows in the same judgment:

> "The rights of personal freedom, protection of one's life and limb and of one's good name are as well recognised (though nowhere defined) in India as in England. The right of self-defence for instance afforded by the Indian Penal Code enables one to repel unlawful force by force. That is primarily a natural right. On the same principle a person who is threatened with legal proceedings which are calculated to affect his person or property has an absolute right to be heard in his defence. It is a right which is implied by natural justice. See the *King* v. *Nilson*.[58] It is a powerful principle of justice in all judicial proceedings: *Wood* v. *Woad*."[59]

In *Rex* v. *Secretary of State for Home Affairs*,[60] Scrutton, L. J., observed as follows: "A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction."

Similar observations were made by Justice Davis delivering the opinion of the Supreme Court of America in *Ex parte Milligan*[61] in which he said:

> "It is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamour of an excited people."

The above principle, namely, that the State must act within the limits of the law in any proceeding affecting the life or liberty of a person is also inculcated and illustrated by other decisions among which may be mentioned *Emperor* v. *Vimlabai Deshpande*.[62] See

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57. 1943 Nag 36 (42) [AIR V 30] : 44 Cri L Jour 237 (DB).

58. (1835) 111 E R 624 (627) : 3 Ad & E 817.

59. (1874) L R 9 Ex 190 (196, 197) : 22 W R (Eng) 709.

60. (1923) 2 K B 361 (382) : 92 L J K B 797. (Quoted by Kania C. J. in A I R 1950 S C 27 (Para 20.))

61. (1866) 18 Law Ed 281 (295) : 4 Wall 2.

62. 1946 P C 123 (127) [AIR V 33 C 39] : 73 Ind App 144 : ILR (1946) Nag 651: 47 Cri L Jour 831 (PC). (Arrest under Defence of India Rules.)

also the undermentioned case.[63]

(f) Has Art. 21 marked an advance?

Thus, in effect, this article has only guaranteed a principle which was already well established and does not indicate any advance over the previous position so far as the right of a person to his life or liberty is concerned.[64] It may, however, be conceded that it has crystallised and given a permanent place as a fundamental principle of the Constitution, to a principle which was previously only part of the common law.[65] The fact that the principle, albeit a well-established one under the common law, finds a place as a solemn declaration as a Fundamental Right in the Constitution may be at least a theoretical gain. It may also be noted, as pointed out by Mukherjea, J., in the passage quoted from his judgment in *Gopalan's case*,[66] that the article is couched in the usual form in which the provisions relating to protection of personal liberty are couched in the written constitutions of various countries. Further, Art. 22 contains various constitutional guarantees for the protection of arrested persons and also persons sought to be incarcerated under preventive detention law. These provisions of Art. 22 cannot be contravened by any legislation. So it cannot be said that the personal liberty or the lives of people under the Constitution are absolutely at the mercy of the Legislature and that the Constitution does not contain any provision for their protection against the Legislature.

(g) Power of Court under article

The next question is as to the powers of the Courts under the article *vis-a-vis* any legislative provision affecting the right of a person to life or personal liberty. As already stated, unlike under Art. 19, under this article the reasonableness or otherwise of such provisions is not open to examination by Courts.

The Courts' powers under this article will include the following:

(1) to see if the deprivation of life or personal liberty of a person is under any law;

(2) to see what is the procedure which the law prescribes in the matter;

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[63] 1948 All 225 (Pr 12) [AIR V 35 C 95] : I L R (1948) All 233 : 49 Cri L Jour 257, *Jamil Ahmad* v. *Emperor*. (Under S. 5, U. P. Maintenance of Public Order (Temporary) Act, it is the duty of the officer concerned to inform the person detained of his right to make representation against the order and to afford him the earliest practicable opportunity of doing so. Failure to do this is violation of the mandatory provision of the law and the person detained is prejudiced thereby. (In this case he was ordered to be released.))

[64] 1952 S C 106 (108) (Pr 9) [A I R V 39 C 20] : 1952 S C R 395 : 1952 Cri L Jour 656 (S C), *Naranjan Singh* v. *State of Punjab (I)*.
1950 S C 27 (Pr 20) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*. (Per *Kania, C. J.* — It is only the priniciples of *Eshugbayi Eleko* v. *Govt. of Nigeria*, A I R 1931 P C 248 and *King* v. *Secy. of State for Home Affairs*, (1923) 2 K B 361 (382) : 92 L J K B 797, that seem to be guaranteed by the Constitution of India.)

[65] 1951 Mad 1015 (Pr 10) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras*.

[66] 1950 S C 27 [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras*.

(3) to see whether all the essential requirements of the procedure are satisfied; and

(4) to see whether the law is a valid law.

Thus, the Court has to see under the authority of which law action is being taken[67] and whether all the requirements of the law have been complied with. The Court has also to see whether the law is a valid one.[68] The law must have been passed by a competent Legislature[69] and must not be repugnant to the Fundamental Rights in the Constitution.[70] Thus, the law must not be opposed to the equal protection clause in ART. 14.[71] (See ART. 14, NOTE 25.) Similarly, the law must not be opposed to ART. 22.[72] (As to applicability of ART. 19 to laws for deprivation of personal liberty, see NOTE 5.)

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67. 1950 S C 27 (Prs 106, 180) (A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

68. 1951 Raj 127 (Pr 11) [A I R V 38 C 56] : 52 Cri L Jour 1021 (DB), *Birma* v. *State.* (The extradition treaty between the former Dholpur State and the British Government not having been incorporated into the law of that State by Legislative enactment cannot be regarded as a part of the municipal law of the Dholpur State and the detention of a person under the provisions of such treaty cannot be said to be according to procedure established by law within the meaning of Art. 21, Constitution of India, and as such is invalid—The practice of surrendering fugitive criminals in accordance with the treaty followed by the former Dholpur State till the time of its merger cannot be deemed to be a law that can be continued under Art. 372 of the Constitution of India.)

(1888) 127 U S 678 (686): 32 Law Ed 253, *Powell* v. *Pennsylvania.* (The judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution.)

[*See* 1951 Hyd 97 (Pr 33) [A I R V 38 C 45] : 52 Cri L Jour 1123 (DB), *Mohd. Kasim Razvi* v. *State of Hyderabad.* (Where a trial held by a special Tribunal under the Hyderabad Special Tribunals Regulation was defective but the defect was cured by the Validating Regulation passed by the military Governor on 6-10-1949, it was held that there could be no infringement of Art. 21 of the Constitution as the Validating Regulation was as much the law as the Regulation appointing the Tribunal.)

69. *See* 1950 F C 67 (Pr 8) [A I R V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC), *Rex* v. *Basudeva.* (Section 3 (1) (i) of the U. P. Prevention of Black-marketing (Temporary Powers) Act (22 of 1947) is not within the power of the Provincial Legislature.)

70. 1950 S C 27 (Pr 180) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

71. 1952 S C 123 (126) (Pr 7) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (SC), *Kathi Raning* v. *State of Saurashtra.* (Per *Patanjali Sastri, C. J.*—It is not correct to say that Art. 14 provides no further constitutional protection to personal liberty than what is afforded by Art. 21 —Art. 14 remains an important bulwark against discriminatory procedural laws.)

72. 1950 S C 27 (Prs 171, 215) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1950 All 562 (Pr 38) [A I R V 37 C 226] : I L R (1952) 1 All 8 : 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State.* (Per *Raghubar Dayal, J.*—S. 123A, Criminal P.C., as amended in U.P., being inconsistent with the provisions of Art. 22 (1) and (2) of the Constitution of India is void under Art. 13 (1) of the Constitution — Any detention under S. 123A, Criminal P. C., would be illegal as the person detained is deprived of his personal liberty by a process which is not in accordance with procedure established by law.)

In this connection it has to be remembered that the Constitution of India is a written constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of the absolute supremacy of Parliament in matters of legislation. In this respect it has followed the American Constitution and other systems modelled on it. Notwithstanding the representative character of their political institutions, the Americans regard the limitations imposed by their Constitution upon the action of the Government, both legislative and executive, as essential to the preservation of public and private rights. They serve as checks upon what has been described as the despotism of the majority. As was observed in the case of *Hurtado* v. *People of California*,[73] "A Government, which recognised no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depositary of power, is after all but a despotism." In India, it is the Constitution that is supreme and the Parliament as well as the State Legislatures must not only act within the limits of their respective legislative spheres as demarcated in the three Lists occurring in SCH. VII to the Constitution, but Part III of the Constitution guarantees to the citizens certain Fundamental Rights which the legislative authority can on no account transgress. The statute law must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is unconstitutional or not.[74] These principles apply in full force to 'law' mentioned in ART. 21 under which a person's life or liberty is taken away.

But Courts are not at liberty to declare an Act void merely because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, Courts cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument.[75]

1951 Mad 1015 (Prs 34, 63, 67) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras*. (The provisions of the Madras Maintenance of Public Order Act (23 of 1949), relating to preventive detention are totally repugnant to the provisions of Arts. 21 and 22 of the Constitution and are therefore *ultra vires* and void.)

1950 Pat 265 (Pr 30) [AIR V 37 C 67]: ILR 29 Pat 335: 51 Cri L Jour 1081 (DB), *Brahmeshwar Prasad* v. *State of Bihar*. (The provisions of the Bihar Maintenance of Public Order Act (3 of 1947) being inconsistent with Arts. 22 (4) and (5) of the Constitution of India have become void on coming into force of the Constitution.)

[73] (1884) 110 U S 516 (537) : 28 Law Ed 232.

[74] 1950 S C 27 (Pr 161) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[75] 1950 S C 27 (Pr 26) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (Per *Kania, C. J.*)

[But see 1951 Hyd 64 (Pr 2) [A I R V 38 C 19] : I L R (1951) Hyd 818 (DB), *Venkatnarsa* v. *State*. (Section 5 of the (Hyderabad) Public Safety and Public Interest Regulation (12 of 1358F) is inconsistent with the provisions of Art. 21 of the Constitution and is, therefore, void under Art. 13—Wide powers given to

A punitive statute must not be vague. It is necessary, before holding a person guilty of an offence, that he must be in a position to know what he has to do or abstain from doing.[76] If the criminal statute is too vague and uncertain, the mere fact that the actual charge made is not uncertain will not validate the proceedings because it is the statute that has to be free from vagueness in order to be valid.[77]

The next matter to be considered by the Court is to see what is the procedure required by law for depriving a person of his life or personal liberty, for the Constitution has provided that unless such procedure is followed a person cannot be deprived of his life or personal liberty.[78] Where a law enables the Executive to deprive a person of his personal liberty at its sweet will and pleasure and lays down no procedure to be followed in the matter, such a law will be repugnant to this article.[79] But under this article the discretion of deciding what the procedure should be and to what extent it needs to be prescribed has been given entirely to the Legislature. Obviously, it cannot be necessary that every detailed step of the procedure need be mentioned.[80] Further, no one has a vested right in procedure and the Legislature may modify it in any manner it thinks fit.[81] In other words, the

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security officer—Such powers are against spirit of Part III of the Constitution, relating to Fundamental Rights — S. 5 is, therefore, inconsistent with Art. 21 and is void — *Note :* — This view is opposed to the view of Kania, C. J., in A I R 1950 S C 27 at Para 26 (S C).)]

76. 1950 S C 27 (Pr 27) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

(1939) 306 U S 451 (453) : 83 Law Ed 888 (890), *Lanzetta* v. *New Jersey.* (Statute penalizing "gangsters" and declaring that "any person not engaged in any lawful occupation, known to be a member of any gang, consisting of two or more persons, who has been convicted at least 3 times of being a disorderly person, or who has been convicted of any crime, is a gangster," is so vague and uncertain in its definition of offence as to be repugnant to due process clause.)

(1926) 269 U S 385 : 70 Law Ed 322 (329), *Connally* v. *General Construction Co.* (The terms of a penal statute creating a new offence must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties—The statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law—A statute requiring a contractor under a penalty to pay his employees, not less than the current rate of per diem wages in the locality where the work is performed, is so uncertain as to deprive contractors of their property without due process of law.)

77. (1939) 306 U S 451 (453) : 83 Law Ed 888 (890), *Lanzetta* v. *New Jersey.*

78. 1950 S C 27 (Pr 242) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

79. 1951 Hyd 64 (Pr 2) [A I R V 38 C 19] : I L R (1951) Hyd 818 (DB), *Venkatnarsa* v. *State.*

80. 1951 All 456 (Pr 2) [A I R V 38 C 96], *Mohd. Athar Rizvi* v. *State.* (Under the Preventive Detention Act the Legislature empowered the authorities to make an order of detention on being satisfied that one of the conditions laid down in S. 3 exists, and it is not necessary that the Legislature should also have gone on to say by what process that satisfaction should have been arrived at.)

81. 1951 Mys 72 (Pr 35) [AIR V 38 C 33]: ILR (1951) Mys 284: 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (It is open to the Legislature to deter-

Legislature is left free to lay down any procedure within the ambit of legislative powers conferred upon it under the Constitution subject to the limitation that there is no invasion of Fundamental Rights.[82] An Act empowering a State Government to direct offences or classes of offences to be tried by special Courts may be valid.[83]

After ascertaining the requirements of the law and of the procedure established by it, the Court has to see whether those requirements have been completely satisfied in the particular case that comes before it.[84] Where the deprivation of personal liberty is not according to procedure established by law, the Court must order the release of the detained person.[85] In regard to this, certain general principles should

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mine what evidence may be received and the effect of such evidence so long as Fundamental Rights are preserved — A right of appeal is not considered to be essential for protection of Due Process of Law.)

[82] 1952 Nag 118 (Pr 21) [AIR V 39 C 45 (10)] : I L R (1952) Nag 14 : 1952 Cri L Jour 646 (DB), *Jagjiwanrao* v. *The State.* (Madhya Pradesh Public Security Measures Act (23 of 1950), S. 12, does not contravene Art. 21 of the Constitution of India.)

[83] 1952 S C 123 (Prs 20, 22) [A I R V 39] : 1952 S C R 435 : 1952 Cri L Jour 805 (S C), *Kathi Raning* v. *State of Saurashtra.* (Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949) held valid— AIR 1952 S C 75 (SC), Disting.)

1951 Mys 72 (Pr 40) [AIR V 38 C 33] : I L R (1951) Mys 284 : 52 Cri L Jour 992 (FB), *Abdul Khader* v. *State of Mysore.* (The provisions of the Mysore Special Criminal Courts Act (24 of 1942), are not repugnant to Art. 21 of the Constitution and as such the Act is not void.)

[*See also* 1952 Nag 118 (Pr 26) [AIR V 39 C 45 (10)]: ILR (1952) Nag 14 : 1952 Cri L Jour 646 (DB), *Jagjiwanrao* v. *The State.* (The accused has no absolute right to be tried under the Criminal Proceedure Code.)]

[84] 1952 S C 27 (28) (Pr 4) [A I R V 39 C 7] : 1952 S C R 368 : 1952 Cri L Jour 321 (S C), *Makhan Singh* v. *State of Punjab (I).* (It cannot be too often emphasised that before a person is deprived of his personal liberty the procedure established by law must be strictly followed.)

1952 S C 106 (108) (Pr 9) [A I R V 39 C 20] : 1952 S C R 395 : 1952 Cri L Jour 656 (SC), *Naranjan Singh* v. *State of Punjab (I).* (Do.)

1952 Cal 798 (798) (Pr 3) [A I R V 39] : 1952 Cri L Jour 1662, *Khudi Prosad* v. *The State of West Bengal.*

1951 Bom 161 (Pr 11) [A I R V 38 C 31] : I L R (1950) Bom 736 : 52 Cri L Jour 62 (DB), *In re S. V. Ghate.* (The satisfaction contemplated by S. 3 (1) (a), Preventive Detention Act (1950), must be related to the person, against whom the order is made, acting in a prejudicial manner—There must be at least a reasonable probability of the person acting in a prejudicial manner— Of course, the satisfaction has got to be of the detaining authority and on a judgment, which he himself has to come to, that there is a reasonable probability that but for the detention the person against whom the order is to be made, will act in a prejudicial manner — The detaining authority must be satisfied that it was necessary to detain the person at the date when the order was made—Thus where an order of detention is passed in 1950 against a person who is already under detention from 1948, it is not open to the detaining authority in 1950 to fall back upon the satisfaction of the detaining authority in 1948.)

1951 Bom 30 (Pr 3) [A I R V 38 C 12]: I L R (1951) Bom 190 : 52 Cri L Jour 366 (FB), *In re Pandurang.*

[85] 1953 S C 325 (332) (Pr 22) [A I R V 40 C 77] : 1953 Cri L Jour 1432 (SC), *Maqbool Hussain* v. *State of Bombay.* (Punjab Communist Detenus Rules (1950), R. 41 — The scheme of R. 41 is to constitute the Jail Superintendent only an

be remembered. For instance, penal provisions are to be construed strictly and in case of ambiguity they must be construed in favour of the subject. To this general principle, however, there is an exception that under war conditions the presumption that the Legislature did not intend to interfere with liberty or property is very much weaker.[86] (See Preamble, NOTE 6.)

(h) Detention by executive order

Most of the principles in this connection arise with reference to detention of a person without trial by executive action for emergent or special reasons. The subject of preventive detention is dealt with under ART. 22 and the notes on that article may be referred to. But the following principles may be here noted. Where under the Act the Government is empowered to arrest a person to prevent him from taking part in subversive activities and the Act merely requires that the Government must be 'satisfied' that it is necessary to arrest a person for that purpose, it is not necessary, if the matter goes before the Court, that the Government must prove the reasonable ground for its satisfaction.[87] But in such cases the Court may examine whether

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administrative authority to maintain jail discipline and inflict summary punishment on the detenus for breach of that discipline by committing a jail offence—It is only when the Jail Superintendent considers that the offence is not adequately punishable by him that he can send the case to the Magistrate — If he actually himself punishes he cannot, under this rule, refer the case again to the Magistrate—A reference by him after punishment will be wholly unauthorised and without jurisdiction and the prosecution before the Magistrate would be illegal and not in accordance with procedure established by law.)

1953 S C 318 (320) (Pr 5) [A I R V 40 C 74] : 1953 Cri L Jour 1241 (S C), *Ram Krishan* v. *State of Delhi.* ("Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.")

[*See* 1953 Sau 51 (Prs 3, 5) [A I R V 40 C 22] : 1953 Cri L Jour 503 (DB), *Umedsing* v. *State.* (Preventive Detention Act (1950), S. 10 (1) — Failure to report within ten weeks—Detention becomes illegal.)

1952 Orissa 208 (211) (Pr 10) [A I R V 39] : I L R (1951) Cut 529 : 1952 Cri L Jour 1113 (DB), *Parsuram Das* v. *State.* (Preventive Detention Act (1950), Ss. 9 (1) and (2) (a), 10 (1) and 12 (a) (as amended by Act 4 of 1951) — Procedure prescribed by sections not followed — Detention held not in accordance with procedure established by law.)

(1934) 79 Law Ed 791 (794) : 294 U S 103, *Mooney* v. *Holohan.* (Where a conviction is obtained by the State by perjured evidence (known to the prosecuting authorities to be perjured evidence) that will amount to depriving a person of his liberty by State action without due process of law.)]

[86] (1941) 3 All E R 338 (344) : 110 L J K B 724, *Liversidge* v. *Anderson.*

(1920) 36 T L R 469 (475), *Hudson's Bay Co.* v. *Maclay.*

[*See* (1921) 255 U S 81 : 65 Law Ed 516 (519), *United States* v. *Cohen Grocery Co.* (The mere existence of state of war does not suspend guarantees and limitations of the Constitution as to legislative power.)]

[87] 1953 S C 451 (452) (Pr 4) [A I R V 40 C 107] : 1953 Cri L Jour 1921 (SC), *Ashutosh* v. *State of Delhi.* (The satisfaction of the authority making the order of detention as to the matter specified in the Preventive Detention Act is the only condition for the exercise of its powers and the Court cannot substitute its own satisfaction for that of the authority. It is, however, open to the detenu to establish if he can that the order was made *mala fide* in abuse of process.)

1946 P C 123 (126) [AIR V 33 C 39] : I L R (1947) Kar P C 449: 73 Ind App 144: I L R (1946) Nag 651 : 47 Cri L J 831 (PC), *Emperor* v. *Vimlabai Deshpande.*

the order is made *bona fide* or *mala fide*.[88] Where the statute says that a certain officer can arrest a person on reasonable suspicion he

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[See however 1952 Cal 798 (799) (Prs 6, 8) [AIR V 39] : 1952 Cri L Jour 1662, *Khudi Prosad* v. *The State of West Bengal.* (An order directing detention under S. 21 (1) of the West Bengal Security Act, merely stating that the detaining authority is satisfied that with a view to preventing the person to be detained, from doing any subversive act, it is necessary to make the order, without stating that the person is doing or is about to do or is likely to do an act, is not in compliance with the said section and is accordingly void, as it is repugnant to the Constitution, infringing, as it does, Fundamental Rights guaranteed by it: AIR 1950 Cal 543, Foll.)

1950 Bom 213 (Prs 2, 4, 10) [AIR V 37 C 57] : I L R (1950) Bom 762 : 51 Cri L Jour 1184, *Ramesh* v. *Province of Bombay.* (Bombay Public Security Measures Act (6 of 1947) — The Legislature has in S. 9A left it to the satisfaction of the Provincial Government as to the nature and necessity of the action to be taken, but as far as the purpose for which action has to be taken it has not chosen to leave it to the subjective determination of the Government, but has provided that the purpose must be objectively established and must be a condition precedent before Government could take the action contemplated by the section. An order issued by the Government under S. 9A is, therefore, not an executive order but a judicial or quasi-judicial order against which a writ of *certiorari* can be issued.)

1950 Cal 543 (Prs 8, 9) [AIR V 37 C 204] (DB), *Amrita Lal* v. *The State.* (No order can be made under S. 21 (1), West Bengal Security Act (19 of 1950), unless there is satisfaction of authority that the person is actually doing or is about to do or is likely to do an act falling within S. 2 (9). It is not enough to say that the authority was satisfied that an order of externment is necessary with a view to preventing a person from doing a subversive act. Unless there is first a satisfaction upon the point that the person is doing or is about to do or is likely to do a subversive act an order made with a view to preventing a person from doing a subversive act is not one made under S. 21 (1) and there can be no conviction under S. 21 (4) for disobeying that order.)]

[88] 1953 S C 451 (452, 453) (Prs 4, 8) [AIR V 40 C 107] : 1953 Cri L Jour 1921 (SC), *Ashutosh* v. *State of Delhi.*

1950 Bom 202 (Prs 5, 6) [AIR V 37 C 54] : ILR (1950) Bom 438 : 51 Cri L Jour 1126 (FB), *Malyali* v. *Commr. of Police.* (Investigation of offence without affording the safeguards under the Criminal Procedure Code—Detention is illegal.)

1946 Bom 32 (34, 35) [AIR V 33 C 8] (DB), *Bajirao Yamanappa* v. *Emperor.* (If the order of detention was made merely in the colourable exercise of the powers under the Act or if the detaining authority exceeded the powers given to it under the Act, the order will not be one under the Act. The detaining authority must satisfy the Court that it has satisfied all the rules of procedure laid down in the Act and has observed all the safeguards. The order must not be made for an ulterior purpose. The order must not be intended to override the ordinary powers of the police for the investigation of the crime or to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction.)

1945 Nag 8 (27, 28) [AIR V 32] : I L R (1945) Nag 6 (DB), *Vimlabai Deshpande* v. *Emperor.* (Where a person is detained under R. 129, Defence of India Rules, with a view to facilitating the investigation into a dacoity case, the detention must be held to be in utter want of good faith and a fraud on the statute.)

1944 Pat 354 (363) [AIR V 31] (DB), *Kamla Kant* v. *Emperor.* (The power under R. 129, Defence of India Rules, to arrest and detain a person on mere suspicion, which has been conferred on the executive, is not intended to be exercised in an arbitrary and capricious manner. In exercising this power to detain on suspicion, the executive must act reasonably and in good faith, that is, in such a way that a Court of law cannot say that it was obviously not acting *bona fide* because it was acting so unreasonably that no honest man could say that it could possibly have so acted.

has to prove to the Court that his suspicion was reasonable.[89] Where a person is detained under a law without trial and the law says that the grounds for his detention must be furnished to him, the grounds must not be too vague.[90] If a reason is given for the detention of a person under a preventive detention law, the order is vitiated if the reason falls outside the purview of the Act although other reasons which are given are good and are within the Act.[91] Where the law does not require the grounds to be furnished to a detenu but such grounds are actually furnished, it is open to the Court to consider the statement of these grounds together with the order made and if the

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If it does act so unreasonably, there is ground for saying that it has not acted *bona fide*. The provisions in the proviso to R. 129 (2) are intended to protect the individual against the caprice or malice of the subordinate and the carelessness or neglect of the higher officials: *Sheffield Conservative Club* v. *Brighten*, (1916) 85 L J K B 1669, Rel. on.)

[*See* 1945 Bom 533 (536) [AIR V 32]: 47 Cri L Jour 297 (DB), *Gajanan Krishna* v. *Emperor*. (The right to prosecute a person under the ordinary criminal law and the right to detain him under the Defence of India Rules or the Ordinance are not mutually exclusive. If a person, who is really dangerous to public safety and maintenance of public order, commits an offence, Government would certainly be justified to prosecute him for the offence first and if, for want of sufficient evidence, the prosecution fails, it would none the less be necessary to keep him in detention for the sake of public safety and maintenance of public order.)]

[*See also* 1945 F C 18 (19, 20) [AIR V 32] : 24 Pat 187 : 1945 F C R 81 : I L R (1945) Kar (FC)-13 : 46 Cri L Jour 559 (FC), *Basanta Chandra* v. *Emperor*. (It is no doubt open to the detenu to show that the order was not in fact made by the Governor of the Province or that it was a fraudulent exercise of the power but the burden of substantiating these pleas lies on the detenu : *Liversidge* v. *Anderson*, (1942) App Cas 206 : 1941-3 All E R 338 and *Greene* v. *Secretary of State for Home Affairs*, (1942) App Cas 284: 1941-3 All E R 388, Rel. on. The mere fact that the detenu challenged the factum or the *bona fides* of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the Government to adduce evidence in support of the order.)]

89. 1946 P C 123 (127) [AIR V 33 C 39]: 73 Ind App 144: I L R (1946) Nag 651: 47 Cri L Jour 831 (PC), *Emperor* v. *Vimlabai Deshpande*. (1914 App Cas 808, *Shearer* v. *Shields*, Rel. on. ; 1942 App Cas 206 : (1941) 3 All E R 338, *Liversidge* v. *Anderson*, Disting.)

(1914) 1914 App Cas 808 (814), *Shearer* v. *Shields*.

90. 1951 Orissa 20 (Prs 4, 5) [AIR V 38 C 8] : I L R (1950) Cut 540 : 52 Cri L Jour 104 (DB), *Kulamoni* v. *The State*.

1950 Bom 126 (Pr 3) [AIR V 37 C 34]: I L R (1950) Bom 177: 51 Cri L Jour 665, *In re Bhaurao Karbhari Aware*. (Where the ground of detention stated that the detenu was likely to act in a prejudicial manner by inciting ignorant people to resort to criminal activities: *Held*, that the ground was bad for want of precision.)

91. 1950 All 709 (Pr 14) [AIR V 37 C 276] : I L R (1951) 2 All 493 : 52 Cri L Jour 732, *Asha Ram* v. *State*. (If a reason is given for the detention of a person which is not within the scope and ambit of the Act conferring the power upon the Government to detain, then the whole order is vitiated, notwithstanding the fact that the other reasons given are good, because something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purposes of the Act: AIR 1948 Bom 334, Foll.)

detaining authority has not applied its mind to the question of detention, the Court may interfere.[92]

(i) Onus of proof.

It is for the State to support the legality of the action taken by its officers in depriving a person of his personal liberty.[93]

9. Preventive detention. — See ART. 22 and notes thereunder. See also NOTE 8.

Protection against arrest and detention in certain cases.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice,

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien ; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention

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[92] 1950 Bom 126 (Pr 3) [AIR V 37 C 34]: I L R (1950) Bom 177: 51 Cri L Jour 665, *In re Bhaurao Karbhari Aware.*
[*See* 1949 Bom 37 (Pr 5) [AIR V 36 C 11] : 50 Cri L Jour 129, *Bashan Madar* v. *Emperor*. (Where the District Magistrate had not applied his mind to the facts of the case at the time when he signed the order of detention under S. 2 (1) (a), Bombay Public Security Measures Act (1947), inasmuch as the order passed under S. 2 stated that the detenu was acting in a manner prejudicial to the public safety, etc., of the Sholapur city, but the grounds mentioned in the order passed under S. 3 had no connection whatsoever with the tranquillity of the city of Sholapur: *Held*, that the order of detention was bad.)
1950 All 709 (Pr 7) [AIR V 37 C 26]: I L R (1951) 2 All 493 : 52 Cri L Jour 732 *Asha Ram* v. *State*.]

[93] 1952 Assam 187 (186) (Pr 7) [AIR V 39] : I L R (1952) 4 Assam 134 : 1952 Cri L Jour 1706, *Hari Prosad* v. *State of Assam*.

shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause *(b)* of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses *(a)* and *(b)* of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause *(a)* of clause (4);

Article 22

(*b*) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(*c*) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (*a*) of clause (4).

COGNATE PROVISIONS

Clause (4) — "Law providing for preventive detention" — See the Preventive Detention Act, 1950 (4 of 1950), as amended from time to time.

Clause (7)—Power of President to make order in respect of persons under preventive detention until provision is made by Parliament under Art. 22 (7) or until the expiration of one year from the commencement of this Constitution—See ART. 373.

Synopsis

1. Scope of the article.
    - (a) This article and Art. 19.
    - (b) Laws inconsistent with article.
    - (c) Some general considerations as to the article.
2. Retrospective effect.

2a. "Arrest" meaning of — Clauses (1) and (2).

3. Right to be defended by pleader. Clause (1).
    - (a) Right to be provided with a lawyer by the State.
4. Clause (2).
5. Clause (3) (a)—Enemy alien.
6. Clause (3) (b)—"Person arrested or detained under any law providing for preventive detention."
7. Preventive detention — Legislative competency.
8. Validity of Preventive Detention Act, 1950.
9. Preventive detention — General principles.
    - (a) Meaning and object of preventive detention.
    - (b) Law of preventive detention —Essentials for validity.
    - (c) Principles of natural justice.
    - (d) Legislative competency.
    - (e) Spirit of Constitution.
    - (f) Principles of construction.
    - (g) Conformity to law.
    - (h) Criminal prosecution if bar to preventive detention, and vice versa.
    - (i) Order for preventive detention—Change of officers.
10. Preventive detention—"Satisfaction" of detaining authority.
11. Preventive detention—Bona fides of the order of detention.
12. Preventive detention—Advisory Board.
13. Procedure before Advisory Board —Clause (7) (c).
14. Preventive detention—Advisory Board—Qualification of members.
15. Preventive detention—Maximum period of detention—Clauses (4) and (7) (b).
16. Preventive detention—Detention for more than three months without obtaining the opinion of the Advisory Board — Clause (7) (a).
17. President's powers.
18. Clause (5)—General.
19. "The grounds on which the order has been made."
20. Vagueness of grounds.
21. Grounds of detention—Consideration by the Court.
22. "Supplementary grounds."
23. On what grounds detention can be ordered.
24. "As soon as may be."
25. Right to make a representation against the order of detention.
26. Clause (6).
27. Fresh order of detention.

1. Scope of the article. — This article is one of the group of articles in Part III of the Constitution (Fundamental Rights), which have been collected together under the sub-heading "Right to Freedom". The subject-matter of the article is personal liberty. Under ART. 21, no person shall be deprived of his personal liberty except according to procedure established by law. It has been seen in the notes on ART. 21 that the expression 'procedure established by law' does not refer to the procedure established by principles of natural justice but the procedure established by positive State-made law, i.e., enacted law. We have seen that such law must be a valid law, i.e., within the legislative competence of the particular law-making authority, which has made it, and also not inconsistent with the Fundamental Rights guaranteed by the Constitution.

This article proceeds to guarantee certain Fundamental Rights to every arrested person except in two cases which are mentioned in cl. (3). These rights being guaranteed by the Constitution are of a higher status than rights which are merely conferred by the ordinary law and have no such constitutional guarantee.

We have seen that ART. 20 also confers certain Fundamental Rights on persons charged with crimes. Thus, the position is not as if personal liberty is entirely and absolutely subordinate to the power of the Legislature without any protection of constitutional guarantees. This aspect must not be forgotten when considering the effect of ART. 21 in the context of the interpretation of the words 'procedure established by law' by the Supreme Court in *Gopalan's case*[1], as meaning procedure established by enacted law and not having reference to principles of natural justice. (See also ART. 21 NOTE 8).

This article confers the four following Fundamental Rights on every person, except in two cases mentioned in cl. (3), as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever and for however brief a period, of his personal liberty by placing him under arrest or keeping him in detention :

(1) to be informed, as soon as may be, of the grounds for such arrest ;

(2) not to be denied the right to consult and to be defended by a legal practitioner of his choice ;

(3) to be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate ;

(4) not to be detained in custody beyond the said period of twenty-four hours without the authority of a Magistrate.

Article 22 — Note 1

[1] **1950 S C 27 (Prs 18, 109, 196) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.***

Clauses (1) and (2) contain the guarantee of the four Fundamental Rights enumerated above. Clause (3) contains two exceptions[1a] to the above and provides that the above-mentioned constitutional guarantees do not apply to (a) enemy aliens and (b) persons arrested or detained under any law providing for preventive detention. Clauses (4) to (7) are devoted to laying down certain fundamental principles as to preventive detention and guaranteeing certain Fundamental Rights to persons who are arrested or detained under any law for preventive detention.

It must be noted that the Constitution does not directly authorise preventive detention of any person for any purpose. In other words, the Constitution does not directly permit the Executive to keep any person in detention, without such person being charged with a crime and being tried in accordance with law in the normal Courts or otherwise being dealt with according to the ordinary law of criminal procedure of the country, embodied in the Code of Criminal Procedure. Article 22 only assumes the possibility of a *law* for preventive detention. If there is no such law, the Executive cannot, of its own responsibility, detain any person in custody or deprive him of his personal liberty, however grave may be the danger of such person being at large.

But if there is a law for preventive detention, which is valid under the Constitution, the detention of a person under such law after satisfying all the requirements thereof will be deprivation of personal liberty of a person according to procedure established by law and, therefore, will be within the powers of Executive under the Constitution.

Any law relating to preventing detention must, in order to be valid, satisfy the requirements of cls. (4) to (7) of this article. No person can be arrested or detained in custody even under a duly enacted law providing for preventive detention where such detention contravenes the provisions of cls. (4) to (7) of this article. That such detention is authorised by the law for preventive detention under which the person is detained will not validate the detention, as, in so far as the law contravenes the provisions of cls. (4) to (7), it would be void.

The fact that provisions relating to preventive detention have been enacted in the Constitution and preventive detention has thereby been given, so to say, a constitutional status has been commented upon and it has been pointed out that no other Constitution in the world contains similar provisions. (See NOTE 9).[2] But we wish to point out that the liability for preventive detention is not the creation of this article. The constitutionality of a law for preventive detention is implicit in ART. 21. This article, instead of authorising preventive detention or a law for such detention, imposes certain fundamental restrictions on the power of the State and the Executive in this matter and confers on the person detained certain important Fundamental Rights in respect of his detention. Thus, so far as this article is concerned, it is clearly not one tending to abridge a person's Fundamental Rights but confers certain Fundamental Rights on a person whom it is found necessary to keep under detention without a regular judicial trial or enquiry. It is no doubt true that under cl. (3) of this article, the four Fundamental Rights, enumerated in cls. (1) and (2) as belonging to all persons who are arrested or detained in custody, are denied to persons kept under detention under a law relating to preventive detention. But cls. (4) to (7) clearly amount to a check and a limitation on the power of the Executive even in those cases in which the law authorises them to keep persons in preventive custody in the interests of the security of the State or other similar grave objects, and compel the Executive to follow certain forms and procedures, for the purpose of ensuring, as far as it may be possible, that the Executive does not abuse its powers.

[1a] *See* 1953 Punj 52 (54) (Pr 5) [AIR V 40 C 19] : ILR (1952) Punj 362 and 495 : 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi.* (Clause (3) must be construed strictly as it provides an exception to the Fundamental Right created by cl. (1).)

[2] 1950 S C 27 (Prs 22, 133, 165, 209) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.* (The Judges in this case have remarked on this.)

The Fundamental Rights, guaranteed by cls. (4) to (7) to persons detained under any law for preventive detention, relate to the maximum period of detention, the provision of an Advisory Board to consider and report on the sufficiency of the cause for detention in certain cases, the right to be informed the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention.[3] The two latter rights go some way to make up for the denial of the rights, which are ordinarily given to arrested persons under cl. (1), namely, of being informed, as soon as may be, of the grounds of arrest and the right to consult and be defended by a legal practitioner of his choice.

Although Art. 22, cls. (4) to (7) contain certain special guarantees of Fundamental Rights to persons detained under law relating to preventive detention, Art. 21 also applies to such persons, in so far as any matter not provided for by Art. 22 is concerned.[4] Thus, if a law relating to preventive detention confers on the detenu any additional rights and safeguards against abuse of power by the Executive, which are not covered by Art. 22, the detenu will have a constitutional right to them by virtue of the provisions of Art. 21, inasmuch as such rights and safeguards will be "procedure established by law" under Art. 21.[5]

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[3] *See* 1950 S C 27 (Pr 118) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.* (Per *Patanjali Sastri, J.*—Clauses (4) to (7) deal only with certain aspects of preventive detention.)

[*See also* 1951 Mad 1015 (Pr 10) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commissioner of Police, Madras.* (In so far as preventive detention is concerned, Art. 22 prescribes what ought to be the "procedure established by law.")]

[4] 1950 S C 27 (Prs 22, 78, 137, 138) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.* (Per *Kania, C. J.*—Article 21 has to be read as supplemented by Art. 22. Reading in that way, the proper mode of construction will be that to the extent the procedure is prescribed by Art. 22 the same is to be observed, otherwise Art. 21 will apply.)

[5] *See* 1950 S C 27 (Pr 118) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.* (Per *Patanjali Sastri, J.* — Article 21 is

Article 22
Note 1

(a) This article and Article 19

Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in Art. 19 (1) and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil rights as distinct Fundamental Rights and made separate provision in Art. 19 and Arts. 21 and 22 as to the limitations and conditions, subject to which they could be taken away or abridged. A law, which authorises deprivation of personal liberty, does not fall within the purview of Art. 19 and its validity is not to be judged by the criteria indicated in that article, but depends on its compliance with the requirements of Arts 21 and 22. Hence, Art. 19 does not apply to the question of the constitutionality of a law providing for preventive detention.[6]

(b) Laws inconsistent with article

Any law or any provision of law, which affects personal liberty and is inconsistent with the provisions of this article and Art. 21, will be void to that extent.[7]

(c) Some general considerations as to the article

Before a person can be deprived of his personal liberty, all the requirements of the Constitution and of any law, that may be applicable to the case, must be strictly complied with.[8] Brett, L. J., observed as

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perfectly general in its language — Clauses (4) to (7) of Art. 22 deal only with certain aspects of preventive detention.)

[6] 1951 S C 270 (Prs 5, 6) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (S C), *Ram Singh* v. *State of Delhi.*
1950 S C 27 (Pr 171) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*
('50) ILR 29 Pat 502 (509, 517, 533, 543) (FB), *L. K. Burman* v. *The State.*
1951 Bom 33 (Prs 15, 24) [AIR V 38 C 13] : ILR (1951) Bom 546 : 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.*

[7] 1950 Cal 274 (Prs, 21, 22) [AIR V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government.* (West Bengal Security Ordinance (1949) is clearly an Ordinance providing for preventive detention, but the Ordinance is void because it is inconsistent with the provisions of the Constitution. The Ordinance does not provide for any Advisory Board of the nature contemplated by Art. 22 (4).)
1951 Mad 1015 (Pr 62) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commissioner of Police, Madras.* (Madras Maintenance of Public Order Act, (23 of 1949), Ss. 2 (1) (a), 3, 4, 4A and 15 are totally repugnant to the provisions of Arts. 21 and 22 of the Constitution of India and are therefore '*ultra vires*' and void. It, therefore, follows that the detention of a person made under that Act cannot be held to be legal, in any event after 26-1-1950 which is the date of the commencement of the Constitution of India.)
1950 All 562 (Prs 43, 44, 45, 46, 49, 74, 76) [AIR V 37 C 226] : ILR (1952) 1 All 8: 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State.* (Criminal P. C. (1898), S. 123A (U. P.) is inconsistent with Arts. 21 and 22 and consequently became void on the midnight of 25th/26th January 1950.)
1950 Pat 265 (Prs 19, 20, 57, 60 and 62) [AIR V 37 C 67]: ILR 29 Pat 335: 51 Cri L Jour 1081 (DB), *Brahmeshwar Prasad* v. *State of Bihar.* (The detention provisions of Bihar Maintenance of Public Order Act (3 of 1950) are inconsistent with Art. 22 (4) and (5) and consequently became void after the Constitution came into force.)

[8] 1952 S C 27 (Pr 4) [AIR V 39 C 7] : 1952 S C R 368: 1952 Cri L Jour 321 (SC), *Makhan Singh* v. *State af Punjab (1).* (So if Preventive Detention Act, as amended in 1951, requires that period of detention should be fixed only after Advisory Board has reported, the fixing of the period in the initial order itself will make it invalid. Mere fact, that under the Act if Advisory Board says that there

follows in *Thomas Pelham Dale's case*[9] :

> "It is a general rule which has always been acted upon by the Courts of England that if any person procures the imprisonment of another, he must take care to do so by steps all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity, the Court will not allow the imprisonment to continue."

Cotton, L. J., expressed his agreement with the above observations and went on to add that the person imprisoned might be discharged, although the particulars in which the authorities had failed to follow the powers under which they acted, might be matters of mere form.[10] (See also NOTE 9.)

The detention of the person must be valid not only at its commencement but also throughout. So, even if the detention is valid *ab initio*, it may cease to be so if some provision of law or of the Constitution is violated subsequently and in such a case the person will be entitled to be released forthwith.[11]

In construing the provisions of cls. (3) to (7) of this article, it must be remembered that the provisions as to preventive detention are doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic. It must be remembered that, except for this consideration, the constitutional status given to preventive detention would be out of place in a democratic Constitution which invests personal liberty with the sanctity of a Fundamental Right and incompatible

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is no sufficient cause detenu would be released, is not a ground for saying that the fixing of period is surplusage and may be ignored—Such direction would tend to prejudice a fair consideration of the detenu's case by the Advisory Board.)

1952 S C 106 (Prs 9, 10) [AIR V 39 C 20] : 1952 S C R 395 : 1952 Cri L Jour 656 (S C), *Naranjan Singh* v. *State of Punjab (I).*

1954 Pat 57 (59) (Pr 2) [AIR V 41 C 23] : I L R 32 Pat 55 : 1954 Cri L Jour 91 (DB), *Karamvir* v. *State.*

1952 Orissa 208 (Pr 9) [AIR V 39] : ILR (1951) Cut 529 : 1952 Cri L Jour 1113 (DB), *Parsuram Das* v. *State.* (Every bit of the procedure must be strictly followed before a person can be legally detained.)

1950 All 69 (Pr 20) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*

[9] (1881) 6 Q B D 376 (461) : 50 L J Q B 234.

[10] (1881) 6 Q B D 376 (469, 470): 50 L J Q B 234, *Thomas Pelham Dale's Case.*

[11] 1951 S C 157 (Pr 4) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (S C), *State of Bombay* v. *Atma Ram.* (If requirements of Art. 22 are not complied with the detention even if valid *ab initio* ceases to be in accordance with law.)

1951 Bom 30 (Prs 2, 3, 5) [AIR V 38 C 12]: ILR (1951) Bom 190 : 52 Cri L Jour 366 (FB), *In re Pandurang.* (Failure to supply grounds within reasonable time makes detention illegal—So also non-compliance with S. 3 (3) of Preventive Detention Act regarding report being submitted 'forthwith' i.e., within reasonable time to State Government where detention order has been passed by certain officers.)

1950 Hyd 68 (Pr 2) [AIR V 37 C 21] : ILR (1951) Hyd 183 (DB), *Narayanamma* v. *Hyderabad State.*

1949 All 37 (Pr 26) [AIR V 36 C 15] : ILR (1949) All 217 : 50 Cri L Jour 34, *Inder Prakash* v. *Emperor.* (Failure to supply grounds of detention within reasonable time to person detained under preventive detention law.)

with the promises of its Preamble. It is in this spirit that the clauses must be construed and harmonized, as far as possible with ART. 21, so as not to diminish unnecessarily the protection afforded for the legitimate exercise of personal liberty.[12] As stated by Bose, J., in the Supreme Court,[13] ARTS. 21 and 22 confer a Fundamental Right and give a fundamental guarantee. It is, therefore, the duty of the Court to see that the right is kept fundamental and that the fullest scope is given to the guarantee. It is the duty of the Court to ensure that the right and the guarantee are not rendered illusory and meaningless.

2. Retrospective effect.—The article has no retrospective effect and does not apply to a person who was arrested before the 26th January 1950, the date of the coming into force of the Constitution. The words used are "who is arrested" and not "who has been arrested." The words "shall be detained" and "shall be denied" in cl. (1) suggest futurity. A Constitution is always prospective and not retrospective.[1]

2a. "Arrest", meaning of—Clauses (1) and (2).—As seen in NOTE 1, cls. (1) and (2) confer certain Fundamental Rights on every person who is arrested and detained in custody except in the two cases specified in cl. (3). As to the meaning of the word "arrest" for the purpose of cls. (1) and (2), it does not denote every case of physical restraint on a person, but has a limited connotation.[1] It would appear that before a person can be said to be "arrested" within the meaning of cls. (1) and (2), a double test has to be satisfied : (i) the arrest must be by the Executive and not by an order of the Court or under a warrant issued by the Court ; (ii) it must be on an accusation of some offence or some prejudicial activity on the part of the arrested person.[2] In *State of Punjab* v. *Ajaib Singh*,[2a] the Supreme Court observed as follows :

> "The language of Art. 22 (1) and (2 indicates that the Fundamental Right conferred by it gives protection against such arrests

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[12] 1950 S C 27 (Pr 119) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[13] 1951 S C 301 (Pr 43) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (S C), *S. Krishnan* v. *State of Madras.* (Therefore, wherever there is scope for difference of opinion on a matter of interpretation in this behalf, the interpretation which favours the subject must always be used because the right had been conferred upon him and it is the right which has been made fundamental, not the fetters and limitations with which it may be circumscribed by legislative action.)

Article 22 — Note 2

[1] 1951 All 718 (Pr 30) [AIR V 38 C 192] : ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.*

Article 22 — Note 2a

[1] 1953 S C 10 (13) [A I R V 40 C 4] : 1953 S C R 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*
1953 Cal 522 (Pr 6) [A I R V 40 C 193] : 1953 Cri L Jour 1187 (DB), *Raj Bahadur* v. *Legal Remembrancer.*

[2] 1953 S C 10 (15) (Pr 20) [A I R V 40 C 4] : 1953 S C R 254: I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*

[2a] 1953 S C 10 (15) (Pr 20) [AIR V 40 C 4] : 1953 SCR 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC).

as are effected otherwiss than under a warrant issued by a Court, on the allegation or accusation that the arrested person has, or is suspected to have, committed, or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest."

Hence, where custody is taken of an "abducted person" for the purpose of restoring her to her kinsfolk in Pakistan under the Abducted Persons (Recovery and Restoration) Act, 1949, there is no "arrest" within the meaning of this article.[3] The reason is that although it is the Executive which takes custody of the abducted person, the Executive does not do so on charge of any offence or any prejudicial activity, proved or suspected, of the abducted person. Similarly, the removal of a minor girl from a brothel under an Act for the suppression of immoral traffic is not an "arrest" within the meaning of this article.[4]

A person arrested under a warrant issued by the *Court* is not "arrested" within the meaning of cls. (1) and (2) of this article.[5] Where a person wrongfully confined or an abducted female is taken into custody under S. 100 or S. 552 of the Code of Criminal Procedure, there is no "arrest" within the meaning of this article.[6] A person, arrested under a warrant issued by the Speaker of a State Legislature, is "arrested" for the purpose of cls. (1) and (2) of this article, inasmuch as the Speaker's warrant is not a judicial warrant.[7] An arrest under warrant of civil Court in execution of decree, and an arrest before judgment under the warrant of a Civil Court, are not covered by cls. (1) and (2) of this article, being arrests under judicial process.[8]

See also meaning of "preventive detention" discussed in NOTE 9.

3. Right to be defended by pleader — Clause (1). — Under cl. (1) of this article, a Fundamental Right of very great importance is guaranteed to all persons who are arrested, as a safeguard against abuse of power by the Executive. This clause is subject to the exceptions specified in cl. (3). The right referred to is a right to consult and to be defended by a legal practitioner of the arrested person's own choice.

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[3] 1953 S C 10 (15) (Pr 20) [AIR V 40 C 4] : 1953 SCR 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*

[4] 1953 Cal 522 (Pr 6) [A I R V 40 C 198] : 1953 Cri L Jour 1187 (DB), *Raj Bahadur* v. *Legal Remembrancer.* (The word "arrest" in Art. 22 has a much restricted meaning — Case under S. 13 of the Bengal Suppression of Immoral Traffic Act, 1933—AIR 1953 S C 10, Rel. on.)

[5] 1953 S C 10 (15) (Pr 20) [AIR V 40 C 4] : 1953 S C R 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*

[6] 1953 S C 10 (16) [A I R V 40 C 4] : 1953 S C R 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*

[7] 1953 S C 10 (15) [A I R V 40 C 4] : 1953 S C R 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.* (Explaining decision of Supreme Court in *the Blitz case* (Petn. No. 75 of 1952).)

[8] 1953 S C 10 (14) (Pr 15) [AIR V 40 C 4] : 1953 S C R 254 : I L R (1953) Punj 121 : 1953 Cri L Jour 180 (SC), *State of Punjab* v. *Ajaib Singh.*

A right to be heard by a Tribunal or Court before an adverse order is passed against a party is a substantive right. But a right to be heard by an advocate is only a matter of procedure. It is for the Courts or Tribunals to determine as a matter of procedure as to how parties should be represented and how they should present their case to the Court or Tribunal, and if a rule in laying down such a procedure provides that a party shall be heard in person and not by his advocate or lawyer, it is nothing more than a rule of procedure.[1] For, the general principle as to a right of audience in a Court is that, in the absence of any statutory enactment or established practice defining what persons are to be heard as advocates, the Court itself has the power to regulate its own procedure and to determine what class of persons have audience.[2] Thus, the right to be heard by an advocate or a lawyer before a Court or Tribunal cannot be claimed in every case as an inherent right of a party whose case is determined by a Court or Tribunal. The right depends on *statutory* provisions. If the right is not granted by statute, the Court or Tribunal has it in its power to allow or not to allow appearance by a lawyer.

In India, the right to be defended by a lawyer in a criminal case depends on S. 340 of the Criminal Procedure Code. That section runs as follows :

> "(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader . . . . ."

Thus, the constitutional right guaranteed by cl. (1) of this article has already found legislative expression in S. 340 of the Code of Criminal Procedure. But the embodiment of that right in the form of a Fundamental Right in the Constitution now makes it immune from legislative attack, while in the absence of such constitutional guarantee, the provision in the Code of Criminal Procedure will always be open to repeal or alteration to the detriment of the subject, by a legislative enactment.

Further, it may be observed that S. 340 of the Code of Criminal Procedure is limited in its terms to a person accused of an offence before a Criminal Court or against whom proceedings are instituted under the Code in any such Court. But under cl. (1) of this article the right is a general right and applies to all persons who are arrested, subject to the two exceptions specified in cl. (3). The notes on S. 340 in A. I. R. COMMENTARIES on the Code of Criminal Procedure may usefully be referred to for the scope and effect of S. 340 of the Code.

A further difference between S. 340 of the Code of Criminal Procedure and this article is that this article expressly provides that

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Article 22 — Note 3

[1] 1952 Bom 296 (297) (Pr 3) [AIR V 39] : ILR (1952) Bom 766 (DB), *Mulchand v. Mukund.*

[2] 1934 Bom 70 (71) [AIR V 21] (FB), *In re Philip N. Godinho.*
(1846) 115 E R 1280 (1281) : 9 Q B 279 (281), *Ex parte Evans.* (Per *Parke J.*)

the arrested person shall be entitled as of right not only to be defended by a legal practitioner of his choice but to *consult* such legal practitioner. This right to consult, apart from the right to be defended, does not find specific expression in S. 340 of the Criminal Procedure Code.

In *Gopalan* v. *State of Madras*,[3] Patanjali Sastri, J. (as he then was), expressed his opinion that the words 'procedure established by law' in ART. 21 did not refer to procedure prescribed by *any* law, whatsoever, including any piece of *ad hoc* legislation brought into existence for any special purpose or occasion. His Lordship, however, held in agreement with the other learned Judges, who constituted the majority of the Court in that decision, that the words 'procedure established by law' did not refer to principles of natural justice but to positive enacted law. In order to make his meaning clear as to the distinction which he drew between *general* procedural law and *ad hoc* legislation, brought into existence for a special purpose or occasion, Patanjali Sastri, J., took, for purposes of illustration, the right of an accused person to be defended by a legal practitioner of his own choice. He pointed out that if the right had not been embodied in the form of a Fundamental Right in cl. (1) of this article and merely depended for its legal existence on S. 340 of the Criminal Procedure Code, an Act of the Legislature, which abrogated the right conferred by S. 340 in only certain cases and as a temporary measure, would be valid if the view taken was that the expression 'procedure established by law' applied to any and every law passed by the Legislature without exception, while if the view propounded by him, namely, that the words 'procedure established by law' referred to the general law of procedure, it would be necessary to amend the general law of Criminal Procedure itself, before the right conferred by S. 340 could be affected in any way.

The right to consult and be defended by a legal practitioner of a person's own choice is confined, under clause (1) of this article, to a person who is arrested and does not apply to persons who are not arrested at all.[4] In this respect also, this article differs from S. 340 of the Code of Criminal Procedure under which the right is conferred upon a person accused of an offence before a Criminal Court or against whom proceedings are instituted under the Code in any such Court and there is not a limitation of the right to persons who are actually *arrested*. But this does not affect the operativeness of S. 340 of the Criminal Procedure Code, inasmuch as it is not repugnant to cl. (1) of this article, the reason being that cl. (1) does not *prohibit* the grant of a right to be defended by a pleader in cases not covered by the clause.

The effect of this article being confined in its application, as regards the right to be defended by a pleader, to arrested persons, is that in cases in which a person is not actually arrested, although he may be accused of an offence and may be entitled under S. 340 of the Criminal Procedure Code to be defended by a pleader, the right can be taken away by legislative enactment.[5] Thus, for instance, if a Panchayat Courts Act says that an accused person tried by a Panchayat Court cannot engage a lawyer, such a provision will be valid if the accused has not been arrested or detained in custody at all.[6]

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[3] 1950 S C 27 (Prs 109, 116) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[4] 1951 All 718 (Pr 30) [AIR V 38 C 192] : ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State*.

The right to be defended by a pleader attaches to a person *on arrest* and continues even though he is released on giving security.[7]

Any statutory provision which conflicts with the right of an arrested person to consult and be defended by a legal practitioner of his choice will be void as repugnant to cl. (1) of this article.[8]

The question as to an infringement of the right conferred by cl. (1) can only be raised by the arrested person. For instance, suppose an accused person applies for transfer of his case to a Panchayat Court. The Panchayat Act applicable provides that the accused, in cases tried by a Panchayat Court, shall not be entitled to engage a lawyer to defend him. The application for transfer of the case cannot be opposed by the complainant on the ground that if the case is transferred to the Panchayat Court, the accused will lose his constitutional right under cl. (1) of this article.[9]

In order to show that the Constitution has been infringed, it is not, however, necessary to show that a person arrested under a certain Act was actually denied the right of defence by a legal practitioner. It is sufficient that the Act impugned denied the arrested person such right.[10]

Under the Constitution of the United States of America, the Sixth Amendment guarantees to the accused, in all criminal prosecutions, the right to have the assistance of counsel for his defence. The Amendment provides that "in all criminal prosecutions the accused shall enjoy the right . . . . to have the assistance of counsel for his defence." This applies to proceedings in Federal Court, but as regards

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[5] 1952 All 924 (925) (Pr 5) [A I R V 39] : 1952 Cri L Jour 1666, *Lal Bachan Singh* v. *Suraj Bali.*

[6] 1952 All 924 (925) (Pr 5) [A I R V 39] : 1952 Cri L Jour 1666, *Lal Bachan Singh* v. *Suraj Bali.*

[7] 1951 All 718 (Pr 30) [AIR V 38 C 192] : ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.*

[8] 1953 Punj 52 (55) (Pr 5) [A I R V 40 C 19] : I L R (1952) Punj 362 & 495 : 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi.* (Person arrested under U. P. Goondas Act (1 of 1932)—So far as proviso to S. 5 (2), U. P. Goondas Act, makes it a matter of discretion with the advising Judge whether to allow or not representation by pleader, it must be held to infringe cl. (1).)

1951 All 718 (Pr 30) [A I R V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.* (Case under U. P. Prevention of Crimes (Special Powers) (Temporary) Act, 1949.)

[9] 1952 All 924 (925) (Pr 5) [A I R V 39] : 1952 Cri L Jour 1666, *Lal Bachan Singh* v. *Suraj Bali.*

[10] 1951 All 718 (Pr 30) [AIR V 38 C 192]: ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.*

State Courts, not only are there similar provisions in State Constitutions, but the "due process" clause in the Fourteenth Amendment to the Constitution also is usually relied on as guaranteeing the right of an accused person to have the assistance of counsel for his defence. Under the Fourteenth Amendment, no State shall deprive any person of life, liberty or property without due process of law. This due process clause is regarded as the source of the protection of a constitutional guarantee of the right of accused persons to assistance of counsel.[11]

The right of an accused person to be represented by counsel includes a fair opportunity to secure counsel of his own choice.[12] This view of the Supreme Court of United States of America is also the law under S. 340 of the Criminal Procedure Code. The assistance of counsel must be given to an accused person not only at the trial itself but also in preparing for the trial.[13] This view is expressly given effect to in clause (1) of this article, which provides that an arrested person shall be entitled to *consult* a legal practitioner of his choice. Although S. 340 of the Criminal Procedure Code only refers to the right of an accused person to be defended by a pleader, it is well established that the right necessarily implies a right to consult a pleader preparatory to the trial. (See A. I. R. Commentaries on the Criminal Procedure Code, S. 340, Note 5.)

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11. (1932) 77 Law Ed 158 (170) : 287 U S 45 (68, 69), *Powell* v. *Alabama.* (In U. S. A. accused is entitled to have free legal assistance — It is regarded as a denial of his right under 6th Amendment if the Court does not ask him on his arrest if he requires assistance or if he is able to provide such assistance himself or with the help of friends and relatives.)

[*See* (1949) 337 U S 773 (781) : 93 Law Ed 1686 (1691, 1692), *Gibbs* v. *Burke.* (*Held* that, in the circumstances of the case, though the accused had not made a request for counsel his trial without counsel being provided for him contravened due process clause. This view was not inconsistent with *Betts* v. *Brady*, 316 U S 455 : 86 Law Ed 1595 that due process clause does not guarantee to every person charged with serious crime in a State court the right to the assistance of counsel regardless of the circumstances.)

(1948) 335 U S 437 (441) : 93 Law Ed 127, *Uveges* v. *Pennsylvania.* (Due process clause of 14th and 5th Amendments require counsel for all persons charged with serious crimes when necessary for their adequate defence in order that such persons may be adequately advised as to how to conduct their trial.)

(1948) 333 U S 640 (644) : 92 Law Ed 986 (989), *Bute* v. *Illinois.* (Due process clause in 14th Amendment does not of its own force require tender of assistance of counsel to one charged in a State court of non-capital crime.)

(1947) 332 U S 134 (136, 137) : 91 Law Ed 1955 (1958), *Foster* v. *Illinois.* (By virtue of the 6th Amendment counsel must be furnished to every indigent defendant prosecuted in a Federal Court, in every case, whatever the circumstances — This does not apply to prosecutions in State courts—Such assistance of counsel may be necessary under due process clause of the 14th Amendment.)

(1942) 316 U S 455 (461) : 86 Law Ed 1595 (1601), *Betts* v. *Brady.* (Refusal of trial court to appoint counsel for one prosecuted for robbery who requests such appointment on the ground of want of funds held in circumstances not to have materially prejudiced the defendant.)]

12. (1932) 287 U S 45 (53) : 77 Law Ed 158, *Powell* v. *Alabama.*

13. (1932) 287 U S 45 (57) : 77 Law Ed 158, *Powell* v. *Alabama.*

As regards the meaning of the expression "right to be defended", the principles embodied in the Code of Criminal Procedure as to the nature of defence which is open to an accused person in criminal proceedings may be taken to furnish a general standard of reasonableness, when the nature of the right of defence allowed by an impugned Act is to be considered.[14] But absolute conformity with the procedure laid down in the Code is not essential to the "right to be defended" conferred by cl. (1) of this article.[15]

It has been held by the Supreme Court of America that Attorneys as officers of Court are bound to defend one charged with crime when required to do so by appointment of Court.[16]

(a) Right to be provided with a lawyer by the State

Both under cl. (1) of this article and under S. 340 of the Code of Criminal Procedure, it is only an opportunity to engage a lawyer for defence that is guaranteed and there is no guarantee that a lawyer shall be provided at State expense.[17] Even in capital cases, the accused is not absolutely entitled to have provided defence counsel at public expense.[18] Referring to S. 340 of the Code of Criminal Procedure, in this respect, the Supreme Court observed as follows in *Janardhan Reddy* v. *State of Hyderabad* [19] :

> "This provision must undoubtedly be construed liberally in favour of the accused and must be read along with the rules made by the High Courts and the circular orders issued by them enjoining that where in capital cases the accused has no means to defend himself, a counsel should be provided to defend him. The proper view seems to us to be : (1) that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated; and (2) that a Court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial."

In *Powell* v. *Alabama*,[20] the Supreme Court of America held as follows :

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[14] 1953 Punj 52 (55) (Pr 7) [AIR V 40 C 19] : ILR (1952) Punj 362 and 495 : 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi*. (Mode of defence in security proceedings under Chapter VIII of the Criminal Procedure Code may be compared for seeing whether provisions of Goondas Act allow a "right of defence.")

[15] 1953 Punj 52 (55) (Pr 7) [AIR V 40 C 19] : ILR (1952) Punj 362 and 495 : 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi*.

[16] (1932) 287 U S 45 (73) : 77 Law Ed 158, *Powell* v. *Alabama*.

[17] 1951 S C 441 (443) (Pr 16) [AIR V 38 C 57] : 1951 S C R 729 : 52 Cri L Jour 1491 (SC), *Tara Singh* v. *The State*.

1951 S C 217 (221, 222) [AIR V 38 C 39] : 1951 S C R 344 : 52 Cri L Jour 736 (SC), *Janardhan Reddy* v. *State of Hyderabad*.

[18] 1951 S C 217 (222) [AIR V 38 C 39]: 1951 S C R 344 : 52 Cri L Jour 736 (SC), *Janardhan Reddy* v. *State of Hyderabad*.

[19] 1951 S C 217 (222) (Pr 13) [AIR V 38 C 39] : 1951 S C R 344 : 52 Cri L Jour 736 (SC).

[20] (1932) 287 U S 45 (71):77 Law Ed 158 (172). (Court has power, even in absence of statute, to appoint counsel to defend one charged with crime.)

> "In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defence because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."

With regard to the above decision the Supreme Court observed as follows in *Janardhan Reddy* v. *State of Hyderabad*[21] :

> "That the assignment of a counsel in the circumstances mentioned in the passage is highly desirable, cannot be disputed. But the question raised before us is whether in law non-assignment of a counsel would vitiate the trial. It seems to us that in dealing with the point, we cannot rest our judgment wholly on American precedents, which are based on the doctrine of due process of law, which is peculiar to the American Constitution, and also on certain specific provisions bearing on the right of representation in a criminal proceeding. The provision which is material to the contention raised before us is S. 271 of the Hyderabad Criminal Procedure Code which corresponds to S. 340, Criminal Procedure Code."

4. Clause (2). — Under this clause every person who is arrested and detained in custody must be produced before the nearest Magistrate within a period of twenty-four hours from his arrest and he must not be detained in custody for a longer period unless a Magistrate has authorised such detention. This is a Fundamental Right of very great importance because it ensures that the Executive cannot arbitrarily place under detention any person at its own sweet will and pleasure, for an indefinite period. The maximum limit of time for which police can keep a person in detention without the orders of the Magistrate on their own authority is twenty-four hours. Even within this period, if the arrest is *mala fide* and contrary to law, the police officer concerned will be liable to a suit for damages for false imprisonment. But even if there should be a legal provision empowering a police officer to arrest and detain in custody a person, the maximum period for which he can keep the arrested person in detention without recourse to a Magistrate is twenty-four hours. Any legal provision which enables the Executive or the police to keep in detention a person for a longer period than twenty-four hours without the order of a Magistrate will be void as violating a Fundamental Right granted by the Constitution. Hence, the result of cl. (2) of this article is to give constitutional foundation to the provisions of Ss. 61 and 167 of the Code of Criminal Procedure and make them immune from interference by legislative enactments.

The Magistrate referred to in cl. (2) of this article is a Magistrate acting as a Court.[1]

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[21] 1951 S C 217 (221, 222) [AIR V 38 C 39] : 1951 S C R 344 : 52 Cri L Jour 736 (SC).

Article 22 — Note 4

[1] 1952 Assam 167 (167) (Pr 2) [AIR V 39] : ILR (1952) 4 Assam 18 : 1952 Cri L Jour 1659, *Prabhat Malla* v. *D. C. Kamrup.* (It is immaterial where such Magistrate was sitting at the time of the passing of the order of remand.)

Article 22
Notes 4-5

Both under cl. (2) and under S. 167, Criminal Procedure Code, the actual production of the accused person before a Magistrate is necessary for obtaining an order of remand. But neither under this clause nor under S. 167 of the Code of Criminal Procedure, the production of the accused before the Magistrate is necessary on the occasion of a subsequent remand.[2]

5. Clause (3) (a)—Enemy alien.—This article is not confined in its application to *citizens* of India. The article is of general application and applies to *all persons*. Hence, the article applies also to aliens. So, the four Fundamental Rights, conferred by cls. (1) and (2) of the article, can be availed of even by aliens who are arrested. Such rights cannot be in any way affected by ordinary legislation even in the case of aliens. But clause (3) (a) makes an exception in regard to this matter in the case of (a) enemy aliens, and (b) persons who are arrested or detained under any law providing for preventive detention.

It is to be marked that cl. (3) (a) refers to a person who *for the time being* is an enemy alien.

An alien enemy is defined as follows in Halsbury's LAWS OF ENGLAND :[1]

> "An alien enemy is one whose Sovereign or State is at war with the Sovereign of England or one who is voluntarily resident or who carries on business in an enemy's country even though a natural-born British subject or a naturalised British subject."

Further on, on page 457 and in para. 774 the following occurs :

> "To prove that a person is an alien enemy at the time of the commencement of an action, it is not enough to show that he was some time before domiciled in territory which has become hostile."

The above refers to persons who are alien enemies *vis-a-vis* Great Britain but may be applied to India and to the meaning of the words "enemy alien" in cl. (3) (a) *mutatis mutandis*. The expression "alien enemy" has also been defined in the "Explanation" under S. 83 of the Code of Civil Procedure. The Explanation runs as follows :

> "Every person residing in a foreign country the Government of which is at war with India and carrying on business in that country without a license in that behalf granted by the Central Government, shall, for the purpose of this section, be deemed to be an alien enemy residing in a foreign country."

It is clear that the above definition only applies to alien enemies residing in a foreign country and, therefore, is obviously not directly

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1950 All 562 (Pr 38) [AIR V 37 C 226] : ILR (1952) 1 All 8 : 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State*. (Hence detention under order of Magistrate under S. 123A, (U. P.) Criminal P. C., acting as *persona designata* of State Government under special enactment is not covered by Art. 22 (2). Hence, detention under S. 123A is illegal.)

[2] 1952 Assam 167 (167, 168) (Pr 2) [AIR V 39] : ILR (1952) 4 Assam 18 : 1952 Cri L Jour 1659, *Prabhat Malla* v. *D. C. Kamrup*.

Article 22 — Note 5

[1] Halsbury's Laws of England, 2nd Edn., Vol. I, page 447, para 754.

applicable to the determination of the meaning of "enemy alien" under cl. (3) (a). But the definition is sufficient to show that there is no question of a person being an enemy alien where there is actually no state of war between his country and India. The definition also shows, however, that the test of being an alien enemy is not the nationality of a person and that even citizens of a country may be regarded as alien enemies of that country if they are actually and voluntarily resident in a hostile country. But we are not concerned with this part of the definition for the applicability of cl. (3) (a) as obviously it refers to persons in India.

As regards the rights of alien enemies to sue or defend suits in India, see S. 83 of the Civil Procedure Code and notes thereon in the A. I. R. COMMENTARIES on the Code.

The law in England is also well settled that the Crown is entitled in the exercise of its prerogative to imprison an alien enemy and that an alien enemy so imprisoned has no right to apply for a writ of *habeas corpus.*[2]

6. Clause (3) (b) — "Person arrested or detained under any law providing for preventive detention." — Clause (3), as already stated in NOTE 1, enacts two exceptions to the general rules contained in cls. (1) and (2). The four Fundamental Rights guaranteed to arrested persons by cls. (1) and (2) of this article do not apply to the persons covered by these exceptions. They are (a) enemy aliens and (b) persons arrested or detained under any law providing for preventive detention.

As to the meaning of preventive detention, see NOTE 9.

Unless the law, under which a person is arrested, is one providing for *preventive detention*, the arrested person cannot be deprived of his rights under cls. (1) and (2) of this article. Hence, it becomes material to determine what is preventive detention and whether the law under which a person is arrested is a law providing for preventive detention. If the law is not of this type, the arrested person cannot be denied his constitutional rights under cls. (1) and (2).[1] It has been held that an Act, which enables the police to demand security from persons for being of good behaviour and for keeping the peace, and to arrest such persons on their refusal to furnish the security demanded, is an Act

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[2] (1917) 87 L J K B 43 (46):117 L T 627, *Rex* v. *Knockaloe Camp Commandant.* (1916) 1 K B 268 (276) : 85 L J K B 210, *Rex* v. *Vine Street Police Station Superintendent; Ex parte Liebmann.*

Article 22 — Note 6

[1] 1950 Cal 274 (Pr 20) [AIR V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government.* (The Bengal Criminal Law Amendment Act (6 of 1930) does not deal with preventive detention. The law regarding preventive detention is directed towards preventing a person from doing something which the Legislature thinks should not be done. The Act nowhere says that a person may be detained or otherwise dealt with in order to prevent him from doing anything.)

Article 22
Notes 6-7

providing for preventive detention.[2] But where in such a case, although the *warrant* of arrest is under the Act but actually the *arrest* is not one under the Act, cl. (3) (b) will not apply and the arrested person will not be disentitled to his constitutional rights under cls. (1) and (2). Thus, a warrant under the United Provinces Prevention of Crimes (Special Powers) (Temporary) Act (5 of 1949), issued to the police, directed them to take security from applicants and to take them in custody only on their default. The police took them into custody first and then released them on security thinking that it was a warrant for arrest and that the security to be taken from the applicants was for their appearance before the Magistrate and not for being of good behaviour and keeping the peace. It was held that the arrest could not be said to be under the Act which was held to be one for preventive detention. Hence, cl. (3) of this article did not apply so as to deprive the arrested persons of their right of defence by a legal practitioner of their own choice.[3]

The article seeks to make some amends for the loss of the Fundamental Rights under cls. (1) and (2) in the case of persons arrested under any law providing for preventive detention. Clause (5) of the article provides for such amends. Under that clause, the detenu must be informed, as soon as possible after the detention, the grounds of the detention and also must be given the earliest opportunity of making a representation against the order of detention. These rights are intended to go some way to make up for the loss of the right to be informed the grounds of his arrest and to consult and be defended by a pleader, under clause (1).[4]

7. Preventive detention—Legislative competency.—Under Art. 246 read with Sch. VII, List 1, Entry 9 and List 3, Entry 3, jurisdiction is conferred upon the Legislatures of the land to enact laws for preventive detention. Under Entry 9 of List 1, which relates to the Parliament, power is given to legislate about preventive detention for reasons connected with defence, foreign affairs or the security of India and about persons subject to such detention. List 3 of Sch. VII is Concurrent List, under which both the Parliament and State Legislatures have legislative powers. Entry 3 of this List is as follows:

> "Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention."

This means that on these subjects both Parliament and the State Legislatures have jurisdiction to pass laws.

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[2] 1951 All 718 (Pr 30) [A I R V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.* (U. P. Prevention of Crimes (Special Powers) (Temporary) Act (5 of 1949), S. 4.)

[3] 1951 All 718 (Pr 30) [AIR V 38 C 192] : I L R (1951) 2 All 745 : 52 Cri L Jour 1251 (DB). *Deodat Rai* v. *State.*

[4] 1950 S C 27 (Pr 119) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *Patanjali Sastri, J.*)

In considering whether a law falls within the legislative competence of the Legislature, which has passed it, it has to be seen whether it falls under any of the items in the list which is applicable to the particular Legislature. In order to see whether an Act is covered by Entry 9, List 1 or Entry 3, List 3, it must first be seen whether the Act is one for preventive detention or not. In a certain case, before the late Federal Court of India,[1] the argument was raised that the Act there in question was not one for preventive detention, because the provisions in the Act as regards the safeguards against abuse of power by the executive authorities were so much whittled down that the detention under the Act was arbitrary and not preventive. Although the contention was repelled, that shows that an argument that a particular Act is not one for *preventive* detention is open in attacking the competency of a Legislature to pass a certain law under the entries in the legislative lists above referred to. It is also necessary that an Act providing for preventive detention must relate to one of the objects mentioned in the two entries of the legislative lists above mentioned. Unless the preventive detention, for which provision is made, is for reasons connected with the particular subjects mentioned, the Act would fall outside the scope of the legislative jurisdiction of the Legislatures and would be *ultra vires.*[1a] Thus, under the Bombay Prohibition Act (25 of 1949), S. 136 (1), it was possible for a police officer to detain a person, without being produced before a Magistrate, for a period not exceeding 15 days. It was held that as the Act did not deal with subjects for which alone the Legislature was competent to

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Article 22 — Note 7

[1] 1950 F C 59 (Prs 23, 24, 25) [AIR V 37 C 5]: 1949 F C R 693: ILR 29 Pat 185: 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar.*

[1a] *See* 1950 S C 27 (Prs 26, 244, 245) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Bearing in mind the provisions of Art. 22 read with Art. 246 and Sch. 7, List 1, Entry 9 and List 3, Entry 3, it is clear that the Parliament is empowered to enact a law of preventive detention : (a) for reasons connected with defence, (b) for reasons connected with foreign affairs, (c) for reasons connected with the security of India, and (under List 3), (d) for reasons connected with the security of a State, (e) for reasons connected with the maintenance of public order, or (f) for reasons connected with the maintenance of supplies and services essential to the community.)

(1920) 1920-1 K B 829 (832, 833) : 89 L J K B 387, *Chester* v. *Bateson.* (Lord Atkinson in *Rex* v. *Halliday,* 1917 App Cas 268 quoted:—"It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not aid in any reasonable way in securing the public safety and the defence of the realm, it would not be *ultra vires* and void".)

[*See also* 1950 F C 67 (Prs 7, 8) [A I R V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC), *Rex* v. *Basudeva.* (It is true that black-marketing in essential commodities may at times lead to a disturbance of public order but activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot fall within purview of Item I of List II, Sch. VII, Government of India Act, 1935—Section 3 (1) (i), U. P. Prevention of Black-Marketing (Temporary Powers) Act (22 of 1947), is *ultra vires* the Provincial Legislature: AIR 1949 All 513 (FB), Affirmed.)]

make a law for preventive detention, the provision was *ultra vires.*[2]

To ascertain the class to which a particular enactment really belongs, the Court is to look to the *primary* subject-matter of the legislation. Once the nature and character of a legislation determine its place in a particular list, the fact that it deals incidentally with matter appertaining to other lists is immaterial.[3] In seeing whether an Act for preventive detention falls within legislative power of the Legislature, the Court is not entitled to question the wisdom of the policy of the Legislature.[4]

On a question of vires the intention of the Legislature is immaterial.[5] It has already been seen in NOTE 1 that a law as to preventive detention, which contravenes the provisions of cls. (4) to (7), will be *ultra vires.*[6] See also NOTE 9.

8. Validity of Preventive Detention Act, 1950. — The validity of this Act came up for decision before the Supreme Court of India in *Gopalan* v. *State of Madras.*[1] It was held by majority of the court that the whole Act except S. 14 was *intra vires.* Section 14 was held to be *ultra vires* as contravening the provisions of cl. (5) of this article. Section 14 was consequently repealed under the provisions of the Preventive Detention (Amendment) Act, 1951.

Section 12 of the Preventive Detention Act, 1950, was held to be *ultra vires* by Fazl Ali and Mahajan, JJ., in *Gopalan's case*[2] on the ground that the section contravened the provisions of cl. (7) (a) of this article.

The validity of S. 3 of the Preventive Detention Act, 1950, was attacked in *Gopalan's case*[3] on the ground that, in conferring absolute discretion on the executive authority to detain a person on the strength of its own satisfaction that such detention was necessary for the purpose of preventing him from acting in a manner prejudicial to the specified objects, it delegated legislative power to the Executive. The contention was, however, repelled and it was held that the authority conferred was not delegation of legislative power but was only the vesting of a discretion to enforce the law made by the Legislature. (See also NOTE 9.)

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[2] 1951 Bom 210 (Pr 23) [AIR V 38 C 42] : I L R (1951) Bom 17 : 52 Cri L Jour 80 (FB), *Fram Nusserwanji Balsara* v. *State of Bombay.* (Partly reversed in A I R 1951 S C 318.)

[3] 1950 F C 59 (Pr 15) [AIR V 37 C 5]: 1949 F C R 693: ILR 29 Pat 185: 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar.* (The extent of invasion by a Provincial Act into subjects enumerated in other lists is an important matter not because the validity of an Act can be determined by discriminating between degrees of invasion but for determining what is the "pith and substance" of the Act. AIR 1947 P C 60 Rel. on—Judged by this test, the Bihar Maintenance of Public Order Ordinance, 1949, is a legislation on public order or preventive detention for reason connected with it and not on criminal procedure.)

[4] 1950 F C 59 (Prs 23, 24, 25) [AIR V 37 C 5]: 1949 F C R 693: ILR 29 Pat 185: 51 Cri L Jour 921 (FC), *Lakhi Narayan Das* v. *Province of Bihar.*

[5] 1951 S C 301 (Pr 10) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC), *S. Krishnan* v. *State of Madras.*

[6] 1950 S C 27 (Prs 93, 149) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Per *majority*: Section 14 of Preventive Detention Act (1950) was *ultra vires* as contravening cl. (5) of this article.)

Article 22 — Note 8

[1] 1950 SC 27 (Prs 93, 149) [AIR V 37 C 6]: 1950 S C R 88: 51 CriLJ 1383 (SC). [*See also* ('50) I L R 29 Pat 502 (509, 533) (FB), *L. K. Burman* v. *The State.* (To same effect as AIR 1950 S C 27 (SC).)]

[2] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[3] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

(a) Meaning and object of preventive detention

9. Preventive detention—General principles. — In *Rex* v. *Halliday*,[1] Lord Atkinson observed as follows :

> "Preventive justice, as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England."

But the peculiarity of this Constitution is that it makes provision in the Constitution itself as regards a law of preventive detention. In England, during the Great War and during the World War II, the Executive was invested with powers of preventive detention for the purpose of the security of the realm and in India during the war, the Government, under the Defence of India Act, enjoyed such powers. Such powers were continued also subsequently under various Provincial Public Safety Acts. But such powers are usually regarded only as emergency powers to be utilised in times of war and so on, and they are not regarded as powers that should be a normal feature of legal system of a country. As pointed out by Kania, C. J., in *Gopalan* v. *State of Madras*:[2]

> "Neither the American nor the Japanese Constitution contains provisions permitting preventive detention, much less laying down limitations on such right of detention, in normal times, i. e. without a declaration of emergency. Preventive detention in normal times, i. e. without the existence of emergency like war, is recognised as a normal topic of legislation in LIST 1, Entry 9 and LIST 3, Entry 3 of SCH. VII. Even in the chapter on Fundamental Rights, ART. 22 envisages legislation in respect of preventive detention in normal times. The provisions of ART. 22 (4) to (7), by their very wording, leave unaffected the large powers of legislation on this point, and emphasize particularly by ART. 22 (7), the power of the Parliament to deprive a person of a right to have his case considered by an Advisory Board. Part III and Art. 22 in particular are the only restrictions on that power and, but for those provisions, the power to legislate on this subject would have been quite unrestricted."

In the same case Patanjali Sastri, J. (as he then was), observed as follows :[3]

Article 22 — Note 9

[1] (1917) 1917 App Cas 260 (273) : 86 L J K B 1119.

[2] 1950 S C 27 (Pr 22) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[3] 1950 S C 27 (Pr 119) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

"The outstanding fact to be borne in mind in this connection is that preventive detention has been given a constitutional status. This sinister-looking feature, so strangely out of place in a democratic constitution, which invests personal liberty with the sacrosanctity of a Fundamental Right, and so incompatible with the promises of its Preamble, is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic."

It is obvious that preventive detention necessarily involves the *detention* of a person. Detention means that the person detained is at liberty to go *nowhere*. Hence, a law which only provides for externment or banishment, although as a precautionary measure, is not a law providing for preventive detention.[4] Hence, a person, arrested for the purpose of being banished from a certain place, cannot be deprived of his rights under cls. (1) and (2) of this article.[5] Similarly, a law imposing restrictions on movements is not a law providing for preventive detention[6] and the conditions imposed by this article for the validity of a law relating to preventive detention do not apply to a law merely authorising restrictions of movement.[7]

As to the meaning of preventive detention, that meaning will be clear by a look at the wording of S. 3 of the Preventive Detention Act, 1950. Section 3 (1) (a) of the Act provides that the "Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to . . . . . ." The words "with a view to preventing him from acting" are important as showing the real meaning of preventive detention. The object of the detention, therefore, must be to prevent a person from acting in a certain manner. If such is not the object of the detention then it will not be preventive detention and the law providing for such detention will not be one relating to preventive detention. Thus, it was held that the Bengal Criminal Law Amendment Act (6 of 1930) was not a law relating to preventive detention, because the law did not say anywhere that a person might be detained or otherwise dealt with in order to *prevent* him from doing anything.[8]

There is no authoritative definition of the term 'preventive detention' in Indian law. The word 'preventive' is used in contradistinction to the word 'punitive.' The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge formulated if the justification of such detention is suspicion or reasonable probability and not criminal conviction warranted by legal evidence.[9]

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[4] 1953 Punj 52 (55) (Pr 5) [AIR V 40 C 19] : ILR (1952) Punj 362 and 495: 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi*. (U. P. Goondas Act (1 of 1932) is not a law providing for preventive detention.)

[5] 1953 Punj 52 (55) (Pr 5) [AIR V 40 C 19] : ILR (1952) Punj 362 and 495 : 1953 Cri L Jour 421 (DB), *Inderjit Singh* v. *State of Delhi*.

[6] 1953 Assam 77 (78) (Pr 4) [AIR V 40 C 32] : ILR (1952) 4 Assam 126 : 1953 Cri L Jour 657, *Amrit Bhattacharjya* v. *The State*. (Assam Maintenance of Public Order Act (5 of 1947) (as amended by Assam Act 21 of 1950), S. 2, is not a law for preventive detention.)

[7] 1953 Assam 77 (78) [AIR V 40 C 32] : ILR (1952) 4 Assam 126 : 1953 Cri L Jour 657, *Amrit Bhattacharjya* v. *The State*.

[8] 1950 Cal 274 (Pr 19) [AIR V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government*.

As pointed out by Patanjali Sastri, J. (as he then was), in the passage already quoted, the object of providing for preventive detention in the Constitution is obviously to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic. In *Rex* v. *Halliday*,[10] Lord Atkinson observed as follows :

> "In that, as in almost every case, where preventive justice is put in force, some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is under this statute inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defence of the realm. It must not be assumed that the powers conferred upon the Executive by this statute will be abused."

Lord Atkinson also observed as follows in the same case:[11]

> "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."

Lord Finlay, L. C., in the same case,[12] pointed out that the law providing for preventive detention is not punitive but precautionary. Bankes, L. J., pointed out, in *Ronnfeldt* v. *Phillips*,[13] that in times of grave national peril, it was necessary that competent military authorities should be clothed with wide powers to act and to act on suspicion. Honest mistakes might easily be made and, if they were honestly made, must be borne as one of the consequences of a lamentable war. In the same case Scrutton, L. J., observed as follows :[14]

> "The courts were always anxious to protect the liberty of the subject. They did so both in the interest of the subject himself and in the interest of the State. In time of war, there must be some modifications in the interests of the State. It had been said that a war could not be conducted on the principles of the Sermon on the

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[9] 1950 S C 27 (Pr 165) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.
[*See also* 1950 Hyd 66 (Pr 6) [AIR V 37 C 20]: ILR (1951) Hyd 196 (DB), *Mohd. Abdur Rahman* v. *Hyderabad State*. (Preventive detention means that restraint whose object is to prevent probable and in some cases possible activity on the part of a person, which is deemed prejudicial and which is apprehended from him on grounds of his past conduct.)]

[10] (1917) 1917 App Cas 260 (273) : 86 L J K B 1119.

[11] (1917) 1917 App Cas 260 (271) : 86 L J K B 1119, *Rex* v. *Halliday*.

[12] (1917) 1917 App Cas 260 (269) : 86 L J K B 1119, *Rex* v. *Halliday*.

[13] (1918) 35 T L R 46 (46).

[14] (1918) 35 T L R 46 (47), *Ronnfeldt* v. *Phillips*.

Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta."

In America also, certain standards, which do not conform to ordinary and normal law, have been applied by Judges during the period of the war and sometimes they are referred to as being included in "war power".[15]

Thus, the power of preventive detention, to be exercised in emergencies, is not a conception unknown to the legal systems of the civilised world and the recognition of such a power under the Constitution of India, therefore, has to be regarded only as a provision for circumstances requiring emergent action.

As pointed out, however, in NOTE 1, it must not be overlooked that although preventive detention is, in the phrase of Patanjali Sastri, J. (as he then was), given a "constitutional status" and though under cl. (3) of this article it is provided that the four Fundamental Rights, conferred on all arrested persons as essential safeguards against abuse of power by police or Executive, are not applicable to persons detained under a law relating to preventive detention, and although, as pointed out by Kania, C. J., the provisions of cls. (4) to (7) of this article leave very extensive powers to the Legislature to affect the personal liberty of persons detained under law relating to preventive detention, yet, it must not be overlooked that a minimum of protection is guaranteed as constitutional and Fundamental Rights under cls. (4) to (7) and that it does not lie in the power of any Legislature to take away or abridge these rights under any law relating to preventive detention.

Under the Code of Criminal Procedure, Chapter VIII, there are provisions for ordering a person to give security for keeping the peace or for being of good behaviour. If the security that is ordered is not furnished, the person against whom the order is passed will be detained in prison under S. 123 of the Code. The provisions of Chapter VIII of the Code are generally regarded as *preventive* provisions as distinct from punitive provisions. But still detention under those provisions cannot be regarded as "preventive detention" within the meaning of this article, because the reason is that the words "preventive detention" in this article seem to refer to detention by executive authority, whereas the detention for failure to furnish security under Chapter VIII of the Criminal Procedure Code is a result of an order of a *Court*. Where, however, the police themselves have the power to demand security for keeping the peace or being of good behaviour from a person and to arrest on his failure to furnish the security, it has been held that the detention by the police of such a person will be preventive detention.[16]

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[15] **1950 S C 27 (Pr 94) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC),** ***Gopalan* v. *State of Madras.*** **(Per *Mahajan J.*)**

[16] **1951 All 718 (Pr 30) [AIR V 38 C 192] : ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB),** ***Deodat Rai* v. *State.*** **(U. P. Prevention of Crimes (Special Powers) (Temporary) Act (5 of 1949), S. 4.)**

It will be clear from the above that preventive detention has certain special features. Firstly, it is detention by the *Executive* without trial or enquiry by *Court*. Secondly, the object of the detention is *prevention* and not punishment. In other words, preventive detention is resorted to when the Executive is convinced that such detention is necessary in order to *prevent* the person detained from acting in a manner prejudicial to certain objects which are specified by the law. The action, therefore, being only precautionary, as pointed out by Lord Finlay, L. C., in *Rex* v. *Halliday*[17] already cited, the matter has necessarily to be left to the discretion of the executive authority which can only act on suspicion and cannot be expected to have in every case *proof* of any crimes committed, which will satisfy a Court of law.

(b) Law of preventive detention--Essentials for validity

In *Gopalan* v. *State of Madras*,[18] one of the grounds on which the validity of the Preventive Detention Act, 1950, was attacked was that under S. 3 of the Act the Executive was given authority to detain any person merely on its own satisfaction that it was necessary to do so to prevent him from acting in a manner prejudicial to certain objects. It was contended that the section laid down no objective standard of conduct by following which a person might avoid the clutches of the law. It was also argued that the section amounted to a delegation of legislative power to the Executive. The objections on both these grounds were repelled by the Supreme Court. It was pointed out that S. 3 only confers a discretion on the officer to enforce the law made by the Legislature and does not delegate any legislative power to the officer. It was also explained how it was impossible to lay down any objective standard of conduct by following which a person could avoid being arrested under the law relating to preventive detention. Kania, C. J., observed as follows:[19]

> "It is clear that no such objective standard of conduct can be prescribed except as laying down conduct tending to achieve or to avoid a particular object. For preventive detention action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions perhaps spread over a considerable period. As observed by Lord Finlay in *Rex* v. *Halliday*,[20] a Court is the least appropriate tribunal to investigate the question whether circumstances of suspicion exist warranting the restraint on a person. The contention is urged in respect of preventive detention and not punitive detention. Before a person can be held liable for an offence, it is obvious that he should be in a position to know what he may do or not do, and an omission to do or not to do will

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[But see 1950 All 562 (Pr 21) [AIR V 37 C 226] : ILR (1952) 1 All 8 : 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State.*]

17. (1917) 1917 App Cas 260 : 86 L J K B 1119.

18. 1950 S C 27 (Prs 27, 123) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

19. 1950 S C 27 (Pr 27) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

20. (1917) 1917 App Cas 260 (269) : 86 L J K B 1119.

result in the State considering him guilty according to the Penal enactment. When it comes, however, to preventive detention, the very purpose is to prevent the individual not merely from acting in a particular way but, as the sub-heads summarised above (the objects set forth in SCH. VII, LIST 1, Entry 9 and LIST 3, Entry 3) show, from achieving a particular object. It will not be humanly possible to tabulate exhaustively all actions which may lead to a particular object. It has, therefore, been considered that a Preventive Detention Act which sufficiently prescribes the objects, which the Legislature considers have not to be worked up to, is a sufficient standard to prevent the legislation being vague."

As pointed out by Patanjali Sastri, J., in the same case,[21] it is not practicable to lay down objective rules of conduct, the failure to conform to which should lead to detention. So also, in *Liversidge* v. *Anderson*,[22] Lord Macmillan observed as follows: "The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence." A reading of the speeches of their Lordships in the above cases clearly negatives the view that there is a delegation of legislative power to the Executive in such cases or that the law is vitiated by the failure to provide an objective standard of conduct.

It will be noted that under ART. 21 a law, according to which a person is deprived of his personal liberty, has to be a *valid* law. The validity of a law may be questioned not only on the ground of its being outside the legislative powers of the particular Legislature which has passed it or on the ground of its being repugnant to any of the Fundamental Rights guaranteed by the Constitution, but also on the ground of other objections. Among these objections would come an objection that the law amounts to a delegation of legislative power to the Executive which would be a contravention of the provisions of the Constitution conferring legislative power exclusively on the Legislature. Similarly, an objection that a law is vague and uncertain would also be a valid objection where such objection is applicable. As shown above, the validity of the Preventive Detention Act, 1950, was questioned before the Supreme Court on the above mentioned grounds in *Gopalan's case*[23] but both objections were negatived by the Supreme Court.

(c) Principles of natural justice

The scheme of cls. (4) to (7) has already been explained in NOTE 1. The validity of any law relating to preventive detention cannot be attacked merely on the ground of its being contrary to principles of natural justice. This is clear from the provisions of ART. 21 under which, according to the interpretation placed on the article by the Supreme Court in *Gopalan's case*,[24] it is only necessary that there should be followed a procedure laid down by enacted law in the matter of depriving a person of his personal liberty. But the provisions of any such law must conform to cls. (4) to (7) of this article. Provided that this condition is satisfied and that the law relating to preventive detention is otherwise valid, as explained above, arguments purely based on principles of natural justice cannot be advanced against the validity of such a law. Thus, a right to a judicial trial cannot be claimed as an absolute right and the denial of such a right in a law relating to preventive detention will not invalidate it.[25] Similarly, no notice before detention can be claimed as a matter of right and the failure to provide for such a notice will not invalidate a law relating to preventive detention.[26] Such notice will be absolutely inappropriate and out of place in any case of preventive detention.[27]

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[21] 1950 S C 27 (Pr 123) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[22] (1941) 3 All E R 338 (367) : 110 L J K B 724.

[23] 1950 S C 27 [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

The right to orderly procedure is regarded as a matter of fundamental natural justice. Apart from the question that such a right has to be provided by actual statutory provisions before it can be demanded, an orderly procedure is guaranteed by the provisions of cls. (4) to (7) of this article.[28] An orderly course of procedure is not necessarily limited to procedure sanctioned by usage. New forms of procedure are as much held, even by the Supreme Court of America, due process of law as old forms, provided they gave a person a fair opportunity to present his case.[29] Such an opportunity is guaranteed by cl. (5).

(d) Legislative competency

The question as to the legislative competency of Indian Legislatures to pass laws regarding preventive detention has already been dealt with in NOTE 7.

(e) Spirit of Constitution

In considering the validity of a law relating to preventive detention, the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, the Court cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution, which is not even mentioned in the instrument. To quote the words[30] of Kania, C. J. :

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[24] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[25] 1950 S C 27 (Pr 29) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[26] 1950 S C 27 (Pr 37) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[27] 1950 S C 27 (Prs 37, 107) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[28] 1950 S C 27 (Pr 28) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[29] 1950 S C 27 (Pr 28) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[30] 1950 S C 27 (Pr 26) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

> "It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the expressed words of a written constitution give that authority. It is also stated (on authority) if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights."

(f) Principles of construction

The principle that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved. This was the view expressed by Viscount Maugham in *Liversidge* v. *Anderson.*[31] In the same case, Lord Macmillan observed as follows[32] :

> "In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the Courts ought to adopt in war time canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the Courts in seeing that the law is duly observed especially in a matter so fundamental as the liberty of the subject. Rather the contrary. However, in a time of emergency when the life of the whole nation is at stake, it may well be that the regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a peacetime measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote, rather than to defeat, its efficacy for the defence of the realm."

But the above principles, it is conceived, should not be taken as applicable in their entirety to the interpretation of this article or of preventive detention legislation *in general.* It must be noted that the above principles have special reference to war time measures when the nation is in very great peril and cannot be regarded as being of universal or eternal applicability, so as to hold good even in normal peacetimes. Hence, the ordinary rule of strict construction and presumption in favour of the subject must be followed in interpreting laws relating to preventive detention.[33] Further, as pointed out by

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[31] (1941) 3 All E R 338 (344): 110 L J K B 724: 1942 App Cas 206. (Per *Viscount Maugham.*)

[32] (1941) 3 All E R 338 (366) : 110 L J K B 724, *Liversidge* v. *Anderson.*

Bose, J.,[34] personal liberty is a Fundamental Right under the Constitution and the limitations thereon are not fundamental and this important fact must be remembered in interpreting the Constitution as well as the validity or the meaning of any legislative enactment affecting personal liberty.

The true approach and mode of construction to be adopted was explained by Patanjali Sastri, J. (as he then was), in *Gopalan's case.*[35] He pointed out that the provisions of cls. (3) to (7) of this article are strangely out of place in the context of a democratic constitution, but have been obviously designed to prevent an abuse of freedom by anti-social and subversive elements, which might imperil the national welfare of the infant Republic. He went on to observe[36] : "It is in this spirit that cls. (3) to (7) of ART. 22 should, in my opinion, be construed and harmonised as far as possible with ART. 21, so as not to diminish unnecessarily the protection afforded for the legitimate exercise of personal liberty."

(g) Conformity to law

An order of detention may be challenged on the ground not only of the invalidity of the law under which it is passed or of its being in contravention of the provisions of the Constitution but also on the ground of its not being made in conformity with the Act under which it purports to be made.[37] This follows from ART. 21 because the detention in such a case will not be according to procedure established by law.

In *Ram Krishan* v. *State of Delhi,*[38] Patanjali Sastri, C. J., observed as follows :

> "Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court."

In the same case,[39] his Lordship observed as follows :

> "Notwithstanding repeated admonition by this Court that due care and attention must be bestowed upon matters involving the

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33. 1951 Hyd 43 (Pr 2) [AIR V 38 C 7] (DB), *Ramakishtayya* v *State.*
1950 All 69 (Pr 20) [AIR V 37 C 22]: 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*

34. 1951 S C 270 (Pr 22) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.*

35. 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

36. 1950 S C 27 (Pr 119) [AIR V 37 C 6]:1950 S C R 88:51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

37. 1954 Pat 57 (58, 59) (Prs 1, 2) [AIR V 41 C 23] : ILR 32 Pat 55: 1954 Cri L Jour 91 (DB), *Karamvir* v. *State.* (Preventive Detention Act (1950), Ss. 8 (3) and 9 — Chairman of Advisory Board not duly appointed — Reference made beyond 30 days of date of detention—Provisions of Ss. 8 (3) and 9 held violated—Effect of amendment of S. 8 considered — Provisions of Ss. 8 and 9 held are in the nature of statutory safeguards—Detention held illegal.)
1950 Mad 162 (Pr 26) [AIR V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate.*

38. 1953 S C 318 (320) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC).

39. 1953 S C 318 (319) (Pr 2) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.*

liberty of the individual, it is distressing to find that such matters are dealt with in a careless and casual manner."

Under S. 3 (1) of the Preventive Detention Act, 1950, an order for detention is to be made by the Central Government or the State Government. Under ART. 166 (1), all executive action shall be expressed to be taken in the name of the Governor. Hence, an order of detention which states that the Governor was 'satisfied' is valid. That the order was signed by the Home Secretary is not a defect.[40]

See also NOTES 9, 10 and 11.

(h) Criminal prosecution if bar to preventive detention, and vice versa

It has been seen under ART. 20 that no person shall be prosecuted and punished for the same offence more than once. In the case of preventive detention, as already explained above, there is neither prosecution nor punishment for an offence. Hence, the fact that a person has once been prosecuted and convicted will not be a bar to his being detained under law relating to preventive detention, although the facts that give rise to the apprehension of prejudicial conduct on his part in the future may be the same.[41] Conversely, the detention of a person under any law relating to preventive detention will not *ipso facto* be a bar to his prosecution for a substantive offence which he has committed and for which he is liable to punishment under the criminal law. This may, however, have a bearing upon the question of *bona fides* of his detention. (See further under NOTES 10 and 11.)

(i) Order for preventive detention—Change of officers

The Constitution contemplates, as will be seen from the wording of cl. (5), detention "in pursuance of an order," but does not by itself preclude an order for detention being made by one officer and the same being carried out by his successor after he has left the district.[42]

10. Preventive detention — "Satisfaction" of detaining authority. — As already seen in NOTE 9, preventive detention, in its very nature, is a proceeding taken by the Executive on suspicion and it is impossible in the nature of things to insist upon an objective standard being adopted in such cases. The detaining authority is given power to detain a person on the basis of its own satisfaction that such detention is necessary to prevent the detained person from acting in a manner prejudicial to certain objects specified by the law. The satisfaction of the detaining authority, therefore, is a purely subjective affair. The detaining authority may act on any material and on any information that it may have before it. Such materials and information may merely afford basis for a sufficiently strong suspicion to take action but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable.[1] Hence, it is not open to the Court to go into the question whether the detaining authority had sufficient material before it to proceed to take action. In other words, the Court cannot substitute its own satisfaction for that of the detaining authority.[2] Thus, the reasonableness or otherwise of the action, taken by the detaining authority, is beyond the purview of the power of the Court.[3]

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[40] 1952 S C 350 (352) (Pr 7) [AIR V 39]: 1952 S C R 756: 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.*

[41] 1952 Cal 26 (Pr 15) [AIR V 39 C 10] : 1952 Cri L Jour 204 (DB), *Ramanlal* v. *Commr. of Police.* (The "satisfaction" of the Government under S. 3 of the Preventive Detention Act is not a second prosecution.)

[42] 1951 Bom 33 (Prs 3, 17) [AIR V 38 C 13] : ILR (1951) Bom 546 : 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.* (Delay of about two months after the order was issued by the previous District Magistrate was held not unreasonable.)

The leading case on the subject is that of *Liversidge* v. *Anderson*.[4] In that case, the Court had to deal with a provision of law under which the detaining authority was given the power of detention if it had reasonable cause to believe certain facts about the person to be detained. It was held by the majority of the Court that notwithstanding the form of the words used, the Court was not entitled to consider whether *in fact* the detaining authority had reasonable cause to believe, and that it was quite sufficient if the Court came to the conclusion that the detaining authority *bona fide* thought he had

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Article 22 — Note 10

1. 1950 S C 27 (Prs 27, 123) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

1952 Hyd 112 (115) (Pr 3) [A I R V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB), *Maqdoom Mohiuddin* v. *State of Hyderabad*.

1950 Mad 162 (Prs 28, 29, 30) [A I R V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate*. (It is a personal or "subjective" and not an impersonal or "objective" standard of satisfaction. The Court cannot examine the conscience of the detaining authority to find out whether its reasons for satisfaction were sufficient. No outside decision is involved in this matter of satisfaction which rests solely with the detaining authority.)

2. 1953 S C 451 (452) (Pr 4) [A I R V 40 C 107] : 1953 Cri L Jour 1921 (SC), *Ashutosh* v. *State of Delhi*.

1950 F C 129 (Pr 5) [A I R V 37 C 12] : 1949 F C R 827 : 51 Cri L Jour 1480 (FC), *Machindar Shivaji* v. *The King*.

1949 All 148 (Pr 36) [A I R V 36 C 57] : I L R (1949) All 458 : 50 Cri L Jour 214 (FB), *Durgadas* v. *Rex*.

1949 Bom 319 (Pr 10) [AIR V 36 C 83] : I L R (1949) Bom 508 : 51 Cri L Jour 184 (FB), *In re Jayantilal*.

1949 Mad 307 (Pr 67) [A I R V 36 C 146] : I L R (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanswami* v. *Inspector of Police*.

1951 Pat 47 (Pr 20) [AIR V 38 C 6] : ILR 30 Pat 630 : 52 Cri L Jour 406 (DB), *Dayanand Modi* v. *State of Bihar*.

1950 All 69 (Prs 26, 27) [AIR V 37 C 22]: 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex*.

1950 East Punj 172 (Pr 9) [A I R V 37 C 32] : 51 Cri L Jour 888, *Jankidas* v. *Imperator*. (East Punjab Public Safety Act (5 of 1949), S. 3—Whether detenu is doing propaganda objectionable from communal point—District Magistrate is the sole judge—High Court cannot adjudicate on such facts.)

1950 Mad 162 (Pr 28) [AIR V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate*.

1949 Mad 438 (Pr 3) [AIR V 36 C 198], *In re Narahari*.

1948 Bom 360 (Pr 5) [AIR V 35 C 92] : 49 Cri L Jour 524 (DB), *In re Krishnaji Gopal*.

3. 1949 Mad 596 (Prs 27, 28, 30) [A I R V 36 C 262] : 50 Cri L Jour 843 (DB), *A. K. Gopalan* v. *Dist. Magistrate, Malabar*.

4. (1941) 3 All E R 338 (346) : 110 L J K B 724. (Regulation 18B of the General Regulations under Defence of the Realm Act.)

Article 22
Note 10

reasonable cause to believe. Lord Atkin, however, dissented from the above view and held that if the detaining authority's belief was based on facts capable of proof, those facts should be proved to the Court.[5]

In giving reasons for the majority view Viscount Maugham observed[6] as follows :

> "It is obvious that in many cases he (Secretary of State) will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in Court without the greatest risk of prejudicing the future efforts of the Secretary of State in this matter and in like matters for the defence of the realm."

Lord Macmillan observed as follows in the same case[7] :

> "How could a Court of law, however, deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy and not one of fact ? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no Court can share. As Lord Parker said in *The Zamora*,[8] 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would obviously be undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public'."

As observed by Lord Finlay in *Rex* v. *Halliday*,[9] "no tribunal for investigating the question, whether circumstances of suspicion exist warranting some restraint, can be imagined less appropriate than a court of law."

As regards the objection that such unrestricted power in the hands of the executive authorities would lead to its being abused, Lord Dunedin observed as follows in *Rex* v. *Halliday* :[10]

> "That is true but the fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument, obedience to which may be compelled by some judicial body. The danger of abuse is theoretically present; practically as things exist, it is, in my opinion, absent."

To similar effect are the observations of the Judges in *Gopalan's case*.[11] For instance, in connection with the interpretation of the words 'procedure established by law' in ART. 21, after referring to the possibility of abuse of legislative power by the Legislature arbitrarily abolishing the right of being defended by counsel, conferred upon accused persons under S. 340 of the Criminal Procedure Code, Patanjali Sastri, J., proceeded to observe[12] as follows :

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[5] (1941) 3 All E R 338 (358) : 110 L J K B 724, *Liversidge* v. *Anderson*.

[6] (1941) 3 All E R 338 (346) : 110 L J K B 724, *Liversidge* v. *Anderson*.

[7] (1941) 3 All E R 338 (367) : 110 L J K B 724, *Liversidge* v. *Anderson*.

[8] (1916) 2 App Cas 77 : 114 L T 626.

[9] (1917) 1917 App Cas 260 (269) : 86 L J K B 1119.

[10] (1917) 1917 App Cas 260 (270, 271) : 86 L J K B 1119.

[11] 1950 S C 27 [A I R V 27 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

> "But in a free democratic Republic, such a drastic change in the normal law of procedure, though theoretically possible, would be difficult to bring about and that practical difficulty will be the measure of the protection afforded by Art. 21."

It would be better to pause here for a while just to consider the constitutional position on this matter. Under Art. 21, the Legislature is entitled to confer absolute and untrammelled discretion on the Executive under any law relating to preventive detention. The conferment of such discretion will be amply covered by the words 'procedure established by law' in Art. 21. But the Legislature has to act within the limits set by the Constitution and the law made by the Legislature may be questioned if it is against the Constitution or otherwise open to any objection that may be applicable. Thus, a law may be challenged on the ground of its amounting to delegation of legislative power to the Executive or on the ground of its being too vague and uncertain in its provisions.

It may be noted here that under S. 3 of the Preventive Detention Act, 1950, it is not stated that the detaining authority must have a *reasonable cause* to be satisfied in a particular manner. The section merely says that if the detaining authority is satisfied in a particular manner, he can proceed under the section. And hence the controversy that arose with regard to the meaning of the words 'having reasonable cause to believe' in *Liversidge's case*,[12a] discussed above, is only of academical interest in so far as the interpretation of S. 3 of the Preventive Detention Act is concerned. But the fact that, notwithstanding the use of the words 'having reasonable cause to believe,' the majority of the House of Lords held that the detaining authority in England was not bound to establish in a court of law that, as a matter of fact, he had a reasonable cause to believe a particular matter, but that it was sufficient if he showed that he *bona fide* thought he had reasonable cause to believe certain things, shows how much stronger is the position under the Preventive Detention Act with reference to the absolute discretion conferred upon the detaining authority under the law and the immunity of such discretion from being questioned in a court of law.

This, however, does not mean that the exercise of power by the detaining authority under the law of preventive detention is not open to question under any circumstances. Although the Court cannot examine whether the detaining authority had, as a matter of fact, *a reasonable ground* for its "satisfaction" that preventive action was necessary, yet, the Court can certainly consider whether the executive

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12. 1950 S C 27 (Pr 116) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

12a. (1941) 3 All E R 338 (367) : 110 L J K B 724, *Liversidge* v. *Anderson*.

authority was really satisfied at all as alleged. This topic is further dealt with in NOTES 11 and 21.

We have already adverted above to the fact that the detaining authority under any preventive detention law is perfectly justified in acting on mere suspicion and is not bound to limit its action to cases in which there is before it evidence which is capable of being produced before a court of law.[13] For instance, the detaining authority can act on hearsay evidence,[14] confidential reports[15] and so on. It is also not necessary, where the relevant Act does not prescribe such requirement, that there should be any enquiry in the nature of a preliminary enquiry before the detaining authority takes action.[16] The mere fact that under a particular law there is no provision for an Advisory Board (which is usually provided in similar laws of preventive detention) does not mean that there must be a preliminary enquiry, unless the Act concerned itself prescribes such preliminary enquiry.[17]

It may be pointed out that the relevant entries in the legislative lists in SCH. VII, enumerating the different subjects falling within the jurisdiction of the Parliament and the State Legislatures, speak of preventive detention "for reasons connected with defence and so on." This, however, does not mean that before *taking action* under preventive detention enactments, the Executive must take any particular steps to ensure that the action taken is for reasons connected with the various subjects mentioned in the entries in the legislative lists. The phrase "for reasons connected with" in the entries in the legislative lists is only applicable to the *enactments* passed by the Legislatures and not to the actions taken under them. Once an enactment is passed providing for preventive detention for reasons connected with the stated objects, it has only to be seen whether the action of the Executive falls within the purview of the enactment, and where the enactment provides that the Executive can act on its own satisfaction that certain conditions existed and that certain action is necessary, it is not for the Courts to consider the terms and conditions on which the executive authority has been empowered to order preventive detention, for these are matters of policy.[18]

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[13] 1951 Pat 439 (Pr 6) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB), *Mohit Lal* v. *The State.* (Hence the fact that the police were unable to furnish a detailed report till a date very near the one on which the order was passed cannot lead to the inference that the order was passed *mala fide* in the absence of materials.) (1917) 1917 App Cas 260 (275) : 86 L J K B 1119, *Rex* v. *Halliday.*

[14] (1941) 3 All E R 338 (346) : 110 L J K B 724, *Liversidge* v. *Anderson.*

[15] (1941) 2 All E R 749 (754), *Ex parte Budd.* (Confidential reports, etc., need not be disclosed — Court can act on the affidavit of the Secretary of State: *Ex parte Lees,* (1941) 1 K B 72, Foll.)

[16] 1950 F C 129 (Pr 6) [AIR V 37 C 12] : 1949 F C R 827 : 51 Cri L Jour 1480 (FC), *Machindar Shivaji* v. *The King.*

[17] 1950 F C 129 (Pr 6) [AIR V 37 C 12] : 1949 F C R 827 : 51 Cri L Jour 1480 (FC), *Machindar Shivaji* v. *The King.*

[18] 1950 F C 129 (Pr 5) [AIR V 37 C 12] : 1949 F C R 827 : 51 Cri L Jour 1480 (FC), *Machindar Shivaji* v. *The King.* (It is undoubtedly open to the Court, on a question of vires, to consider whether an impugned enactment has been made

The "satisfaction" of the detaining authority may be based upon the past activities of the intended detenu, if such activities, in the opinion of the detaining authority, give rise to an apprehension of prejudicial conduct on his part in the future.[19] The fact that the intended detenu has been in jail since the time of the past activities giving rise to such apprehension is itself no bar to action under preventive detention law, if the detaining authority is satisfied that, having regard to the past activities, the intended detenu is likely to indulge in prejudicial activities on his release.[20] (See also NOTE 23.)

Although, thus, the question of the detaining authority, under a preventive detention enactment, being satisfied as to the need for action is not open to examination in a court of law with reference to the reasonableness of such satisfaction, yet the factum of such satisfaction is an essential condition precedent for the action taken. The order of detention must show on the face of it that the detaining authority is satisfied to the effect specified under the detention enactment.[21] The terms of the law must be strictly complied with and the order must declare the satisfaction of the detaining authority as to all the requisite particulars mentioned in the detention enactment.[22] The reason is that the person can be deprived of his personal liberty only in accordance with the procedure established by law and where the law requires that the order of detention can be passed only under certain circumstances, the existence of those circumstances must be evident from the order itself.[23]

The "satisfaction" must be of the particular authority who is empowered under the law to pass the order of detention. Thus, where the authority having the power to pass such order is the Home

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with a view to prevent only such act or acts as are likely to endanger the public peace, etc.)

[19] 1952 S C 350 (352) (Pr 8) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.*

1953 Pat 351 (353) (Pr 6) [AIR V 40 C 125] : 1953 Cri L Jour 1734 (DB), *Rajendra Nath* v. *State of Bihar.*

1950 All 69 (Prs 26, 27) [AIR V 37 C 22]: 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*

1950 Mad 162 (174) (Pr 30) [AIR V 37 C 75] : 51 Cri L Jour 525, *M. R. S. Mani* v. *District Magistrate, Mathurai.*

[20] 1951 Hyd 128 (Pr 4) [AIR V 38 C 53] : ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.*

[21] 1950 Mad 162 (Pr 34) [AIR V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate.*

1949 Mad 596 (Pr 30) [AIR V 36 C 262] : 50 Cri L Jour 843 (DB), *A. K. Gopalan* v. *Dist. Magistrate, Malabar.*

[22] 1952 Cal 791 (798) (Pr 3) [AIR V 39] : 1952 Cri L Jour 1662, *Khudi Prosad Bhakat* v. *The State of West Bengal.* (AIR 1950 Cal 543, Foll.)

1948 Bom 360 (Pr 6) [AIR V 35 C 92] : 49 Cri L Jour 524 (DB), *In re Krishnaji Gopal.* (However, the defect would not be considered fatal if on the very day the grounds of detention are communicated and these make it clear that the detaining authority was satisfied as to all the required particulars.)

[23] 1949 Mad 761 (Pr 2) [AIR V 36 C 338] : 51 Cri L Jour 183 (DB), *In the matter of N. R. Sreenivasan.*

Article 22
Notes 10-11

Minister, the Secretary of the Home Department cannot substitute his own "satisfaction" even in cases of urgency.[24]

The onus of proof of the "satisfaction" of the detaining authority is on the State.[25] But when an order duly authenticated by a competent authority is produced and it is mentioned in that order that the order is made after the authority is "satisfied" the onus shifts to the detenu.[26] (See also notes on ARTS. 154 and 166.)

11. Preventive detention — Bona fides of the order of detention. — Although it is not open to the Court to sit in judgment over the action taken by the Executive with a view to determine the reasonableness or otherwise of such action, it is clearly within the power of the Court to see whether the order of detention is really one under the Act under which it purports to be passed.[1] The Court can also see whether the "satisfaction" about the existence of the requisite condition, which is professed in an order of detention, is a satisfaction really and truly existing in the mind of the detaining authority or one merely professed by the detaining authority.[2] The validity of a detention order can always be questioned on the ground that the "satisfaction" on which it is stated to be based does not in fact exist. If such satisfaction does not really exist and is not precisely of the kind required by the law, the order would be a fraud on the law.[3] An order of detention, which is really passed for an ulterior purpose and not because the detaining authority is really satisfied that it is necessary to detain the intended detenu with a view to preventing him from acting prejudicially to certain objects will be void.[4]

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[24] 1953 Orissa 33 (37) (Pr 11) [AIR V 40 C 17] : 1953 Cri L Jour 349 (DB), *State* v. *Somnath.* (Secretary cannot substitute his own satisfaction under Rules of Business, in cases of urgency — Order of detention on such satisfaction is illegal — Scope of Rr. 4, 8, 9 and 13 of the Rules of Business indicated: AIR 1952 Orissa 200, Approved.)

[25] 1953 Pepsu 190 (192) (Pr 7) [AIR V 40 C 77] : ILR (1953) Patiala 1 : 1953 Cri L Jour 1710, *Jangir Singh* v. *State of Pepsu.*

[26] 1953 Pepsu 190 (192) (Pr 7) [AIR V 40 C 77] : ILR (1953) Patiala 1 : 1953 Cri L Jour 1710, *Jangir Singh* v. *State of Pepsu.* (AIR 1951 Pepsu 126, Ref.)
1951 Pepsu 126 (Prs 15, 16) [A I R V 38 C 49] : 52 Cri L Jour 1081, *Hari Singh* v. *State.*

Article 22 — Note 11

[1] 1949 Mad 761 (Pr 2) [A I R V 36 C 338] : 51 Cri L Jour 183 (DB), *In the matter of N. R. Sreenivasan.* (There are four categories in which alone it will be open to the Court to intervene. These are: (a) when the order is not duly authenticated, (b) when the person detained in pursuance of the order is not the person intended to be detained, (c) when there is lack of *bona fides* and (d) when it is established that the essential requirement, namely, the satisfaction is not present: AIR 1949 Mad 307 (SB), Rel. on.)
1949 Mad 307 (Prs 44, 64 to 68) [A I R V 36 C 146] : I L R (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami* v. *Inspector of Police.* (Do.)

[2] 1953 S C 451 (452) (Pr 4) [A I R V 40 C 107] : 1953 Cri L Jour 1921 (SC), *Ashutosh* v. *State of Delhi.*
1952 S C 106 (Prs 9, 10) [A I R V 39 C 20] : 1952 S C R 395:1952 Cri L Jour 656 (SC), *Naranjan Singh* v. *State of Punjab (I).*
1951 S C 157 (Pr 5) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atma Ram.*
1949 All 148 (Prs 32, 35, 36, 39) [AIR V 36 C 57] : ILR (1949) All 458 : 50 Cri L Jour 214 (FB), *Durgadas* v. *Rex.* ('Satisfaction' only means that the detaining authority was in fact satisfied, or, in other words, honestly satisfied and not a dishonest satisfaction, which will be no satisfaction at all.)
1949 Cal 633 (Pr 18) [AIR V 36 C 180] : 51 Cri L Jour 169 (FB), *Bhupendra De* v. *Government of West Bengal.*
1949 Mad 307 (Pr 65) [A I R V 36 C 146] : I L R (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami* v. *Inspector of Police.*

It is also essential that the detaining authority must have applied its mind to the question whether it is necessary to detain the particular person with a view to preventing him from acting prejudicially to any of the objects mentioned in the Act.[5] For this purpose, as will be seen in NOTE 21, the grounds on which the order is based, which are communicated to the detenu under cl. (5), may be looked at by the Court to see whether they are relevant for the purpose for which the order professes to have been passed.

The Court can also take into consideration the affidavit of the detaining authority and the facts stated therein in determining whether the detaining authority had applied its mind to the question whether there were sufficient grounds for detention.[5a]

The burden of proving, however, that an order of detention is not a *bona fide* one is on the detenu who questions the order.[6] It is

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1953 Pepsu 145 (146) (Pr 5) [AIR V 40 C 63] : ILR (1952) Patiala 445 : 1953 Cri L Jour 1519, *Ralla Singh* v. *State.* (It is a question of fact and the petitioner challenging the detention should definitely assert the fact in the petition.)

1949 Mad 761 (Pr 2) [AIR V 36 C 338]:51 Cri L Jour 183 (DB), *In the matter of N. R. Sreenivasan.* (For considering whether the apparent satisfaction recorded by the District Magistrate was in good faith in exercise of the statutory powers conferred upon him, it is permissible to view the order of detention in relation to the apparent and avowed object with which the order of detention was passed.)

[3] 1949 Mad 438 (Pr 3) [AIR V 36 C 198], *In re Narhari.*

[4] 1953 Pepsu 111 (112) (Pr 5) [A I R V 40 C 48] : ILR (1952) Patiala 620 : 1953 Cri L Jour 1210, *Ishar Singh* v. *State.*

1951 Simla 157 (Pr 8) [A I R V 38 C 27] : 52 Cri L Jour 17 (DB), *Bakhtawar Singh* v. *The State.*

1949 Mad 438 (Pr 3) [AIR V 36 C 198], *In re Narhari.*

[5] 1952 Bhopal 1 (5) (Pr 21) [A I R V 39 C 1] : 1952 Cri L Jour 660, *Govind Prasad* v. *The State of Bhopal.*

1950 Mad 162 (Pr 29) [AIR V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate.*

1949 Bom 75 (Pr 1) [AIR V 36 C 21] : I L R (1948) Bom 651 : 50 Cri L Jour 173 (DB), *In re Shoilen Dey.*

[5a] 1953 S C 318 (319) (Pr 2) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.*

[6] 1953 S C 451 (452, 453) (Prs 4, 8) [A I R V 40 C 107] : 1953 Cri L Jour 1921 (SC), *Ashutosh* v. *State of Delhi.* (Suspicion is not proof.)

1951 S C 270 (Pr 12) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.*

1950 S C 27 (Pr 1) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1949 Bom 319 (Prs 10, 11, 12, 24) [A I R V 36 C 83] : I L R (1949) Bom 508 : 51 Cri L Jour 184 (FB), *In re Jayantilal.*

Article 22
Note 11

necessary for the detaining authority to prove that he was satisfied in the manner required by law when he made the order of detention. In such cases, the presumption of *omnia præsumuntur rite esse acta* applies and assuming the order to be proved or admitted, it must be taken *prima facie*, i.e , until the contrary is proved, to have been properly made and it must be taken that the requisite as to the belief for the satisfaction of the detaining authority was complied with.[7] In such cases, therefore, the detenu is not entitled to an order for particulars about the grounds on which the detaining authority had reasonable cause to believe that the detenu was a person who was indulging in the alleged activities, even in a civil suit filed by the detenu against the detaining authority for damages for false imprisonment.[8] But the "satisfaction" of the detaining authority is a state of mind which under the Evidence Act is a question of fact, as the state of a man's mind is as much a question of fact as the state of his digestion. Hence, when the detenu denies the existence of that particular state of mind on the part of the detaining authority, evidence is admissible to prove his contention.[9] It is only the reasonableness of the satisfaction that the Court is precluded from inquiring into.

When it is said that a certain order of detention is *mala fide* and not *bona fide*, no dishonest motive is necessarily imputed. Such a statement merely means that the order is bad for want of necessary care and caution or is for some purpose other than what is stated in the order.[10] ✓

When a question of *mala fides* of the order of detention is raised, the question must be decided with reference to the circumstances of each case.[11]

1953 Assam 97 (100) (Pr 21) [AIR V 40 C 42] : 1953 Cri L Jour 770 : ILR (1953) 5 Assam 66, *Sahadat Ali* v. *State of Assam.*

1953 Pat 334 (336) (Pr 8) [AIR V 40 C 116] : I L R 32 Pat 480 : 1953 Cri L Jour 1690 (DB), *Karamvir Singh* v. *State of Bihar.*

1949 Mad 307 (Pr 68) [A I R V 36 C 146] : I L R (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswami* v. *Inspector of Police.*

1948 Bom 417(420) (Pr 17) [AIR V 35 C 117] : 49 Cri L Jour 579, *Hirji Shivram* v. *Commr. of Police.* ((1942) 1 K B 87, *Rex* v. *Secretary of State for Home Affairs*, Ref.)

[7] (1941) 3 All E R 388 (394) : 111 L J K B 24, *Greene* v. *Home Secretary.* (Affidavit sufficient but not necessary.)

(1941) 3 All E R 338 (348) : 110 L J K B 724, *Liversidge* v. *Anderson.*

[8] (1941) 3 All E R 338 (348) : 110 L J K B 724, *Liversidge* v. *Anderson.*

[9] 1949 Bom 319 (Pr 9) [AIR V 36 C 83] : ILR (1949) Bom 508 : 51 Cri L Jour 184, *In re Jayantilal.*

[10] 1951 Pat 47 (Pr 20) [AIR V 38 C 6] : I L R 30 Pat 630 : 52 Cri L Jour 406 (DB), *Dayanand Modi* v. *State of Bihar.*

[11] 1952 S C 106 (Prs 9, 10) [AIR V 39 C 20] : 1952 S C R 395 : 1952 Cri L Jour 656 (SC), *Naranjan Singh* v. *State of Punjab (I).* (One case cannot be treated as precedent for another.)

1950 S C 27 (Pr 1) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[*See* 1953 Orissa 33 (37) (Pr 8) [AIR V 40 C 17] : 1953 Cri L Jour 349 (DB), *State* v. *Somnath.* (Detention order against candidate for election passed by Home Secretary without approval of Minister-in-charge due to urgency, Minister-

It has already been stated above that an order for detention of a person for an ulterior purpose, that is, for a purpose other than that which is given in the order of detention, will be a *mala fide* order and void as being a fraud on the law.[11a] Thus, when a person is ostensibly detained under a preventive detention enactment but the circumstances clearly show that the detention is really intended to help the police in obtaining evidence in the investigation of a crime, the detention will be illegal.[12] The reason is that not only the order

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in-charge being outside station—Subsequent approval by Minister — Procedure in accordance with pre-existing practice — Order though illegal having been passed without legal authority could not be challenged on grounds of *mala fides*.)

[11a] 1952 Mad 117 (119) (Pr 7) [AIR V 39 C 57] : ILR (1953) Mad 93 (DB), *In re Anandan*. (Detention of a person for the purpose of preventing him for election is *mala fide*.)

[12] 1950 Bom 202 (Prs 5, 6) [AIR V 37 C 54]:ILR (1950) Bom 438: 51 Cri L Jour 1126 (FB), *Malyali* v. *Commr. of Police*. (When the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then, the detaining authority has made his choice and it would not be permissible to him to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigation. If the purpose of detaining a person is a collateral purpose i. e., to deprive him of his rights and safeguards under the Criminal Procedure Code and to carry on an investigation without the supervision of the Court, then the detention is *mala fide* and cannot be justified: Cri. Appln. No. 18 of 1948, D/-4-2-1948 (Unrep.) (Bom), Overruled.)

1953 Pepsu 111 (Pr 5) [AIR V 40 C 48] : ILR (1952) Patiala 620: 1952 Cri L Jour 1210, *Ishar Singh* v. *State*.

1951 Pat 47 (Pr 15) [AIR V 38 C 6] : I L R 30 Pat 630 : 52 Cri L Jour 406 (DB), *Dayanand Modi* v. *State of Bihar*. (Whether detention of a person and prosecution started against him can be simultaneously made does not depend on any rule of law, the question has to be approached and answered in each case on the footing whether the order of detention, in view of the pending prosecution, is *bona fide* or not. For answering the question the uncontroverted facts may have to be considered and the test will be whether the order of detention is for the purpose it purports to be or really for an alterior or collateral purpose.)

1951 Simla 157 (Pr 8) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB), *Bakhtawar Singh* v. *The State*. (Detention in police lock-up for considerable time giving rise to suspicion that detention was for enabling the police to obtain evidence about offences—Detention is illegal.)

1950 Hyd 68 (Pr 3) [AIR V 37 C 21] : ILR (1951) Hyd 183 (DB), *Narayanamma* v. *State of Hyderabad*.

1945 Nag 8 (23) [A I R V 32] : I L R (1945) Nag 6, *Vimlabai Deshpande* v. *Emperor*.

[*See* 1953 Assam 63 (64) [AIR V 40 C 26] : 1953 Cri L Jour 507, *Krishna Kanta* v. *The State*. (Mere reference by District Magistrate to a case which was sub judice at some time, to bring out that according to his information petitioner was an incorrigible smuggler — District Magistrate's order is not vitiated.)

1949 Mad 761 (Pr 2) [AIR V 36 C 338] : 51 Cri L Jour 183 (DB), *In the matter of N. R. Sreenivasan*. (Where it is clear from the averments in the affidavit filed by the detaining authority that it was to prevent the release on bail of the detenu who was charged under certain sections of the Penal Code, that his detention was considered necessary, it is not one of the grounds of satisfaction.)]

[*See also* 1951 Assam 43 (44) [AIR V 38 C 20] : ILR (1950) 2 Assam 470 : 52 Cri L Jour 434, *Labaram Deka* v. *The State*.

of detention in such a case will be a *mala fide* one as being one for an ulterior purpose, but also the detenu would be deprived of his normal rights under the Criminal Procedure Code which would have belonged to him, if the investigations into the offence alleged against him were conducted according to the provisions of the Criminal Procedure Code.

Recourse to preventive detention in a case where the ordinary law will be quite sufficient to meet the needs of the case may lend colour to the contention that the order is *mala fide.*[13] But a prior unsuccessful prosecution of the detenu with regard to the same matter does not necessarily prove the *mala fides* of the order of detention

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1950 Hyd 66 (Prs 11, 12, 13) [AIR V 37 C 20]:ILR (1951) Hyd 196 (DB), *Mohd. Abdur Rahman* v. *Hyderabad State.* (Where a person is already detained in jail awaiting his trial in respect of certain offences alleged to have been committed by him, a warrant issued under S. 3 of the Preventive Detention Act would be illegal.)]

[Compare 1952 Hyd 112 (113) (Pr 7) [AIR V 39]:ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB), *Maqdoom Mohiuddin* v. *State of Hyderabad.* (Arresting and detain a person in police custody with a view to investigation of crime and its prosecution—But subsequently Government deciding to drop proceedings and detaining under Preventive Detention Act—Fact that during police custody the person was interrogated prior to the detention order does not necessarily prove that the detention was for collateral purpose or *mala fide.*)]

[13] 1953 S C 451 (453) (Pr 11) [AIR V 40 C 107] : 1953 Cri L Jour 1921 (SC), *Ashutosh* v. *State of Delhi.* (Recourse to order of detention, rather than to preventive order under Criminal P. C., S. 144, may lend some colour to contention that order is *mala fide.*)

1950 East Punj 172 (Prs 9, 10) [AIR V 37 C 32] : 51 Cri L Jour 888, *Janki Das* v. *Imperator.* (The executive must not detain a subject in order to punish him for what he has already done but in order to prevent him from doing something which in the opinion of the executive is likely to affect the public safety, etc. —East Punjab Public Safety Act (5 of 1949), can only be used for prevention and not for punishing of persons. If the District Magistrate is of the opinion that the detenu had started malicious propaganda and had issued posters which, according to him, were objectionable from communal point of view, then it is open to him to take action against the detenu under S. 153A, Penal Code, or under S. 108, Criminal P. C. The Act is not intended to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary *jurisdiction.* In such a case the action of the executive certainly is dehors the object of S. 3 of the Act and detention of the detenu is illegal : AIR 1946 Bom 32, Rel. on.)

[*See* 1953 Pepsu 190 (192) (Prs 9, 10) [AIR V 40 C 77] : I L R (1953) Patiala 1 : 1953 Cri L Jour 1710, *Jangir Singh* v. *State of Pepsu.* (It cannot be stated as a rule of law that when a person is accused of an offence, the only alternative is to prosecute him, and there is no legal authority to detain him. The right to prosecute a person under the ordinary criminal law and the right to detain him are not mutually exclusive. The question whether an order is made for a collateral purpose has to be decided on the facts of each particular case: Cri. Misc. No. 62 of 1951 (Pepsu) and AIR 1953 Pepsu 111, Rel. on.)

1951 Orissa 251 (Prs 10, 18) [AIR V 38 C 59] : I L R (1951) Cut 387 : 52 Cri L Jour 679 (DB), *T. V. Narsimhamurty* v. *The State.* (Wholesale licensed dealer in food-grains proceeded against under Preventive Detention Act for black-marketing — The act complained of was not done by him as a licensed dealer but stood completely outside—Hence it could not be argued that the self-same act of the detenu as a licensee could be dealt with in a *punitive* measure rather than preventive.)]

under the preventive detention law.[14]

In this connection, however, it must be remembered that the detaining authority has no right to review the judgment of the Criminal Court and question its findings. In *Hirji Shivram* v. *Commissioner of Police*,[15] Desai, J., of the Bombay High Court observed as follows:

> "I do feel, and feel strongly, that it is not permissible for the Commissioner of Police to lend himself to any course of action which suggests that he arrogates to himself the right to review the judgment of the Magistrate. He must respectfully abide by it. Where then a situation arises which lends itself to the construction that the action of the Police Commissioner is an attempt to supersede the order of the Magistrate, Courts of Justice must be vigilant to see that justice is not brought into ridicule and rendered impotent and that a tendency towards autocracy does not prevail in the minds of the representatives of democracy."

See also notes on ART. 226, relating to *habeas corpus* and See also A. I. R. COMMENTARIES on the Code of Criminal Procedure, S. 491, NOTE. 7.

12. Preventive detention—Advisory Board.—So far as the Constitution is concerned, the provision of Advisory Board with power to consider the sufficiency of grounds for detaining a person under preventive detention enactments is not obligatory in every enactment relating to preventive detention. The provisions of cls. (4) to (7) are so drafted that an enactment relating to preventive detention can totally avoid the establishment of an Advisory Board and yet be quite in accordance with the Constitution. Thus, when the detention is not to exceed a period of three months, then clearly under cl. (4) (a) an Advisory Board is not necessary. Even in cases in which the detention is to be for a period of more than three months, the establishment of an Advisory Board is not compulsory under the Constitution under cl. (4) (b) read with cl. (7) (a) and (b) of this article. Hence, failure to provide for the establishment of an Advisory Board will not necessarily amount to the infringement of a Fundamental Right under the Constitution.[1]

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[14] 1952 Cal 26 (Pr 19) [AIR V 39 C 10] : 1952 Cri L Jour 204 (DB), *Raman Lal* v. *Commr. of Police.* (Ordinary criminal laws and preventive detention law are not substitutes for each other.)

[*See also* 1953 Pepsu 111 (Prs 3, 5) [AIR V 40 C 48] : I L R (1952) Patiala 620 : 1953 Cri L Jour 1210, *Ishar Singh* v. *State.* (Whether detention of a person and prosecution started against him can be simultaneously made does not depend on any rule of law and the question is to be approached and answered in each case on the footing whether the order of detention in view of the pending prosecution is *bona fide* or not.)]

[15] 1948 Bom 417 (421) (Pr 20) [AIR V 35 C 117] : 49 Cri L Jour 579.

Article 22 — Note 12

[1] 1950 S C 27 (Pr 24) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

In the absence of a law made by the Parliament under cl. (7) (a) and (b), the establishment of an Advisory Board is compulsory under the Constitution for every case in which the detention is to continue for more than three months. This is the effect of cl. (4) (a). Under that clause no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board has reported before the expiration of the period of three months that there is in its opinion sufficient cause for such detention.

The question has arisen as to the proper function of the Advisory Board under cl. (4) (a). The issue is whether the words "such detention" in cl. (4) (a) mean detention for a longer period than three months or simply the detention that has been ordered. Patanjali Sastri, J., was of the view in *Gopalan's case*[2] that the words "such detention" in cl. (4) (a) refer back to preventive detention mentioned in the first part of cl. (4) and not to detention for a longer period than three months. Kania, C. J. and Fazl Ali, J., however, took the opposite view. In other words, according to Patanjali Sastri, J., the function of the Advisory Board under cl. (4) (a) is to consider whether there is sufficient cause for detention at all, of the detenu, while, according to Kania, C. J. and Fazl Ali, J., the function of the Advisory Board is to consider whether there is sufficient cause for detention for a longer period than three months. But even if the view of Kania, C. J., and Fazl Ali, J., is adopted, it is clear that the Advisory Board will be entitled to go into the merits of the order of detention, inasmuch as it would be impossible to form an opinion about the sufficiency of cause for detention for longer than three months without doing so.

The Advisory Board, however, has no power to express any opinion as to how much longer than three months, if at all, the detenu should be kept in custody.[3] The reason is that such question is peculiarly a matter on which the executive authority alone is best fitted to form an opinion.

The question arises as to the effect of cl. (4) (a) in a case in which the Advisory Board reports that there is sufficient cause for detention. Is it sufficient if the report of the Advisory Board is submitted within the period of three months but the actual order for continuing the detention is passed subsequently? It has been held that not only the report of the Advisory Board should be received within the period of three months but also that the order for the continuation of the detention beyond three months must have been passed within a period of three months.[4]

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[2] 1950 S C 27 (Prs 80, 120) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[3] 1952 S C 324 (Pr 20) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (SC), *Shamrao V. Parulekar* v. *District Magistrate, Thana.* (Individual cases must be considered by the Advisory Board—After this has been done, the detention may be for more than three months up to the maximum limit fixed by the law by Parliament under cl. 7 (b)—Advisory Board need not fix the period after 3 months in individual cases.)

1950 S C 27 (Pr 122) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

There is no competition between the Advisory Board and the Court. As already seen in NOTES 10 and 11, a Court is not entitled to go into the merits of the order of detention and see whether there is reasonable cause for passing such an order. But the Advisory Board is entitled to go into the merits of detention orders. The Court, however, can consider the validity of the order of detention on various other grounds such as its being *mala fide*, not according to law and so on. Thus, the functions of the Advisory Board and the Court are quite distinct and do not overlap each other.[5] Hence, an application to a High Court under S. 491 of the Criminal Procedure Code or ART. 226 of the Constitution may be made before approaching the Advisory Board under the preventive detention enactment itself. The disposal of the application by the High Court cannot, in any way, affect the applicant's cause before the Advisory Board.[6] In other words, the dismissal by the High Court of an application under S. 491, Criminal P. C., or ART. 226 of the Constitution is not an adverse adjudication on merits as to the cause of detention, such merits not being within the purview of the Court but of the Advisory Board.

The Preventive Detention Act, 1950, was extensively amended by the Preventive Detention (Amendment) Act, 1951. Under the Act as amended, provision was made for the institution of an Advisory Board in every case (see S. 9). [There is no change on this point under the Amending Act of 1952.] Obviously, such a provision is not against the Constitution because although the Constitution makes a provision for an Advisory Board compulsory in certain cases, it does not prohibit it in other cases.

Where an Advisory Board is constituted under a provision of law made by the Parliament under cl. (4) (a) read with cl. (7) (a) and (b), it is not necessary that the Advisory Board must make its recommendations within a period of three months from the date of detention in every case. The mere provision for an Advisory Board is not a hallmark which stamps a preventive detention law as one necessarily falling within cl. (4) (a), so as to make its constitutional validity determinable exclusively with reference to that sub-clause.[7]

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[4] 1953 Sau 51 (51, 52) (Pr 4) [AIR V 40 C 22] : 1953 Cri L Jour 503 (DB), *Gohel Umedsing* v. *State.*

[5] 1952 Cal 26 (Pr 26) [AIR V 39 C 10] : 1952 Cri L Jour 204, *Raman Lal Rathi* v. *Commr. of Police.*

1952 Orissa 52 (59) (Prs 22, 23) [AIR V 39 C 11] : I L R (1951) Cut 441 : 1952 Cri L Jour 1039 (DB), *Ratanlal Gupta* v. *District Magistrate, Ganjam.* (After amendment of Preventive Detention Act by Amending Act, 1951, the powers of Advisory Board are increased and its opinion that there is no sufficient cause for detention is binding on the Government. The Board can also go into the question of *mala fides* and is in a better position to judge about it from all the papers than the High Court.)

[6] 1952 Cal 26 (Pr 26) [AIR V 39 C 10] : 1952 Cri L Jour 204 (DB), *Raman Lal* v. *Commr. of Police.*

1952 Orissa 52 (59) (Prs 22, 23) [A I R V 39 C 11] : I L R (1951) Cut 441 : 1952 Cri L Jour 1039 (DB), *Ratanlal Gupta* v. *District Magistrate, Ganjam.*

See also the undermentioned cases.[8]

It is to be noted that the Constitution prescribed the *qualifications* of the persons who can be appointed as members of the Advisory Board but the number of members of such Board has not been prescribed by the Constitution.

13. Procedure before Advisory Board — Clause (7) (c). — Under cl. (7) (c), the Parliament may, by law, prescribe the procedure to be followed by an Advisory Board in an inquiry under sub-cl. (a) of cl. (4).[1] Under cl. (3) of this article the provisions of cls. (1) and (2) are expressly made inapplicable to a person detained under a law relating to preventive detention. Hence, such a person is not entitled, as a matter of Fundamental Right, to consult a legal practitioner or to be represented by him in the proceedings before the Board, unless the law relating to preventive detention permits such a course. The failure to provide for such a right of representation by a pleader before the Advisory Board will not invalidate a law of preventive detention.[2]

A provision in a law made by the Parliament relating to preventive detention, which prohibits the disclosure of any of the proceedings of the Advisory Board or its report, excepting that part of it which contains the opinion of the Advisory Board, is quite valid, because under cl. (7) (c) Parliament has been given power to lay down the procedure before the Advisory Board.[3]

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[7] 1951 S C 301 (Pr 10) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC), *S. Krishnan* v. *State of Madras.*

[8] 1952 S C 27 (Pr 4) [A I R V 39 C 7] : 1952 S C R 368 : 1952 Cri L Jour 321 (SC), *Makhan Singh* v. *State of Punjab (I).* (It is clear that the Preventive Detention Act (1950) as amended requires that every case of detention should be placed before an Advisory Board constituted under the Act (Section 9) and provides that if the Board reports that there is sufficient cause for the detention "the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit "(S. 11). It is, therefore, plain that it is only after the Advisory Board, to which the case has been referred, reports that the detention is justified, the Government should determine what the period of detention should be and not before. The fixing of the period of detention in the initial order itself is, therefore, contrary to the scheme of the Act and cannot be supported.)

1953 Sau 63 (Prs 4, 5) [AIR V 40 C 26] : 1953 Cri L Jour 586 (DB), *Dabhi Harisinh* v. *State.* (The provisions of S. 10 of the Preventive Detention Act appear to be mandatory. If the Advisory Board fails to submit its report within the period prescribed by S. 10 and consequently the Government does not pass orders under S. 11 the detention of the detenu after the expiry of the period provided will in any case become illegal and the accused is entitled to be set at liberty : AIR 1951 Assam 169, Rel. on.)

Article 22 — Note 13

[1] 1950 S C 27 (Pr 32) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[2] 1950 S C 27 (Pr 32) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

In *Local Government Board* v. *Alridge*,[4] the respondent applied to the Board, constituted under the Housing Act, to state a special case for the opinion of the High Court, contending that an order of the Board was invalid, (1) because the report of the Inspector had been treated as a confidential document and had not been disclosed to the respondent, and (2) because the Board had declined to give the respondent an opportunity of being heard orally by the person or persons by whom the appeal was finally decided. The Board rejected the application. Both the points were urged before the House of Lords on appeal. Viscount Haldane, L. C., rejected the contention about the necessity of an oral hearing. In rejecting the contention about the disclosure of the report of the Inspector, the Lord Chancellor said :

> "It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to ..... What appears to me to have been the fallacy of the judgment of the majority in the Court of Appeal is that it begs the question at the beginning by setting up the test of the procedure of a Court of justice instead of the other standard, which was laid down for such cases in *Board of Education* v. *Rice*.[5] I do not think the Board was bound to hear the respondent orally provided it gave him the opportunities he actually had."

The above shows that the prohibition against the disclosure of the full report of the Advisory Board except its opinion in such cases is not open to any serious objection from the constitutional point of view. It also shows that the oral hearing of a party is not a matter of fundamental importance in proceedings before such bodies. Hence, provisions in a preventive detention law, under which oral hearing before the Advisory Board is not allowed, or the disclosure of the proceedings of the Advisory Board is prohibited, cannot be regarded as depriving the detenu of any Fundamental Right he has under the Constitution or of rendering such Fundamental Rights illusory and unreal. See also NOTE 25.

In the same case Lord Haldane, L. C., in laying down the principles that should be followed by administrative bodies to whom matters are referred for decision, observed that the procedure of every such tribunal need not be the same. What that procedure is to be in detail must depend on the nature of the tribunal. Such a tribunal was under a duty to act in good faith and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything, but the matter need not be treated as though it were a trial. The witnesses need not be examined; information may be obtained in any way that is considered best; a fair opportunity is always to be given to those who are parties to the controversy to correct or contradict any relevant statement prejudicial to their view. If the tribunal failed in its duty, its order might be the subject of *certiorari* and it must itself be a subject of *mandamus*.[6]

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[3] 1950 S C 27 (Pr 32) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

[4] (1915) 1915 App Cas 120 (134) : 84 L J K B 72.

[5] (1911) 1911 App Cas 179 : 80 L J K B 796.

14. Preventive detention—Advisory Board—Qualification of members. — Under clause (4) (a), the Advisory Board, whose recommendation is necessary for continuing the detention of a person for more than three months, should consist of persons who are, or have been, or are qualified to be appointed as Judges of a High Court. The qualifications for appointment as a Judge of a High Court, as contemplated by this clause and ART. 165 (1), refer only to those qualifications described in cl. (2) of ART. 217 and do not refer to the age limit fixed in cl. (1) of that article.[1] Hence, a person beyond sixty years of age can be appointed a member of an Advisory Board if he is otherwise qualified to be appointed as a Judge of a High Court.

15. Preventive detention—Maximum period of detention —Clauses (4) and (7) (b). — Under clause (4) of this article, the maximum period for which a person can be detained under a law of preventive detention is laid down. Up to a period of three months, the law can provide for detention of a person without any reference to an Advisory Board. If the law permits detention for a period longer than three months the Constitution requires that one of two conditions must be fulfilled[1] : (1) that an Advisory Board, constituted according to the provisions of cl. (4) (a), should, within the period of three months, report that in its opinion there is sufficient cause for the detention. The Advisory Board is not entitled to report as to the duration of the period in excess of three months for which the detenu can be detained.[2] (2) In the alternative there must be a law, made by the Parliament prescribing the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board under cl. (4) (a). Such law must also prescribe the maximum period for which any person may be detained.

If the law allows detention for more than three months on the recommendation of the Advisory Board under cl. (4) (a), such detention cannot exceed the maximum period that *may* be fixed by law by

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[6] (1915) 1915 App Cas 120 (132-133) : 84 L J K B 72, *Local Govt. Board* v. *Alridge*. (Following *Board of Education* v. *Rice*, (1911) App Cas 179.)

Article 22 — Note 14

[1] 1952 Orissa 60 (Pr 6) [AIR V 39 C 12] (DB), *Baishnab Patnaik* v. *The State*.

Article 22 — Note 15

[1] 1952 S C 350 (352) (Pr 6) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab*.

[2] 1952 S C 324 (Pr 20) [AIR V 39]: 1952 S C R 683 : 1952 Cri L Jour 1503 (SC), *Shamrao V. Parulekar* v. *District Magistrate, Thana*.

Parliament under cl. (7) (b). But Parliament is not *bound* under cl. (7) (b) to fix any maximum period in such cases. A maximum period under cl. (7) (b) has to be fixed by Parliament only in those cases in which it is making provision for detention of persons beyond three months *without recourse* to an Advisory Board. That the Parliament is bound in such cases to fix the maximum period of detention under cl. (7) (b) is clear from cl. (4) (b) which says that the detention beyond the period of three months without recourse to Advisory Board must be in accordance with a law made by Parliament under cl. 7 (a) *and* (b). Hence, a law made by Parliament merely prescribing the circumstances or the classes of cases in which detention beyond three months *without recourse* to the Advisory Board will be legal is not sufficient to authorise such detention unless such law also prescribes the maximum period of detention under cl. (7) (b). As has been stated above, for cases in which the law provides for detention beyond three months *on the report of the Advisory Board*, the Parliament is not bound to fix a maximum period of detention under cl. (7) (b), although *where such period has actually been fixed by Parliament by law*, the detention cannot be for a longer period.

This is our submission. But there is a difference of judicial opinion as to whether the Parliament is not bound to fix a maximum period of detention under cl. (7) (b), in *all* cases. It was the opinion of Kania, C. J., in *Gopalan's case*[3] that the Parliament is not bound to fix any maximum period of detention under cl. (7) (b). The same opinion was expressed by Mahajan, J., in *S. Krishnan* v. *State of Madras*.[4] But in the same case Bose, J., took the view that no law can be made authorising detention either under cl. (4) (a) or cl. 4 (b) unless a maximum period of detention is prescribed by Parliament under cl. (7) (b). The view that *any* law of preventive detention will be void unless it fixes a maximum period of detention under cl. (7) (b) was taken in the undermentioned cases also.[5] As already submitted, the requirement of a legal provision fixing a maximum period appears to be, on a fair construction of cl. (4) (a) and (b), only obligatory in the case of laws permitting detention *without recourse to the Advisory Board* for a period longer than three months and not in the case of laws under which such detention is to be after recourse to the Advisory Board.

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[3] 1950 S C 27 (Prs 25, 33) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[4] 1951 S C 301 (Prs 24, 36) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC).

[5] 1950 Orissa 157 (Prs 5, 10, 31) [AIR V 37 C 26]: I L R (1950) Cut 222: 51 Cri L Jour 1189 (FB), *Prahalad Jena* v. *State.* (The provisions of the Orissa Maintenance of Public Order Act dealing with preventive detention are void under Art. 13 (1) of the Constitution on account of their inconsistency with Art. 22 of the Constitution.)

1950 Nag 203 (Pr 24) [AIR V 37 C 60] : 51 Cri L Jour 1372 (DB), *Trimbak* v. *The State.* (C. P. and Berar Public Safety Act (1948) — Implied provision conferring power to detain person for indefinite period is void.)

Article 22
Note 15

But where the law of preventive detention is a temporary enactment due to expire on a fixed date, this itself has been regarded as tantamount to a provision fixing a maximum period of detention, so that even on the view that such a provision is essential in any context, the requirement as to the provision is regarded as satisfied in such cases.[6] On analogous reasoning, an order of detention has been held not to be bad on the ground of its failure to specify the period of detention where the law under which the order is passed itself prescribes the maximum period of detention, so that the order of detention cannot be said to be one for an indefinite period.[7]

Where a temporary Act relating to preventive detention is amended and the life of the principal Act is prolonged up to a certain date, the period of detention under such Act will also be extended till such date,

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6. 1951 S C 301 (Pr 11) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC), *S. Krishnan* v. *State of Madras.* (Majority view; Bose, J., Dissenting.: — As the Amending Act of 1951 is to be in force only up to 1-4-1952 and no detention under the Act can continue thereafter, the discretionary power given to the appropriate Government could be exercised only subject to that over-all limit, and therefore the validity of S. 11 (1) of the Act cannot be questioned on the ground that it authorises preventive detention for an indefinite period which is contrary to Art. 22 (4) of the Constitution.)

[*See also* 1953 S C 52 (53) (Pr 9) [AIR V 40 C 14] : 1953 S C R 210 : 1953 Cri L Jour 508 (SC), *Godavari Parulekar* v. *State of Bombay.* (Period of detention held to be prolonged till the date up to which the life of the Act was extended.)]

7. 1952 S C 350 (352) (Pr 6) [AIR V 39] : 1952 S C R 756: 1953 Cri L Jour 1462 (SC), *Ujagar Sing* v. *State of Punjab.* (The non-specification of any definite period in the detention order is not a material omission rendering the order itself invalid.)

1951 S C 270 (Pr 11) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.* (Even if the order of detention passed under S. 3 of the Preventive Detention Act, 1950, does not specify the period during which the detenus are to be under detention, the order is not invalid as S. 12 prescribes a maximum period of one year and hence such orders cannot be said to be of indefinite period or unlawful on that ground.)

1951 All 18 (Pr 1) [AIR V 38 C 5] : 1952 Cri L Jour 422 (DB), *Ram Adhar* v *State.*

[*See also* 1951 Pat 389 (Pr 26) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB), *Chandra Sheikhar* v. *State of Bihar.* (The detaining authority is not required, under the Preventive Detention Act to mention the period for which the detaining authority intends the detenu to be detained — If there is no provision for mentioning the period, the detaining authority is not bound or obliged to mention the period: AIR 1951 All 357, Dissent. Hence a detention order under S. 3 of the Act is not invalid by reason of a failure to mention therein the period of detention.)]

[But see 1951 All 357 (Pr 1) [AIR V 38 C 57]: 52 Cri L Jour 115, *M. M. Bashir* v. *State.* (An order directing detention of any person without giving the period for which the person is to be detained is not capable of being properly carried out by the authority to whom the order is directed and, therefore, the detention is not in accordance with law. NOTE. — This decision must be deemed as overruled by the subsequent decision of the Supreme Court in AIR 1951 S C 270.)

1951 Pepsu 1 (Pr 4) [AIR V 38 C 1] : 2 Pepsu L R 421 : 52 Cri L Jour 33, *Dr. Teja Singh* v. *The State.* (Decision must be treated as overruled by the Supreme Court decision in AIR 1951 S C 270.)]

where the period has not been specified by the order of detention.[8]

The Parliament is not precluded from altering the maximum period fixed by it under cl. (7) (b) or making such alteration retrospective.[9]

The Parliament has the power to continue detentions indefinitely by the expedient of periodic amendments in the Preventive Detention Act, 4 of 1950.[10]

Under cl. (7) (b), Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained. By virtue of this power, the Parliament may prescribe the maximum period for a class taken as a whole. The Parliament need not itself direct the maximum period for each separate person falling within the class individually.[11]

Section 3 (1) (a) of the Preventive Detention Act (4 of 1950), classifies grounds of detention into three categories. The cases of persons detained under S. 3 (1) (a), therefore, fall into three categories. But the Parliament is not bound under cl. (7) (b) to fix the same maximum period for all persons falling under each of these categories. Even persons falling under the same category may be classified by Parliament for purposes of cl. (7) (b) and a different maximum period may be fixed by Parliament for different groups in the same class without offending cl. (7) (b) or ART. 14.[12]

16. Preventive detention — Detention for more than three months without obtaining the opinion of the Advisory Board — Clause (7) (a). — Under cl. (4) (b), a person may be detained under a preventive detention law for a period longer than three months if the detention is in accordance with the provisions of any law made by the Parliament under sub-cls. (a) and (b) of cl. (7).

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[8] 1952 S C 324 (326) (Pr 7) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (SC), *Shamrao V. Parulekar* v. *District Magistrate, Thana.* (Act of 1950 amended by Act of 1951—Act of 1950 due to expire on 1-4-1951—Life of Act prolonged to 1-4-1952 by Amending Act of 1951 — Detention order passed under 1950 Act as amended by 1951 Act — Owing to amendment, period would have extended to 1-4-1952—Fresh Act 34 of 1952—Life of Act prolonged to 1-10-1952—This prolonged detention to 1-10-1952—S. 3 of the Amendment Act of 1952 specifically provided for extension till the expiry of the principal Act—The date of expiry of the principal Act was the date as fixed by the Amending Act of 1952, i.e., 1-10-1952.)

[9] 1952 S C 324 (328) (Pr 22) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (S C), *Shamrao V. Parulekar* v. *District Magistrate, Thana.* (It cannot be said that once the power given under clause (7) to fix a maximum period has been exercised the power exhausts itself and cannot be exercised again in respect of the same detention. No such limitation is imposed upon Parliament by the Constitution.)

1951 S C 301 (Pr 25) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC), *S. Krishnan* v. *State of Madras.*

[10] 1952 S C 324 (328) (Pr 23) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (S C), *Shamrao V. Parulekar* v. *District Magistrate, Thana.* ("This was precisely the power exercised in the Amending Act of 1951 and upheld by the Supreme Court in *S. Krishnan* v. *State of Madras*, AIR 1951 S C 301 (SC) — Act 34 of 1952 is not different in this respect.")

[11] 1952 S C 324 (328) (Pr 21) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (S C), *Shamrao V. Parulekar* v. *District Magistrate, Thana.*

[12] 1953 S C 52 (53) (Prs 9, 10, 12) [AIR V 40 C 14] : 1953 S C R 210 : 1953 Cri L Jour 508 (S C), *Godavari Parulekar* v. *State of Bombay.* (The detenus may be classified as those whose cases have already been considered by the Advisory Board and others.)

The first question that has arisen in connection with this provision is whether it is a provision by way of *exception* to cl. (4) (a). In other words, the question is whether, as a *general rule*, the sanction of the Advisory Board must be regarded as necessary in every case in which the detention is to be for a period longer than three months, but in *exceptional* cases, provided for by the Parliament by law under cl. (7) (a), such detention, even for a period longer than three months, may be without obtaining the opinion of the Advisory Board. On this question, the view of the majority of the Judges of the Supreme Court in *Gopalan's case*[1] is that cl. (4) (b), read with cl. (7) (a), *is not an exception* to the general provision contained in cl. (4) (a) but is an *independent* provision.

The above question is material for the purpose of determining the exact meaning of "circumstances" and "classes" for the purpose of cl. (7) (a). If the view be adopted that cl. (7) (a), read with cl. (4) (b), is a provision by way of an exception to the general rule, enacted in cl. (4) (a), it follows necessarily that the Parliament's authority under cl. (7) (a) is limited to cases of an exceptional or special character and it is only in such cases the Parliament could enact that a person can be detained for a period longer than three months without the necessity of obtaining the opinion of an Advisory Board. On the other hand, if it is held that clause (4) (a) and cl. (4) (b) read with cl. (7) (a) are independent provisions, it follows that there is no such restriction on the power of Parliament under cl. (7) (a) and that the circumstances and classes of cases in which Parliament may declare by law that a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board need not be of an exceptional or extraordinary nature. The decision of the majority of the Judges of the Supreme Court in *Gopalan's case*,[2] already referred to above, concludes the question and it is, therefore, settled that the circumstances and classes of cases referred to in cl. (7) (a) *need* not be of an exceptional or extraordinary character revealing special considerations necessitating the detention of a person for longer than three months without taking even the Advisory Board into confidence.

Clause (7) (a) uses two expressions, namely, "circumstances" and "the class or classes". "Circumstances" ordinarily mean events or situations extraneous to the actions of the individual concerned, while "class of cases" means determinable groups, based on the actions of the individuals with a common aim or idea. The determinability may also be according to the nature of the object of detention. Thus, the

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Article 22 — Note 16

[1] 1950 S C 27 (Prs 52, 124) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[2] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

classification can be by grouping the activities of people or by specifying the objectives to be attained or avoided.[3] Thus, the terms "circumstances" and "classes" are not *identical.*[4]

The next question that has arisen is whether the word 'and' connecting the phrases "circumstances under which" and "class or classes of cases in which" in cl. (7) (a) should be taken as having a conjunctive or a disjunctive force. In other words, the question is whether the Parliament in enacting a law under cl. (7) (a) is bound to prescribe *both* the circumstances under which and the classes of cases in which the detention may be for a period longer than three months or whether the Parliament can merely specify *either* the circumstances *or* the class or classes of cases in which such detention may be ordered. On this question also, the view of the majority of the Judges of the Supreme Court in *Gopalan's case*[5] is that the phrases "circumstances" and "class or classes" have been used not conjunctively but disjunctively, so that the law which only provides for either of the two factors will not be open to challenge as contravening the provisions of cl. (7) (a). Fazl Ali and Mahajan, JJ., in *Gopalan's case*[6] who formed a minority, and Bose, J., who was also in a minority in the later case of *S. Krishnan* v. *State of Madras*[7] were, however, of the view that the law made by the Parliament under cl. (7) (a) must prescribe *both* "circumstances and classes."

The next question is, whether a law which, in specifying the circumstances and the class or classes of cases for the purpose of cl. (7) (a), merely sets forth some of the objects or reasons in connection with which the Legislatures can make laws under the relevant entries in the legislative lists in the Seventh Schedule, will be valid. Such a question arose in *Gopalan's case*[8] with reference to S. 12 of the Preventive

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[3] 1950 S C 27 (Prs 35, 125, 145, 199) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*
[*See also* 1952 S C 324 (328) (Pr 20) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (S C), *Shamrao V. Parulekar* v. *District Magistrate, Thana.* (The classification may be into (i) persons whose cases have already been considered by an Advisory Board and (ii) others.)
1951 S C 301 (Prs 10, 22) [AIR V 38 C 51]: 1951 S C R 621 : 52 Cri L Jour 1103 (S C), *S. Krishnan* v. *State of Madras.* (Example of Act coming under cl. (7) (a) – Sections 9 (2) (a) and 12 (i) of Preventive Detention (Amending) Act, 4 of 1951 — Under them persons in detention at the commencement of the new Act can be detained for more than three months if within 10 weeks after new Act, Advisory Board recommends, although Advisory Board's opinion about sufficient cause of detention was not obtained within three months from the date of detention—Person under detention at time of commencement of new Act are a "class of cases.")]

[4] 1950 S C 27 (Pr 89) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[5] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[6] 1950 S C 27 [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[7] 1951 S C 301 (Pr 10) [AIR V 38 C 51]: 1951 S C R 621: 52 Cri L Jour 1103 (SC).

[8] 1950 S C 27 [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

Detention Act, 1950. Before the amendment of the Act, by the Amendment Act of 1951, that section applied to cases where a person was detained with a view to preventing him from acting in any manner prejudicial to (a) the defence of India, relations of India with foreign powers or the security of India, or (b) the security of a State or the maintenance of public order. It will be noted that the phraseology is exactly borrowed from the entries in the legislative lists. It was held by the majority of the Judges in the Supreme Court that the validity of the section was not assailable on the ground that it did not prescribe "the circumstances or classes" for the purpose of cl. (7) (a). It was agreed that there was no prescription of the "circumstances" within the meaning of cl. (7) (a), because there was no mention of factors of an extraneous nature. But it was held that the provision did contain a specification of the "class or classes of cases" in which a person could be detained for a longer period than three months. It may be noted in this connection that S. 12 has been replaced by a new section bearing the same number after the amendment of the Act in 1951.

The phrase "under any law providing for preventive detention" in cl. (7) (a) does not indicate that the Parliament must first make a law prescribing the "circumstances" and the "class or classes of cases" and then there must be another law for preventive detention in accordance with the provisions of the first mentioned law made by Parliament. The "circumstances and classes" may be prescribed in the very law which provides for preventive detention.[9]

Parliament has no power under cl. (7) (a) to direct that the persons detained under any law prior to the coming into force of the Constitution can be detained for more than three months without obtaining the opinion of the Advisory Board. The words "under any law" in cl. (7) refer to future laws.[10]

Under clause (7) (a), it is only the Parliament that can make a law of the kind therein described. A State Legislature has no power to pass such a law.[11]

Under clause (4) (b), the law, under which a person is to be detained for a period longer than three months without the necessity of obtaining the opinion of an Advisory Board, must not only be one under cl. (7) (a) but also one under cl. (7) (b). This means that such a law must necessarily provide a maximum period of detention.[12] (See also NOTE 15.)

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[9] 1950 S C 27 (Pr 248) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[But see 1950 All 562 (Pr 56) [AIR V 37 C 226] : ILR (1952) 1 All 8 : 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State.* (Section 12, Preventive Detention Act (1950) does not provide that detention under any law providing for preventive detention could be for a period up to one year. This provision is made just for the purposes of that Act only and the detention referred to therein is detention ordered under that particular Act. It cannot, therefore, be taken to be an enactment under Art. 22 (7), cls. (a) and (b) of the Constitution — Note. — Not good law in view of decision of the Supreme Court in AIR 1950 S C 27.)]

[10] 1951 Mad 1015 (Pr 63) [A I R V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras.*

1950 Pat 265 (Prs 20, 62) [A I R V 37 C 67] : I L R 29 Pat 335 : 51 Cri L Jour 1081 (DB), *Brahmeswar Prasad* v. *State of Bihar.*

[11] 1950 S C 27 (Prs 126, 248) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

A law under ART. 22 (7), which provides for detention for a longer period than three months in certain classes of cases and provides that such enhanced period may be one year, must be interpreted to mean that the period of one year is to be calculated after the coming into force of that law and cannot apply to detention undergone previously.[13] (See also NOTE 15.)

Under cl. (7) (a), the Parliament may either direct who shall determine the period of detention (more than three months) in each case or may itself determine the period for a class as a whole.[14]

17. President's powers. — Article 373 has to be read with cls. (4) and (7) of this article. Article 373 runs as follows :

> "Until provision is made by Parliament under cl. (7) of ART. 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in cls. (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President."

This is a temporary provision meant to be availed of in the transitional period immediately after the coming into force of the Constitution till Parliament puts through any requisite legislation contemplated by cls. (4) and (7) of this article. During this transitory period, the President is given power to issue an order of the same type as any law that the Parliament has power under cls. (4) and (7) to pass. This power of the President is to cease as soon as Parliament makes a law under cls. (4) and (7), or within one year after the Constitution, if the Parliament has not made such law within that period. The powers of the President under ART. 373 are not more extensive than those of the Parliament under cls. (4) and (7). Hence, the President cannot order the continuation of detention in a case not covered by cl. (7). But as the provision is of purely a temporary character and has ceased to be in force, any further discussion of its effect or implications is unnecessary and the undermentioned cases are only given for purposes of reference as being of some historical interest.[1]

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[12] 1951 S C 301 (Pr 10) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103 (SC), *S. Krishnan* v. *State of Madras*.

[13] 1951 Pat 389 (Pr 7) [AIR V 38 C 99] : I L R 29 Pat 992 : 52 Cri L Jour 282 (DB), *Chandra Sheikhar* v. *State of Bihar*. (The expression 'from the date of his detention' in S. 12 of the Preventive Detention Act, 1950 (before amendment of 1951) must refer to the detention order under the Act under which the person is to be detained, that is to say, the Preventive Detention Act. If Parliament has enacted that a person should be detained without his case having been referred to an Advisory Board for a period not exceeding one year from the date of his detention, it must have reference to detention under the Preventive Detention Act and it would be ridiculous to hold that this maximum period of one year can be made up by taking into consideration the previous detention under some previous enactment.)
[*See also* 1952 S C 324 (328) (Pr 24) [A I R V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (SC), *Shamrao V. Parulekar* v. *District Magistrate, Thana*. (Section 3 of Preventive Detention (Amendment) Act, 34 of 1952, is *intra vires*.)]

[14] 1952 S C 324 (328) (Pr 20) [A I R V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 (SC), *Shamrao V. Parulekar* v. *District Magistrate, Thana*.

18. Clause (5) — General. — Clause (5) confers a very important right on a person detained under a preventive detention law. The clause provides that such person must be informed, as soon as may be, by the detaining authority the grounds on which the order of detention against him has been made. The clause also confers on the detenu another Fundamental Right of great importance, namely, that the detaining authority shall afford him the earliest opportunity of making a representation against the order. Under ART. 21, no person can be deprived of his personal liberty except in accordance with procedure established by law. The provisions of cl. (5) enact certain fundamental principles of procedure in regard to persons detained under preventive detention laws. Hence, the failure to comply with cl. (5) will make the detention one not in accordance with the procedure established by law. Where, therefore, the detaining authority fails to communicate, as soon as may be, to the detenu, the grounds on which the order of detention has been made, and also to furnish him further necessary particulars at the earliest possible opportunity,

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Article 22 — Note 17

[1] 1950 Cal 274 (Pr 26) [A I R V 37 C 97] : 51 Cri L Jour 1110 (SB), *Sunil Kumar* v. *West Bengal Government*. (The Preventive Detention (Extension of Duration) Order, 1950, is of no effect. The Order does not comply with the provisions of Art. 22 (7) (a) and (b) of the Constitution. The Order is also void because the Bengal Criminal Law Amendment Act, 1930, is not an Act providing for preventive detention.)

1951 Mad 1015 (Pr 64) [AIR V 38 C 354] : 1952 Cri L Jour 170 (DB), *Venkataraman* v. *Commr. of Police, Madras*. (The Parliament's power under Art. 22 (7) (a) and (b) can only relate to detentions made under any law enacted in pursuance of and in conformity with the provisions of Art. 22 (4). Neither the Parliament nor the President acting under Art. 373 can, therefore, prescribe what it is empowered to do under Art. 22 (7) (a) and (b) in respect of the detentions made under a law in force prior to the commencement of the Constitution.)

1950 All 562 (Prs 50, 55) [AIR V 37 C 226] : ILR (1952) 1 All 8 : 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State*. (Clause 2 of the Preventive Detention (Extension of Duration) Order, 1950, is in conformity with provisions of Art. 22 (7) (a) but Cl. 3 is not in accordance with Art. 22 (7) (b) of the Constitution.)

1950 Nag 203 (Prs 18, 19) [AIR V 37 C 60] : 51 Cri L Jour 1372 (DB), *Trimbak* v. *The State*. (The powers conferred by Art. 373 on the President are not wider than those conferred on Parliament by Art. 22 (7).)

1950 Pat 265 (Pr 29) [AIR V 37 C 67]: ILR 29 Pat 335: 51 Cri L Jour 1081 (DB), *Brahmeshwar Prasad* v. *State of Bihar*. (Article 22 (7) merely entitles the President to specify circumstances and define classes in which a person may be detained under any pre-existing law for preventive detention but without those limitations imposed by Art. 22 (4) — Article 22 (7) does not authorise making a new detention law that can stand by itself.)

to enable him to make a representation against the order of detention, the detention will be illegal.[1]

There were similar provisions in the Public Safety Acts of different provinces that were in force prior to the Preventive Detention Act. In all these cases, the grounds are to be communicated after the order of detention is passed and the person is actually kept in detention.[2] The order of detention itself, therefore, need not state the grounds or the reasons of the order. It is sufficient if the order states just the "satisfaction" of the requisite type, of the detaining authority.[3] Thus, the failure to furnish the grounds on which the order of detention has been passed is an illegality which is committed subsequent to the order of detention. Therefore, such failure will not make the order of detention itself *void ab initio*.[4] But, as seen in the notes on ART. 21, the deprivation of personal liberty of a person must be in accordance with the procedure established by law not only at the beginning but throughout. Hence, failure to furnish the grounds of detention as required by this clause will make the detention illegal from the moment when such grounds ought to have been furnished.

This clause is of general applicability and applies not only to detention under a Central law relating to preventive detention but also to detention under a State law.[5]

Although the furnishing of grounds to the detenu under this clause is an essential part of the procedure enjoined by the Constitution and although the object of this provision is to enable the detenu

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Article 22 — Note 18

[1] 1953 S C 318 (319) (Pr 3) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.*

1952 S C 350 (352) (Pr 11) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.* (Failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make representation at the earliest opportunity against the order can be considered a breach of Fundamental Right.)

1951 Hyd 79 (Pr 2) [AIR V 38 C 30] : ILR (1951) Hyd 187 : 52 Cri L Jour 502 (DB), *Narsayya* v. *Hyderabad State.*

1950 Hyd 68 (Pr 2) [AIR V 37 C 21] : ILR (1951) Hyd 183 (DB), *Narayanamma* v. *Hyderabad State.*

[*See also* 1951 All 718 (Pr 41) [AIR V 38 C 192]: ILR (1951) 2 All 745 : 52 Cri L Jour 1251 (DB), *Deodat Rai* v. *State.* (U. P. Prevention of Crimes (Special Powers) (Temporary) Act (5 of 1949), Ss. 3 (1), 5 (1) — Column of particulars in the notice left blank — Defect is fatal as applicant would not be in a position to make representation to the Magistrate — Proceedings before the Magistrate and Judge held null and void.)

[2] 1951 Bom 33 (Pr 16) [AIR V 38 C 13] : ILR (1951) Bom 546 : 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.*

[3] *See* 1949 Mad 596 (Prs 27, 28) [AIR V 36 C 262] : 50 Cri L Jour 843 (DB), *A. K. Gopalan* v. *Dist. Magistrate, Malabar.*

[4] *See* 1948 Pat 135 (Prs. 14, 25) [A I R V 35 C 51] : I L R 26 Pat 628 : 49 Cri L Jour 132 (FB), *Murat Patwa* v. *Province of Bihar.* (Case relating to Bihar Maintenance of Public Order Act, 5 of 1947.)

[5] 1950 S C 27 (Pr 23) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

Article 22
Note 18

to make a representation against the order of detention, yet, it is not necessary that before a detenu can move the Court against the order of detention, the grounds must have been communicated to him. In other words, a detenu can impeach the order of detention in a court of law on any ground that may be open to him under the Constitution and under the law even before the detaining authority has communicated to him the grounds of his detention.[6]

The words "the authority making the order" in this clause do not refer to the *individual* making the order but the District Magistrate, or the State Government or Central Government, as the case may be. Hence, there is nothing contrary to the clause in an order of detention being passed by one District Magistrate and the grounds on which the order is passed being communicated under this clause to the detenu by his successor in office, after the former has left the district.[7]

The communication of grounds need not be made directly by the authority making the detention order. The communication may be made through recognized channel prescribed by administrative rules of business.[7a]

Suppose there is no provision in a preventive detention enactment for furnishing of grounds to the detenu as required by this clause, but there is no prohibition also against the grounds being furnished. Is the enactment void as being contrary to this clause ? On this question there is a difference of opinion.[8]

The question has arisen whether a statutory prohibition, against the disclosure of grounds communicated to the detenu under this clause or of the representation made by the detenu is valid. It has been unanimously held by the Supreme Court that such a provision is void as rendering nugatory the rights conferred on the detenu under this clause.[9] The ground of decision is that the Court is entitled to look at the grounds in order to see whether they are relevant to the order of detention and the objects which are professed to be aimed at by the order. A further ground given is that the clause guarantees to the detenu the Fundamental Right of making a representation and the grounds which are required to be communicated to the detenu under this clause are intended to be helpful to him in making his representation. If the grounds are too vague and indefinite to enable the detenu to make any effective representation, it must necessarily be held that he has been denied the Fundamental Right of making representation conferred by this article. Therefore, the Court is entitled to look into the grounds supplied to the detenu even from this point of view. Hence, a prohibition against the disclosure of the grounds furnished to the detenu amounts to depriving him of the Fundamental Rights he has under the Constitution and therefore such a prohibition is *ultra vires*. See also NOTE 21.

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[6] 1951 Trav Co 130 (Prs 8, 9, 10) [AIR V 38 C 45] : ILR (1951) Trav Co 114 : 52 Cri L Jour 845 (DB), *Thiruvadinatha* v. *District Magistrate.*

[7] 1951 Bom 33 (Prs 3, 17) [AIR V 38 C 13] : ILR (1951) Bom 546 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.*

[7a] 1952 S C 350 (352) (Pr 7) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.*

[8] 1950 All 562 (Prs 54, 74, 75) [AIR V 37 C 226] : ILR (1952) 1 All 8 : 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State.* (Per *Raghubar Dayal, J.*—Article 22 (5) provides for the furnishing of grounds for arrest to the person who is detained under any law providing for preventive detention and does not provide that such law should have a provision to that effect. If grounds are not furnished to a person detained under S. 123A, Criminal P. C. (1898) (U. P. amendment) within a reasonable time, that may lead to his detention being held illegal, but should not make the detention illegal from the beginning or the law providing for such detention illegal. Hence S. 123A cannot be said to be bad as being inconsistent with Art. 22 (5) — Per *P. L. Bhargava, J.*—Provisions of S. 123A are inconsistent with Art. 22 (5) in so far as they make no provision for affording any opportunity to the person detained for making a representation against the order. Consequently they became void under Art. 13 (1) of the Constitution.)

[9] 1950 S C 27 (46, 47) (Prs 39, 93) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

19. "The grounds on which the order has been made."— As seen in NOTE 18, the detenu has been given a Fundamental Right under cl. (5) to be informed by the detaining authority, as soon as may be, the grounds on which the order of detention against him has been made. It is the detenu's right under this clause to obtain *all* the grounds on which the order of detention has been made. Where only some of the grounds are communicated, it cannot be argued that the Government has waived the other grounds. It is the constitutional right of the detenu to obtain all the grounds on which the order of detention against him has been made and none of them can be withheld from him on the ground of any waiver by the Government.[1] But what is necessary is only that all the grounds *on which the order is based* must be communicated. It is not necessary that the Government must communicate to the detenu all the grounds that it may have in its possession in support of the order.[2]

Where a detenu is detained on the ground that his remaining at large is a danger to the security of the State, the further fact mentioned in the ground of detention subsequently communicated to the detenu that he was also a danger to the maintenance of communal harmony serves only to show how he was a danger to the security of the State. In such a case, it cannot, therefore,be said that the grounds of detention are not communicated to the detenu.[3] Similarly, the expression "the maintenance of public order", as used in the Preventive Detention Act, 1950, is comprehensive enough to include the security of the State. Therefore, when the *grounds* supplied to the detenu do not suggest that there were other grounds besides those mentioned, it

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Article 22 — Note 19

[1] 1951 Pat 389 (Pr 36) [AIR V 38 C 99] : ILR 29 Pat 992 : 52 Cri L Jour 282 (DB), *Chandra Sheikhar* v. *State of Bihar*.

1950 Mad 162 (169) (Pr 11) [AIR V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate*.

[2] 1951 Pat 389 (Prs 10, 12, 36) [AIR V 38 C 99]: ILR 29 Pat 992: 52 Cri L Jour 282 (DB), *Chandra Sheikhar* v. *State of Bihar*.

[3] 1951 Raj 69 (Pr 10) [AIR V 38 C 29]: 1952 Cri L Jour 425 (DB), *Haqiqatullah Khan* v. *The State*.

cannot be said that they do not disclose all the grounds merely because they were described as concerning maintenance of public order, where the *order* of detention stated that the detention was for the security of the State as well.[4]

The fact that the detenu is entitled under cl. (5) to be informed of the grounds on which the order of detention is passed, necessarily means that the grounds which are communicated to him must be relevant to and must have some connection with the detention.[5] In the absence of such relevance and such connection the communication would not be a communication of "the grounds on which the order of detention has been made." Hence, in such a case, the provisions of cl. (5) will be treated as having been violated. Apart from this, this would also show that the order of detention is not a *bona fide* one and is not made under the particular law under which it purports to be made. But the grounds of detention must be regarded as a whole in order to determine their relevancy.[6]

It is necessary to determine the meaning of the word "grounds" in this clause. A ground according to the dictionary meaning is a reason and this meaning applies in this context. The "grounds," which are required to be communicated to the detenu under this clause are the grounds on which the order of detention is made. "Order of detention," in this context, does not merely mean the operative part in an order of detention which says that a certain person is to be detained in custody. The words also include the expression "satisfaction" of the detaining authority that with a view to preventing the intended detenu from acting in a manner prejudicial to certain specified objects, it is necessary to detain him. Hence, a statement, in which merely the words of the relevant section are repeated, setting forth in the words of the statute the objects to the prejudice of which the intended detenu is supposed to be likely to act, is not sufficient as a communication of the *grounds* on which the order of detention is made.[7] Such a statement only amounts to a repetition of the expression of the "satisfaction" of the detaining authority, which is essential under the law for making an order of detention. What is meant by cl. (5) is that the detenu must be informed the grounds or the reasons for the "satisfaction" of the detaining authority, that with a view to preventing the detenu from acting in a manner prejudicial to the given objects, it is necessary to detain him.

In *State of Bombay* v. *Atmaram Shridhar*,[8] Kania, C. J., observed as follows :

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[4] 1951 Pat 439 (Prs 4, 12) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB), *Mohit Lal* v. *The State.*

[5] 1950 All 709 (Pr 14) [AIR V 37 C 276] : ILR (1951) 2 All 493 : 52 Cri L Jour 732, *Asha Ram* v. *State.*

[6] 1952 S C 324 (328) (Pr 27) [AIR V 39] : 1952 S C R 683 : 52 Cri L Jour 1503 (SC), *Shamrao V. Parulekar* v. *District Magistrate, Thana.*

('52) 1952 I D A 12841A (Sau) (DB), *Kusum Kunverba* v. *Saurashtra State.*

[7] 1951 Bom 33 (Pr 4) [AIR V 38 C 13]: ILR (1951) Bom 546: 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.*

[8] 1951 S C 157 (Pr 5) [AIR V 38 C 24]:1951 S C R 167: 52 Cri L Jour 373 (SC).

> "According to the wording of S. 3 (Preventive Detention Act, 1950), therefore, before the Government can pass an order of preventive detention, it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established. It is significant that while the objects, intended to be defeated, are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same."

Thus, there is clearly a distinction between the "satisfaction" of the detaining authority and the grounds on which an order of detention is made. Although an order of detention cannot be made in the absence of the satisfaction of the detaining authority, and, in fact, such satisfaction is the cause of the order of detention, the satisfaction is not by itself the grounds of the order of detention within the meaning of this clause. Grounds of the order of detention for the purpose of this clause must be taken to refer not to the "satisfaction" of the detaining authority but to the grounds on which such "satisfaction" is based.

"Grounds" must be distinguished from the material in the form of information, confidential communications and other matter by which the detaining authority is moved to take action. The clause does not require the detaining authority to communicate to the detenu the sources of information or the actual information received about the detenu and his activities.[9]

Clause (5), as stated in NOTE 18, gives two rights to the detenu, namely, (1) to be informed of the grounds of his detention, and (2) to be given the earliest opportunity of making a representation against the order of detention. The latter right does not merely mean the physical opportunity of being supplied pen and ink and paper but the right implies that the statement of grounds must be sufficiently full to enable the detenu to make an effective representation against the order of detention. This means, therefore, that the detenu is entitled to obtain particulars of the grounds which will enable him to make an effective representation against the order of detention.[10] The constitutional requirement as to the furnishing of particulars of grounds so as to enable the detenu to make a representation against the order of detention must be satisfied with respect to each of the grounds communicated to the detenu, subject to the claim of privilege under cl. (6).[11] But these particulars need not be so full or detailed as in a charge-sheet in a criminal case.[12]

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[9] 1951 Orissa 251 (Prs 7, 9, 10, 11, 17, 18) [AIR V 38 C 59]:ILR (1951) Cut 387: 52 Cri L Jour 679 (DB), *T. V. Narasimhamurty* v. *The State.*

[10] 1953 S C 318 (319) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.*

1951 S C 157 (Prs 8, 9) [AIR V 38 C 24]: 1951 S C R 167: 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

1951 Bom 252 (253) (Pr 3) [AIR V 38 C 48] : ILR (1951) Bom 92 : 52 Cri L Jour 437 (DB), *Sushila* v. *Commr. of Police, Greater Bombay.*

While thus the detaining authority is bound under this clause to communicate to the detenu adequate particulars of the grounds of his detention, so as to enable him to make an effective representation against the order of detention, there is a distinction between *grounds* themselves and *particulars*. By the word "grounds" is meant conclusions of facts required to bring about the satisfaction of the Government.[13] All the grounds, in this sense, on which the order of detention is based must be communicated to the detenu as soon as may be after the order. If this is not done, the detention will become illegal. "Particulars" in the sense of details relating to these conclusions of facts are a different matter. With regard to the supply of these "particulars," a certain amount of latitude is given to the detaining authority, subject to the condition that the particulars given must be sufficient to enable the detenu to make an effective representation against the order of detention. While with regard to grounds in the narrower sense, as explained above, the clause requires that all the gounds, on which the order of detention is made, must be communicated at one time as soon as may be after the order, the further particulars of the grounds to enable the detenu to make an effective representation against the order may be communicated subsequently. In other words, so long as there is no addition to the grounds in the narrower sense above explained, there is no bar to the detaining authority supplementing the particulars already supplied to the detenu so as to enable him to make an effective representation against the order of detention.[14] (See also NOTE 22.)

1951 Bom 33 (Prs 5, 19) [AIR V 38 C 13]: ILR (1951) Bom 546:52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.*

[11] 1953 S C 318 (320) (Pr 5) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.* (Where it has not been done in regard to one of the grounds mentioned in the statement of grounds the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 and he is, therefore, entitled to be released: A I R 1951 S C 157, Rel. on.)

[12] 1951 Pat 439 (Pr 5) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB), *Mohit Lal* v. *The State.*

1950 All 69 (Pr 31) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*

[13] ('52) 1952 I D A 12841A (Sau) (DB), *Kusum Kunverba* v. *Saurashtra State.* [*See* 1951 S C 157 (Pr 15) [AIR V 38 C 24]: 1951 S C R 167: 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.* (In this case distinction is made between "supplementary grounds" which give additional conclusions of fact on which the order of detention was based and "supplementary grounds" (so called) which merely state additional particulars about the conclusions of fact already communicated.)

[14] 1951 S C 157 (Pr 15) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (S C), *State of Bombay* v. *Atmaram Sridhar.*

In *State of Bombay* v. *Atmaram Shridhar*,[15] Kania, C. J., observed as follows :

> "The adjective 'supplementary' is capable of covering cases of adding new grounds to the original grounds as also giving particulars of the facts which are already mentioned, or of giving facts in addition to the facts mentioned in the ground to lead to the conclusion of fact contained in the ground orignially furnished. It is clear that if by 'supplementary grounds' is meant *additional* grounds, i. e. conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in ART. 22 (5) as the grounds for the order of detention must be before the Goverernment before it is satisfied about the necessity for making the order and all such grounds have to be furnished *as soon as may be.* The other aspects, namely, the second communication (described as supplemental grounds), being only particulars of the facts mentioned or indicated in the grounds first supplied, or being additional incidents, which, taken along with the facts mentioned, or indicated in the ground already conveyed, *lead to the same conclusion of the fact,* (which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of ART. 22 (5). Thus, while the first mentioned type of "additional' grounds cannot be given after the grounds are furnished in the first instance, the other types, even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in Article 22 (5) of the Constitution."

The above extract brings out the distinction between grounds in the narrower sense and particulars of the grounds explained above.

To recapitulate: *firstly*, "grounds" must be distinguished from "satisfaction." Though satisfaction of the detaining authority to a particular effect is the basis on which the order of detention is made, it is not the same thing as the grounds of the order of detention, because the grounds here meant are the grounds of the satisfaction and not the satisfaction itself.

Secondly, "grounds" must be distinguished from the materials or the background or the information, confidential or otherwise, which may be with the executive power which moves it to take action under the preventive detention law. The Executive is not bound to divulge any part of this material with it.

Thirdly, grounds must be distinguished from particulars. This has been explained already.[16]

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[15] 1951 S C 157 (Pr 15) [AIR V 38 C 24] : 1951 S C R 167 : 52 CriLJ 373 (SC).

[16] *See* 1951 Mad 182 (Prs 8, 13) [AIR V 38 C 17] : 52 Cri L Jour 688 (DB), *Narayana Raju* v. *Secy., Govt. of Madras.* (Though if the grounds of deten-

Article 22
Notes 19-20

Various public safety enactments of the different Provinces which were in force previous to the Constitution required not only grounds to be communicated but also *particulars*. Decisions,[17] with reference to these enactments, therefore, holding that the detaining authority was bound to communicate all the particulars about the reasons which led to the order of detention, are only of academical interest for purpose of ART. 22, as there is no express provision in the article that particulars of the grounds of detention should be given to the person detained, but the article only requires that the grounds should be given, giving of particulars being necessary in connection with the other right of the detenu, namely, of making an effective representation against the order of detention.[18]

It has been held that under S. 7 of the Preventive Detention Act, 1950, it is not obligatory on the part of the detaining authority to furnish a *copy of the grounds* to the detenu.[19] The wording of cl. (5) being exactly similar to that of S. 7, the above view would also apply to cl. (5).

20. Vagueness of grounds.—It has been seen in NOTE 19 that the word "grounds" in the context of cl. (5) has a broad and a narrow sense. The broad sense will include the particulars of the grounds; the narrow sense will not include these particulars. The requirement of the clause that grounds must be furnished to the detenu, as soon as may be after the order of detention, will be satisfied even if the grounds in the narrow sense are furnished. But the requirement of the clause that the detenu must be given the earliest possible opportunity of making a representation against the order of detention will not be satisfied by the communication of such grounds. That require-

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tion are very vague and indefinite so as to render the object of furnishing the grounds nugatory the order may be set aside, the detaining authority is under no obligation to disclose to the detenu the basis of the allegation, i. e., the particulars of the allegations on which the detention is made. It is not correct to say that what cl. (6) of Art. 22 entitles the detaining authority is only to refrain from disclosing to the detenu the evidence of the allegations. Grounds of detention cannot be said to be vague and indefinite for the reason that they do not contain the basis of those grounds. NOTE: This decision draws a distinction between "grounds" and "particulars" but in so far as it may be held to say that "particulars" need not be given it cannot be regarded as correct as the right to make a representation which the clause confers necessarily implies an obligation on the part of the detaining authority to communicate some particulars.)

[17] *See* 1948 Bom 334 [AIR V 35 C 85] : ILR (1948) Bom 213 : 49 Cri L Jour 465 (FB), *In re Rajdhar.*
1949 All 37 (Pr 21) [AIR V 36 C 15] : ILR (1949) All 217 : 50 Cri L Jour 34, *Inder Prakash* v. *Emperor.*
1949 Mad 438 (Prs 4, 5) [AIR V 36 C 198], *In re Narahari.*

[18] *See* 1951 S C 157 (Pr 31) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.* (Per *Patanjali Sastri, J.*)

[19] 1951 Raj 69 (Pr 6) [AIR V 38 C 29]: 1952 Cri L Jour 425 (DB), *Haqiqatullah Khan* v. *The State.* (Though it is desirable to supply such copy to the detenu as it would greatly facilitate the making of a representation this would be unnecessary where the detenu had the grounds before him when he made the representation and was not handicapped by a copy not having been supplied to him.)

ment will only be satisfied if particulars sufficient to enable the detenu to make an effective representation are supplied to him.[1]

The sufficiency of particulars for this purpose necessarily involves that they must not be too vague and indefinite to enable the detenu to make an effective representation. Hence, where the particulars supplied to the detenu are too vague and indefinite to enable the detenu to make an effective representation, he will be deemed to have been deprived of his Fundamental Right of making a representation against the order, conferred by cl. (5).[2] Hence, in such cases the detenu will be entitled to be released forthwith.

Article 22 — Note 20

[1] 1952 S C 350 (353) (Pr 11) [AIR V 39]: 1952 S C R 756: 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.* (Vagueness of 'grounds' is not itself a vitiating circumstance unless it indicates *mala fides* or want of 'satisfaction' — 'Particulars' for making representation against the order of detention may be supplied within a reasonable time after 'grounds' are supplied.)

1951 S C 157 (161, 163) (Prs 7, 12) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

[2] 1953 S C 318 (319) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.* (Sufficiency of particulars in the "second communication" is a justiciable issue.)

1952 S C 350 (353) (Pr 11) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.*

1950 S C 27 (Pr 203) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1953 Pepsu 190 (191) (Pr 4) [AIR V 40 C 77] : I L R (1953) Patiala 1 : 1953 Cri L Jour 1710, *Jangir Singh* v. *State of Pepsu.*

1953 Raj 177 (178) (Pr 4) [AIR V 40 C 62] : 1953 Cri L Jour 1424 (DB), *Durg Singh* v. *State.* (Dissenting from AIR 1952 Raj 171.)

1952 Cal 26 (Prs 7, 8, 9) [AIR V 39 C 10] : 1952 Cri L Jour 204 (DB), *Raman Lal* v. *Commr. of Police.* (Vagueness of grounds is not an abstract notion but is always to be examined by the test whether the grounds permit the detenu to make an effective representation or not. While the sufficiency of the grounds in the sense whether the same could give satisfaction to the Government is not a matter for examination by the Courts, the sufficiency of grounds in the sense of enabling a detenu to make an effective representation can be examined by the Courts. In considering the grounds they must be taken and read as a whole and in the context in which they are stated. While a ground taken in isolation might appear to be too vague for representation it may nevertheless in the context of other grounds stated, give sufficient materials for effective representation. It is not correct to say that when one out of many grounds is too vague the order of detention is bad even though such order is based not only on that ground alone but also on other grounds which do not suffer from vagueness. The order of detention is the result of the cumulative effect : A I R 1951 Cal 194 and A I R 1951 S C 174 (SC), Referred to.)

1951 Orissa 251 (Pr 9) [AIR V 38 C 59] : I L R (1951) Cut 387 : 52 Cri L Jour 679 (DB), *T. V. Narsimhamurty* v. *The State.*

1951 Orissa 27 (Prs 5, 6, 7) [AIR V 38 C 10] : 52 Cri L Jour 110 (DB), *Ananta Charan* v. *The State.*

[*See* 1949 Pat 1 (11, 12) (Prs 22, 23) [A I R V 36 C 1] : I L R 27 Pat 773 : 50 Cri L Jour 44 (FB), *Nek Mohammad* v. *Province of Bihar.* (Case as to Bihar Maintenance of Public Order Act, 5 of 1947.)

1951 Cal 194 (Pr 13) [AIR V 38 C 32] : 51 Cri L Jour 1569 (DB), *Safatulla Khan* v. *Chief Secy., W. B. Govt.* (Grounds of detention making wide and sweeping allegations against the detenu without disclosing bases of these allegations are not sufficient under S. 7 of the Preventive Detention Act (1950).)]

The detenu is entitled to go to the Court as soon as he finds that the grounds and particulars supplied to him are so vague and indefinite that he cannot make an effective representation against the order of detention at all. His detention becomes immediately illegal on the supply of such vague and indefinite particulars to him, and it does not lie in the mouth of the Government to contend that before approaching the Court the detenu must have approached the Government for more particulars.[3] The detenu is not bound to do any such thing and give the Government a further opportunity of complying with the requirements of the Constitution.

Nor can the illegality of the detention, which arises on the failure of the Government to supply the detenu sufficiently detailed particulars to enable him to make an effective representation, be cured by the supply of particulars by the Government after the objection has been raised by the detenu and when the matter is before the Court. Hence, the supply of better particulars, in compliance with an order of the Court for such particulars, will not satisfy the requirements of cl. (5).[4] In *Durga Das* v. *Rex*,[5] Malik, C. J., of Allahabad High Court observed as follows :

> "On behalf of the Provincial Government it has been urged that if the detenu has not complained to the detaining authority that the information supplied to him is vague and insufficient, he should not be allowed to make a grievance of it in Court and secondly, that if in the opinion of the Court the grounds and particulars supplied are vague, indefinite or insufficient we should give the detaining authority a chance to supply better grounds and particulars. We cannot accept any of these contentions. Section 5 (U. P. Maintenance of Public Order (Temporary) Act (4 of 1947)) has cast a duty on the detaining authority and if it has not done its

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[3] 1949 All 148 (Pr 25) [AIR V 36 C 57]: I L R (1949) All 458: 50 Cri L Jour 214 (FB), *Durgadas* v. *Rex*. (Case under U. P. Maintenance of Public Order Act.)
1949 All 37 (Pr 26) [AIR V 36 C 15] : I L R (1949) All 217 : 50 Cri L Jour 34, *Inder Prakash* v. *Emperor*.
[See however 1952 Mys 85 (86) [AIR V 39] : I L R (1951) Mys 455 : 1952 Cri L Jour 1526 (DB), *D. M. Revanasiddiah* v. *Mysore State*. (There can be no infringement of any Fundamental Right of a person detained under the Preventive Detention Act or the contravention of any constitutional provision if he has been supplied with sufficient particulars as soon as he raised the objection that the grounds supplied were vague : AIR 1951 S C 157, Foll.—Submitted not correct.)

[4] 1949 All 148 (Pr 25) [AIR V 36 C 57] : ILR (1949) All 458 : 50 Cri L Jour 214 (FB), *Durgadas* v. *Rex*.
1951 Simla 157 (Pr 22) [A I R V 38 C 27] : 52 Cri L Jour 17 (DB), *Bakhtawar Singh* v. *The State*. (Per *Soni, J.*—A real danger exists that original supply of vague grounds and a grudgingly made supply of further grounds, if encouraged, is likely to cause delay in deciding the legality of detention by High Court or the Supreme Court in matters which require prompt attention.)
1949 All 37 (43, 44) (Prs 32, 34) [AIR V 36 C 15] : ILR (1949) All 217 : 50 Cri L Jour 34, *Inder Prakash* v. *Emperor*.

[5] 1949 All 148 (153) (Pr 25) [AIR V 36 C 57] : I L R (1949) All 458 : 50 Cri L Jour 214 (FB).

duty and has thereby incurred a liability, there is no reason why the detenu should make a complaint to it and not come to the Court and ask for his release on the ground that the mandatory provision of the statute not having been fulfilled, his further detention has become illegal. In *Sumer's case*,[6] I had given the detaining authority one week's time to comply with the requirements of S. 5 of the Act after I had come to the conclusion that the provisions of S. 5 had not been complied with. After having considered the matter more fully and in view of the fact that I have already held that the grounds and particulars have to be supplied within a reasonable time, so that the detenu may have 'the earliest practicable opportunity' of making a representation, and an unreasonable delay would make the detention illegal, I agree with the opinion expressed by brother Raghubar Dayal in *Inder Prakash* v. *Emperor*[7] that 'the legal consequences of the non-compliance with S. 5 cannot depend on the conduct of the District Magistrate subsequent to any such direction given by the Court. The legal consequences would depend on the nature of the initial conduct and its effect in law'."

However, as stated in NOTE 19, subject to the condition of the particulars being supplied sufficiently in time to afford the earliest opportunity to the detenu to make a representation, the detaining authority is not precluded from making a supplementary statement of particulars, so as to comply with the requirement of the law that the particulars must be sufficient to enable the detenu to make a representation. See also NOTE 22.

Although the vagueness and insufficiency of grounds and particulars, which deprives the detenu of the opportunity to which he is entitled under the Constitution to make a representation against the order, renders the detention illegal, the illegality arises only from the time at which the non-compliance with cl. (5) occurs. Hence, the order of detention itself does not become *void ab initio*.[8]

The grounds, which are to be communicated to the detenu, are the grounds on which the order of detention has been made. This necessarily means that the grounds which are communicated must be connected with and relevant to the order. If the grounds are not relevant to the objects in connection with which the order of detention states that the detention is considered necessary, then there will be no compliance with the requirements of this clause, apart from the fact that the order of detention will be itself condemnable as not being *bona fide*. But where the grounds furnished cannot be said to be irrelevant or unconnected with the order of detention but are only too

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[6] 1948 All 78 [AIR V 35 C 35] : 49 Cri L Jour 11, *Emperor* v. *Sumer Singh*.

[7] 1949 All 37 [AIR V 36 C 15] : I L R (1949) All 217 : 50 Cri L Jour 34.

[8] 1951 Orissa 251 (Pr 7) [AIR V 38 C 59] : I L R (1951) Cut 387 : 52 Cri L Jour 679 (DB), *T. V. Narasimhamurty* v. *The State*.
1950 All 562 (Pr 54) [AIR V 37 C 226] : ILR (1952) 1 All 8 : 52 Cri L Jour 1282 (DB), *Harpal Singh* v. *State*. (Per *Raghubar Dayal, J.*—Failure to furnish grounds does not make detention *ab initio* void, but only further detention void.

Article 22
Note 20

vague and indefinite to enable an effective representation to be made, the requirement of the clause as to the furnishing of grounds, on which the order of detention has been made, must be deemed as satisfied. This, however, does not mean that there is no connection between the furnishing of grounds and the opportunity to make a representation. The representation is an objection to the order of detention and in the nature of things the representation can only be made after the grounds of "satisfaction" of the detaining authority are supplied to the detenu. But the fact that the grounds are not sufficiently definite to enable the detenu to make a representation will not *ipso facto* condemn the grounds as being irrelevant or unconnected with the order of detention.[9] Thus, vagueness of grounds and irrelevance of the grounds are two distinct matters affecting distinct Fundamental Rights.[10] But where the vagueness of the grounds is such as to prove that the detaining authority has not applied its mind at all to the case, then the vagueness of the grounds will affect the question of the order of detention being a *bona fide* or *mala fide* one.[11]

Where a number of grounds are furnished to the detenu, he must be supplied sufficient particulars about each ground to enable him to make the representation against the order in respect of that ground. In other words, the constitutional requirements must be satisfied in respect of each of the grounds communicated to the detained person.[12] The contrary view expressed in the undermentioned decisions[13] must be deemed as overruled by the decision of the Supreme Court in *Ram Krishan Bhardwaj* v. *State of Delhi*.[14] It was argued on behalf of the detenu in the above case that even though the detenu might succeed in rebutting the other grounds to the satisfaction of the Advisory Board, his representation might fail to carry conviction so far as the vague ground was concerned in the absence of particulars which he could rebut and the Advisory Board might recommend the continuance of detention on that ground. The Supreme Court remarked that the argument was not without force and that the possibility suggested could not be ruled out.

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[9] 1951 S C 157 (Pr 12) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

[10] 1951 S C 174 (Pr 8) [AIR V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400 (SC), *Tarapada De* v. *State of West Bengal.*
1951 S C 157 (163) (Pr 12) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atma Ram Shridhar.*
1952 Mys 85 (87) (Pr 6) [AIR V 39] : ILR (1951) Mys 455 : 1952 Cri L Jour 1526 (DB), *D. M. Revanasiddiah* v. *Mysore State.*

[11] 1949 All 37 (Prs 21, 22, 23, 24, 26, 27, 44, 45) [AIR V 36 C 15] : ILR (1949) All 217 : 50 Cri L Jour 34, *Inder Prakash* v. *Emperor.*

[12] 1953 S C 318 (320) (Pr 5) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.*

[13] 1953 Pepsu 190 (191, 192) (Pr 5) [A I R V 40 C 77] : I L R (1953) Patiala 1 : 1953 Cri L Jour 1710, *Jangir Singh* v. *State of Pepsu.* (3 Pepsu L R 77, Rel. on.)
1952 Cal 26 (Prs 7, 8, 9) [A I R V 39 C 10] : 1952 Cri L Jour 204 (DB), *Raman Lal Rathi* v. *Commr. of Police.*
1950 All 69 (Pr 31) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*
('52) 1952 I D A 12841A (Sau) (DB), *Kusum Kunverba* v. *Saurashtra State.*

[14] 1953 S C 318 (320) (Pr 5) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC).

As to the meaning of "vagueness of grounds", 'vague' can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty, it can be called vague.[15]

A ground is not necessarily vague if the only answer of the detained person can be to deny it.[16] If, on reading the ground furnished, it is capable of being intelligently understood and is sufficiently definite to enable the detenu to make a representation against the order of detention, it cannot be called vague.[17]

Thus, the question whether the grounds supplied are too vague to enable a representation to be made is a question of fact in each case and no hard and fast rule of general applicability can be laid down as a test.[18] But it must be remembered that a layman not experienced in the interpretation of documents can hardly be expected to interpret the grounds supplied to him like trained lawyers. It is, therefore, up to the detaining authority to make its meaning clear beyond doubt. Otherwise the grounds will have to be regarded as being too vague to enable the detained person to make a representation against the order.[19] In this connection, it must be remembered that the detenu is denied the right to legal assistance which is vouchsafed to arrested persons under cl. (1) of this article.[20]

But the fact that the date, time and place of all the particulars are not given would not make the order defective, provided that sufficient particulars were given to enable the detenu to make an effective representation against the order of detention.[21]

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[15] 1951 Hyd 128 (Pr 13) [AIR V 38 C 53] : ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.*

[16] 1951 Hyd 128 (Pr 13) [AIR V 38 C 53] : ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.*

[17] 1951 Hyd 162 (Pr 6) [AIR V 38 C 58] : 52 Cri L Jour 1527 (FB), *Bompalli Sathia* v. *Government of Hyderabad.*

1951 Hyd 128 (Pr 13) [A I R V 38 C 53] : I L R (1951) Hyd 654 : 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.* (Where the detenu, after intelligently understanding the ground, has procured the certificates to contradict its statements, the ground cannot be said to be vague : A I R 1951 S C 157, Applied.)

1952 Hyd 186 (186) (Pr 3) [A I R V 39] : I L R (1952) Hyd 770 : 1952 Cri L Jour 1756 (DB), *S. Ramanadhan* v. *Hyderabad State.*

1950 All 69 (Pr 31) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*

[18] 1949 All 148 (Pr 19) [AIR V 36 C 57] : I L R (1949) All 458 : 50 Cri L Jour 214 (FB), *Durgadas* v. *Rex.*

[19] 1953 S C 318 (320) (Pr 4) [A I R V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.*

[20] 1953 S C 318 (320) [A I R V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi.*

[21] 1950 All 69(Pr 31) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.* [*See also* 1951 Raj 69 (Pr 8) [A I R V 38 C 29] : 1952 Cri L Jour 425 (DB), *Haqiqatullah Khan* v. *The State.* (Grounds not too vague merely because dates of activities are not given.)]

Article 22
Note 20

There is nothing in the law which compels the Government to give all the materials available with it if the grounds are such as to enable the detenu to make a representation. Even a charge-sheet in a criminal case does not narrate all the material on the record of the Court.[22] Slight inaccuracy in giving the particulars must not be regarded as necessarily fatal to the legality of the detention either as showing *mala fides* or absence of satisfaction of the detaining authority or as showing that the detaining authority did not apply its mind to the question or for any other reason. The question in such a case is whether the detenu has been prejudiced by the alleged vagueness or inaccuracy in the statement of grounds.[23]

It has been held that if the detenu knew what incidents were being referred to and was, therefore, not prejudiced by the meagreness of the particulars supplied to him, he cannot complain that owing to such meagreness he was denied an opportunity to make a representation against the detention.[24] It will be seen that in such a case the statement of grounds and particulars is in the circumstances of the case, in spite of its meagreness, not insufficient to enable the person detained to make a representation against the order of detention. But where such is not the case, the mere fact that the law allows the detained person to appear before the Advisory Board and that the Advisory Board can call for the necessary particulars from the Government will not be sufficient to justify the vagueness of the grounds and particulars supplied. The reason is that in such cases the question is not whether the detained person will in fact be prejudicially affected in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed.[25]

When grounds are stated to be scanty, it means that they are incomplete and lacking in detail, while vague means not clear and involving an element of ambiguity.[26] See the undermentioned cases[27] as illustrative instances as to the vagueness of grounds for the purpose of this clause.

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[22] 1950 All 69(Pr 31) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex*.

[23] 1951 Pat 68 (Prs 7, 8) [A I R V 38 C 9] : 52 Cri L Jour 603 (DB), *Subodh Kumar* v. *The State*.

(1941) 3 All E R 388 (395) : 1942 App Cas 384, *Greene* v. *Home Secretary*. (Discrepancy—Slight inaccuracy in grounds—Detenu not prejudiced — Immaterial.)

[24] 1951 All 18 (Pr 2) [AIR V 38 C 5] : 1952 Cri L Jour 422 (DB), *Ram Adhar* v. *State*.

[25] 1953 S C 318 (320) (Pr 5) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (S C), *Ram Krishan* v. *State of Delhi*. ("Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.")

[26] 1951 Simla 157 (Pr 5) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB), *Bakhtawar Singh* v. *The State*.

[27] 1949 Pat 1 (Prs 36, 38) [AIR V 36 C 1]: ILR 27 Pat 773: 50 Cri L Jour 44 (FB), *Nek Mohammad* v. *Province of Bihar*. (A statement in the grounds furnished that the detenu is a member of an organization or association which has been recently declared unlawful, without any reference to the nature of the activity in which he is or was engaged and without any particulars of that activity, is not sufficient compliance with the mandatory provisions of S. 4, Bihar Maintenance of Public Order Act (5 of 1947). A statement to the effect that the activity

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was underground and secret is general and vague and means nothing, unless the nature of the activity is indicated and some particulars at least are given. Secret activity does not necessarily mean that it is an activity subversive of law and order.)

1951 Bom 266 (Prs 1, 3) [AIR V 38 C 52] : ILR (1951) Bom 155 (DB), *In re Atmaram Shridhar.* (Where a detenu was arrested by an order under the Act and the grounds furnished were that detenu was engaged and was likely to be engaged in promoting acts of sabotage on railway and railway property in Greater Bombay : *Held*, that the detention was not valid as the grounds furnished were not in compliance with the constitutional and statutory provisions.)

1951 Orissa 251 (Prs 10, 18) [AIR V 38 C 59] : ILR (1951) Cut 387 : 52 Cri L Jour 679 (DB), *T. V. Narasimhamurty* v. *The State.* (Grounds stating that detenu was hoarding food-grains for selling in the black-market—*Held* that the grounds disclosed were not insufficient for enabling the detenu to make a representation, although all the sources of information which led the authorities to the conclusion that detention was essential to prevent the detenu from selling in the black-market were not disclosed.)

1951 Orissa 27 (Prs 5, 6, 7) [AIR V 38 C 10] : 52 Cri L Jour 110 (DB), *Ananta Charan* v. *The State.* (Vagueness consists in that the reasons of apprehension of the detaining authority are too remote being mere possibility upon possibility or contingency upon contingency. Merely saying that detenu is a dangerous character and his creed is communism is not sufficient.)

1951 Orissa 20 (Prs 4, 5) [AIR V 38 C 8] : ILR (1950) Cut 540 : 52 Cri L Jour 104 (DB), *Kulamoni* v. *The State.* (The grounds supplied to *A* (detenu), which were exactly similar to grounds supplied to other detenus, alleged that *A* was an avowed member of Communist party which described existing Communist agitation as 'Civil War' and that *A* was attempting to collect weapons, etc., and was likely to go underground. No further details were given on the ground that their disclosure was against public interest — *Held* that the grounds were too vague. Moreover, they were such as could be taken against every member of that party and if really existed were sufficient to declare the party unlawful. In absence of such declaration every member of the party could not be predicated to be sabotageous or violent.)

1951 Pat 439 (Pr 5) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB), *Mohit Lal* v. *The State.* (Where in a case of detention for instigating, in collaboration with a notorious outlaw, the landless labourers to loot food-grains, the grounds served upon the detenu clearly mentioned the places at which the disturbances have taken place and also the period when they took place, the mere fact that the exact date and hour and the part played by the detenu in each of the occurrences were not set out in detail will not render the grounds vague.)

1951 Simla 157 (Prs 4, 5) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB), *Bakhtawar Singh* v. *The State.* (Where the grounds supplied to several detenus under S. 7 (1) of the Preventive Detention Act were that they were engaged in smuggling cloth and other supplies, maintenance of which is essential to the community, and in furtherance of object indulged in activities prejudicial to the security of the State and the maintenance of public order—*Held* that the grounds were vague and indefinite as they did not mention particulars of date or kind of smuggling or of the country to which supplies were smuggled and hence the detention was invalid.)

1950 Assam 49 (Pr 2) [AIR V 37 C 15] : 51 Cri L Jour 477 (DB), *Benoy Bhusan* v. *Government of Assam.* (Assam Maintenance of Public Order Act (5 of 1947), S. 4 — Where the grounds furnished to the detenu, *inter alia*, stated that he threatened public peace and tranquillity in a certain district by urging violent methods specially among the labour classes and that he professed communist ideology and had actively engaged himself to put communist directives into

Article 22
Note 21

21. Grounds of detention—Consideration by the Court.— The grounds furnished to a detenu may be viewed from three points of view : (1) as to their relevancy or connection with the objects for which the detention purports to have been ordered; (2) the adequacy of the grounds to create the "satisfaction" of the detaining authority that it is necessary, with a view to prevent the detenu from acting in a certain manner, to place him under detention ; and (3) the adequacy of the grounds for the purpose of enabling the detenu to make an effective representation against the order of detention.

It is open to the Court to examine the grounds and particulars supplied to a detenu, in order to see whether they are relevant and they are connected with the objects for which the detention purports to have been ordered. If they are not so relevant, then the grounds will not be grounds on which the order of detention has been made and the furnishing of such grounds will not amount to a compliance with the requirement of cl. (5). Further, the order of detention itself would have been proved to be not *bona fide* in such a case. It is open to the Court to examine the grounds from this point of view.[1]

But it is not open to the Court to examine the grounds and particulars supplied in order to see whether they are sufficient to produce the "satisfaction" of the detaining authority.[2] As already seen

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effect for a political struggle by bringing a revolution — *Held* that these grounds were sufficient to enable the detenu to make a representation to the Provincial Government.)

1950 East Punj 222 (Prs 13, 14) [AIR V 37 C 43]: 51 Cri L Jour 1237, *Har Tirath Singh* v. *The Crown.* (Where the grounds supplied to the detenu merely state that he took part in subversive activities and committed breach of the public tranquillity, the information given is not merely vague, insufficient or indefinite but amounts to no information at all and there is no compliance with all the provisions of law as contained in S. 3, East Punjab Public Safety Act (5 of 1949) and the continued detention of the detenu becomes illegal.)

Article 22 — Note 21

[1] 1950 S C 27 (42) (Pr 39) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

1950 F C 129 (Pr 6) [AIR V 37 C 12] : 1949 F C R 827 : 51 Cri L Jour 1480 (FC), *Machindar Shivaji* v. *The King.*

1951 Simla 157 (Pr 6) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB), *Bakhtawar Singh* v. *The State.* (Thus, where detention order was based on allegation that the detenu was engaged in smuggling activities and that it was necessary to prevent him from doing so and thereby endanger public order or supply of essential commodities, the Court considered whether the smuggling activities alleged could have such an effect, and holding that smuggling could not lead to breach of public order and that the particular commodities alleged to be involved were not essential for the life of the community, declared the order of detention as not founded on any *bona fide* satisfaction.)

1949 Mad 761 (Pr 2) [AIR V 36 C 338] : 51 Cri L Jour 183 (DB), *In the matter of N. R. Sreenivasan.* (It is permissible to view the order of detention in relation to the apparent and avowed object with which the order of detention was passed.)

[2] 1953 Pat 351 ([illegible]52) (Pr 3) [AIR V 40 C 125] : 1953 Cri L Jour 1734 (DB), *Rajendra Nath* v. *State of Bihar.*

1952 Bhopal 1 (5) (Pr 21) [AIR V 39 C 1]: 1952 Cri L Jour 660, *Govind Prasad* v. *State of Bhopal.*

in NOTE 10, the "satisfaction" of the detaining authority is purely a *subjective* satisfaction and no objective standard is applicable to it. In other words, a Court is not entitled to substitute its satisfaction for that of the detaining authority or to examine the reasonableness or otherwise of the grounds on which the detaining authority professes to be satisfied about the necessity of detaining the particular individual. As already said, however, this does not mean that the Court is powerless to consider the *relevancy* of the grounds for the order of detention. A distinction must be drawn between the *relevancy* of the grounds and the *sufficiency* of the grounds. The relevancy of the grounds is always open for examination by the Court,[3] but not their sufficiency. In other words, where the grounds are such as can be rationally connected with the detention, the question of satisfaction of the detaining authority is beyond the purview of the Court's jurisdiction to examine.[4]

But although the sufficiency of the grounds to produce the satisfaction which the detaining authority professes to have felt cannot be looked into by the Court, the Court can, in addition to seeing whether the grounds are relevant for the objects of the detention, also see whether the grounds and particulars supplied are sufficient to enable the detenu to make an effective representation against his order of detention.[5] Clause (5) confers a double right on the detenu. One is to be supplied the grounds of the order of detention. The other is to be afforded the earliest opportunity of making a representation against the order of detention. The latter right necessarily implies his being furnished sufficient particulars about the grounds of his detention to enable him to make an effective representation. It is clear that the point of view from which the sufficiency of the grounds is to be examined is different for the purpose of the two rights. In the case of the requirement of cl. (5) that the detenu must be supplied the grounds of detention as soon as may be the test of the sufficiency of the grounds is only the test of *relevancy*. The test of their adequacy to

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1952 Hyd 112 (115) (Pr 3) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076, *Maqdoom Mohiuddin* v. *State of Hyderabad*.

[3] 1950 Mad 162 (174) (Pr 30) [AIR V 37 C 75]:51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate, Mathurai*. (E.g. detention on ground of religious, economic or political beliefs, or addiction to *personal* vice have nothing to do with public order, public safety, etc.)

[4] 1951 S C 174 (Pr 8) [AIR V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400 (SC), *Tarapada De* v. *State of West Bengal*.

1951 S C 157 (Pr 5) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar*.

1953 Pat 351 (353) (Pr 6) [AIR V 40 C 125] : 1953 Cri L Jour 1734 (DB), *Rajendra Nath* v. *State of Bihar*.

1952 Mys 85 (87) (Pr 7) [AIR V 39] : ILR (1951) Mys 455 : 1952 Cri L Jour 1526 (DB), *D. M. Revanasiddiah* v. *Mysore State*. (The "satisfaction" is that of the detaining authority.)

1951 Pat 47 (Pr 20) [AIR V 38 C 6] : ILR 30 Pat 630 : 52 Cri L Jour 406 (DB), *Dayanand Modi* v. *State of Bihar*.

[5] 1953 S C 318 (319) [AIR V 40 C 74] : 1953 Cri L Jour 1241 (SC), *Ram Krishan* v. *State of Delhi*.

support the alleged satisfaction of the detaining authority does not apply. But in regard to the second right of the detenu, above referred to, namely, his right to make an effective representation against his order of detention, the Court is entitled to see whether the grounds and particulars supplied to him are sufficiently full and detailed to enable him to make an effective representation.[6]

In the *State of Bombay* v. *Atmaram Shridhar*,[7] Kania, C. J., observed as follows :

> "The first part of Art. 22, cl. (5) gives a right to the detained person to be furnished with 'the grounds on which the order has been made' and that has to be done 'as soon as may be'. The second right given to such person is of being afforded 'the earliest opportunity of making a representation against the order'. It is obvious that the grounds for making the order as mentioned above are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds, therefore, must be in existence when the order is made. By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts.
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> "The conclusions drawn from the available facts will show in which of the three categories of prejudicial acts the suspected activity of the particular person is considered to fall. These conclusions are the 'grounds' and they must be supplied. No part of such grounds can be held back. Nor can any more grounds be added thereto. What must be supplied are the grounds on which the order has been made and nothing less. The second right of being afforded the earliest opportunity of making a representation against the order is not confined to only the physical opportunity by supplying paper and pen only. In order that a representation can be made, the person detained must first have knowledge of the grounds on which the authorities convey that they were satisfied about the necessity of making the detention order. It is, therefore, clear that if the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object. Ordinarily, the grounds in the sense of conclusions drawn by the authorities will indicate the kind of prejudicial act the detenu is suspected of being engaged in and that will be sufficient to enable him to make a representation setting out his innocent activities to dispel the suspicion against him. Of course, if the detenu is told about the details of facts besides the grounds, he will certainly be in a better position to deal with the same. It is significant that the clause does not say that the grounds as well as details of facts on which they are based must be furnished or

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[6] 1951 S C 174 (Pr 8) [AIR V 38 C 25] : 1951 S C R 212:52 Cri L Jour 400 (SC), *Tarapada De* v. *State of West Bengal.*
1951 S C 157 (Prs 7, 12) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

[7] 1951 S C 157 (Pr 7) [AIR V 38 C 24] : 1951 S C R 167:52 Cri L Jour 373 (SC).

furnished at one time. The law does not prescribe within what time after the grounds are furnished the representation could be made. The time in each case appears deliberately unprovided for expressly, because circumstances vary in each case and make it impossible to fix a particular time for the exercise of each of these two rights."

Kania, C. J., in another part of the same judgment, observed as follows :

> "Although the ground may be good there may be a certain indefiniteness in its statement. Proceeding on the footing that there is some connection, i. e., the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person, the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the enquiry of the Court. On the other hand, the question whether the vagueness or indefinite nature of the statement furnished to the detained person is such as to give him the earliest opportunity to make a representation to the authority is a matter within the jurisdiction of the Court's enquiry and subject to the Court's decision.
>
> "The analogy sought to be drawn between a ground which can have no connection whatsoever with the order and a ground which on its face has connection with the order, but is not definite in its statement, is clearly faulty. The extreme position on the other hand that there is no connection between the ground to be furnished and the representation to be made by the detained person under ART. 22 (5) is equally unsound when the object in furnishing the ground is kept in mind. The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds, i. e., materials on which the detention order was made. In our opinion, it is, therefore, clear that while there is a connection between the obligation on the part of the detaining authority to furnish the grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. As already pointed out, for the first, the test is whether it is sufficient to satisfy the authority. For the second, the test is whether it is sufficient to enable the detained person to make the representation at the earliest opportunity."

The above passages clearly bring out, if we may say so with respect, the distinction between "grounds" in the narrower sense of the term and "particulars", and also the position as regards the power of the Court to examine the sufficiency of the grounds and particulars supplied to the detenu, with reference to the three aspects referred to above. The distinction between grounds and particulars has already been discussed in NOTE 19.

Patanjali Sastri and Das, JJ., in the above case, were, however, of the view that the Court is not entitled to consider the adequacy of the grounds and particulars supplied for the purpose of enabling the

Article 22
Note 21

detenu to make a representation against the order of detention. But the view of the majority was according to the judgment of Kania, C. J., from which passages have been quoted above and which was to the effect that the Court can examine the grounds and particulars supplied to see if they are sufficient to enable the detenu to make a representation against the order of detention. But even Patanjali Sastri and Das, JJ., agree that the Court can see whether the grounds are *relevant* to the order of detention.

In view of the power, which the Court has to examine the grounds for certain purposes, a provision of law, which prohibits the disclosure of the grounds communicated to the detenu, will be void as rendering nugatory the constitutional right conferred on a detenu under cl. (5).[8]

The falseness or incorrectness of the *facts* stated in the grounds of detention communicated to the detenu is not a matter open for enquiry by the Court.[9] The reason is that the "satisfaction" of the detaining authority is a *subjective* satisfaction (see NOTE 10) and not a justiciable issue and the opinion of the detaining authority on the material before it cannot be questioned in a Court of law, though it can be questioned before the Advisory Board.[10] But accepting the facts at their face value the Court can say that the "satisfaction" of the detaining authority is not a real satisfaction or a 'satisfaction according to law'.[11] Thus, where an order of detention is stated to be based on

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8. 1950 S C 27 (79, 89, 105, 124) (Prs 127, 152, 203, 250) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

('50) ILR 29 Pat 502 (509, 517, 533, 543) (FB), *L. K. Burman* v. *The State.*

9. 1950 Mad 162 (174) (Pr 30) [A I R V 37 C 75] : 51 Cri L Jour 525, *M. R. S. Mani* v. *District Magistrate.*

1951 Hyd 162 (Pr 5) [AIR V 38 C 58] : 52 Cri L Jour 1527 (FB), *Bompali Sathia* v. *Govt. of Hyderabad.*

1951 Hyd 128 (Prs 11, 12) [A I R V 38 C 53] : I L R (1951) Hyd 654 : 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.*

1953 Assam 97 (100) (Pr 21) [A I R V 40 C 42] : I L R (1953) 5 Assam 66 : 1953 Cri L Jour 770, *Sahadat Ali* v. *State of Assam.*

1953 Assam 63 (64) (Pr 4) [AIR V 40 C 26]: 1953 Cri L Jour 507, *Krishna Kanta* v. *The State.* (It is a matter for the consideration of the Advisory Board.)

1953 Pepsu 145 (Pr 3) [A I R V 40 C 63] : I L R (1952) Patiala 445 : 1953 Cri L Jour 1519, *Ralla Singh* v. *State.*

1953 Pepsu 190 (191, 192) (Pr 5) [AIR V 40 C 77] : I L R (1953) Patiala 1 : 1953 Cri L Jour 1710, *Jangir Singh* v. *State of Pepsu.*

1952 Hyd 112 (115) (Pr 3) [A I R V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076, *Maqdoom Mohiuddin* v. *State of Hyderabad.*

1951 Orissa 27 (Prs 5, 6, 7) [A I R V 38 C 10] : 52 Cri L Jour 110 (DB), *Ananta Charan* v. *The State.*

10. 1953 Assam 63 (64) [AIR V 40 C 26] : 1953 Cri L Jour 507, *Krishna Kanta* v. *The State.*

[*See also* 1953 Assam 97 (100) (Pr 21) [AIR V 40 C 42] : I L R (1953) 5 Assam 66 : 1953 Cri L Jour 770, *Sahadat Ali* v. *State of Assam.* (If the facts stated in the grounds of detention are disputed, the remedy that the law allows to the petitioner is by a representation to the Government.)]

11. 1951 Pat 47 (Pr 20) [A I R V 38 C 6] : I L R 30 Pat 630 : 52 Cri L Jour 406 (DB, *Dayanand Modi* v. *State of Bihar.*

1950 Mad 162 (174) (Pr 30) [AIR V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate, Mathurai.*

certain grounds, but on uncontroverted facts it appears that those grounds do not really exist, then it follows that the order of detention is made for reasons other than those disclosed in the grounds. In that case the order will be a *mala fide* one and will also be a contravention of ART. 22 (5).

22. **"Supplementary grounds."**—As already seen in NOTES 19 and 21, there is a distinction between the grounds on which an order of detention is made and the particulars of such grounds. This distinction has already been explained in the above notes and in the passages from the judgment of Kania, C. J., quoted in the said notes. It has also been seen in NOTE 21 that cl. (5) confers two distinct rights on a detenu, namely, of being informed the grounds of his detention and of being given the earliest opportunity of making a representation against the order. The communication of the grounds of detention which the clause enjoins in the first part thereof refers to grounds in the narrow sense of the term, as meaning the conclusions of facts which have led to the satisfaction of the detaining authority as to the necessity of making the detention order. These grounds have to be supplied all at the same time and as soon as may be after the order of detention has been made. They cannot be supplemented afterwards. They refer to the grounds which must have been in existence at the time when the order of detention was made and therefore there can be no question of adding to them after the grounds have been communicated to the detenu under the first part of cl. (5). Under that part of the clause, all the grounds onw hich the order of detention is made have to be communicated. There can be no withholding of any of them and, therefore, there cannot be any question of adding to them subsequently.[1]

But these limitations and restrictions do not apply to the *particulars* of the grounds, though the expression "grounds" in a broad sense will include both the conclusions of facts on which the order of detention is made and the particulars or the full details of facts relating to such conclusions of facts. With reference to these "particulars" it is open to the detaining authority to supplement its former communications so as to put more particulars in the possession of the detenu for the purpose of enabling him to make an effective representation against his detention. "Supplementary grounds", in this sense, are not prohibited under the clause.[2] In the *State of Bombay* v. *Atmaram*

Article 22 — Note 22

[1] 1952 S C 350 (352) (Pr 11) [AIR V 39]: 1952 S C R 756: 1953 Cri L Jour 1462 (SC), *Uajgar Singh* v. *State of Punjab.*
1951 S C 157 (164) (Pr 15) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

[2] 1951 S C 157 (Prs 15, 18) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*
1951 S C 174 (Pr 7) [A I R V 38 C 25]: 1951 S C R 212 : 52 Cri L Jour 400 (SC), *Tarapada De* v. *State of West Bengal.*
1950 Mad 162 (Prs 11, 50) [A I R V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate.*
[*See* 1953 Cal 129 (132, 133) (Prs 19, 23) [AIR V 40 C 42] : 1953 Cri L Jour 361 (DB), *Ananda Sankar* v. *Govt., West Bengal.*

Shridhar,[3] Kania, C. J., observed as follows:

> "The adjective 'supplementary' is capable of covering cases of adding new grounds to the original grounds as also giving particulars of the facts which are already mentioned or of giving facts in addition to the facts mentioned in the grounds to lead to the conclusion of fact contained in the ground originally furnished. It is clear that if by "supplementary grounds" is meant *additional* grounds, i. e., conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in ART. 22 (5), as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished *as soon as may be.* The other aspects, namely, the second communication (described as supplemental grounds) being only particulars of the facts mentioned or indicated in the grounds first supplied or being additional incidents, which, taken along with the facts mentioned or indicated in the ground already conveyed, *lead to the same conclusion of fact* (which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of ART. 22 (5). Thus, while the first mentioned type of 'additional' grounds cannot be given after the grounds are furnished in the first instance, the other types even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in ART. 22 (5) of the Constitution."

In *Tarapada De* v. *The State of West Bengal,*[4] Kania, C. J., delivering the judgment of the majority of the Supreme Court observed as follows:

> "A description of the contents of the second communication as 'supplementary grounds' does not necessarily make them additional or new grounds. One has to look at the contents to find out whether they are new grounds as explained in our judgment in Case No. 22 of 1950 (*Atmaram Shridhar's case,*[5] already referred to). Examining the contents of the later communication in that way, we find that they only furnish the details of the second head of the grounds furnished to the appropriate applicant on 14-3-50 in respect of his activities. We are unable to treat them as new grounds and we agree with the High Court in its conclusion that these are not fresh

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1951 Simla 157 (166, 167) (Pr 22) [A I R V 38 C 27] : 52 Cri L Jour 17 (DB), *Bakhtawar Singh* v. *The State.* (Fresh particulars amounting to new ground not to be allowed to be given.)]

[3] 1951 S C 157 (Pr 15) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L J 373 (SC).

[4] 1951 S C 174 (Pr 7) [AIR V 38 C 25]: 1951 S C R 212: 52 Cri L Jour 400 (SC).

[5] 1951 Bom 266 [A I R V 38 C 52] : I L R (1951) Bom 155, *In re Atmaram Shridhar.*

or new grounds. We do not think it proper to consider the true effect of the communication only by reading its opening words. The whole of it must be read and considered together. The contention that the authorities were not satisfied on the original grounds and therefore put forth this communication as the supplemental grounds is again unsound. The fact that these details were communicated later does not necessarily show that they were not within the knowledge of the authorities when they sent the communication dated the 14th of March."

23. On what grounds detention can be ordered. — This question is not properly one within the scope of this article. Under this article only certain principles are laid down which are of a fundamental character and which must of necessity be complied with, whenever an enactment is passed relating to preventive detention. The objects for which such preventive detention law can be passed are not laid down in this article. Those objects are laid down in the legislative lists in SCH. VII defining the various subjects on which the Legislatures can make laws. The subject of preventive detention is provided for in Entry 9 LIST 1 and Entry 3 LIST 3 of SCH. VII. Under Entry 9 LIST 1, the Parliament is given power to make laws as to preventive detention for reasons connected with defence, foreign affairs, or the security of India; and persons subject to such detention. Under Entry 3 in LIST 3, both the Parliament and the State Legislatures have power to make laws as to preventive detention for reasons connected with the security of a State, maintenance of public order, or the maintenance of supplies and services essential to the community. The subjects enumerated above clearly indicate the matters in relation to which a preventive law can be passed. Hence, it is necessary that the activities, which are sought to be prevented by the detention of an individual under a preventive detention law, must have relation to the matters enumerated in the above entries of the legislative lists. It is only in this broad sense that the Constitution may be said to have anything to do with the *grounds* on which a person may be detained for preventive purposes. In other words, the function of the Constitution in this regard is only to define the objects for which a preventive detention law may be passed.

Subject to the above, the grounds on which it is thought necessary to place under detention any person is not the concern of the Constitution except for the fact that such grounds have to be communicated to the detenu under cl. (5).

Provided that the law is within the legislative competence of the particular Legislature which has passed it, and that the preventive detention for which it makes provision is for reasons connected with one or more of the above subjects, the law *can* lay down also on what grounds a person may be detained under it. Such grounds may be laid down with greater or less particularity as the Legislature may think fit. In determining the validity of any order of preventive detention, one of the questions to be considered by the Court is whether the grounds of the detention fall within the scope of the law as to preventive detention under which the order professes to be made. In such cases, therefore, the question concerns the construction of the particular preventive detention law that may be applicable and not the construction of the Constitution as such.[1]

The question as to on what grounds detention can be ordered under a preventive detention law is thus not within the purview of the Constitution except to the extent shown above. Under the Preventive Detention Act, 1950, S. 3, preventive detention is provided for in the following cases :

(1) when the specified authority is satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to (a) the defence of India, the relations of India with foreign powers, or the security of India, or (b) the security of the State or the maintenance of public order, or (c) the maintenance of supplies and services essential to the community, it is necessary to keep him in detention, and

(2) when the specified authority is satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary to make an order directing that such person be detained.

The actual grounds or conclusions of fact on which the detaining authority may consider action under preventive detention law justifiable or necessary are a matter left to the judgment of the detaining authority. But Courts are entitled to go into the question of the *relevancy* of the grounds given for detention, with regard to the objects for which the detention purports to have been ordered. The Court is also entitled to consider whether the objects fall within the purview of the preventive detention enactment in question and whether the enactment itself is within the legislative competence of the Legislature which has passed it.

The cases noted below[2] are illustrative of the relevancy of various grounds for purposes of detention under several detention enactments. (See also NOTE 10.)

Article 22 — Note 23

[1] 1949 F C 152 (Pr 5) [AIR V 36 C 28] : 50 Cri L Jour 880 (FC), *Rex* v. *Amir Hassan.*

[2] 1950 F C 129 (Pr 7) [AIR V 37 C 12] : 1949 F C R 827 : 51 Cri L Jour 1480 (FC), *Machindar Shivaji* v. *The King.* (While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party, which is alleged to be spreading its "doctrine of violence rendering life and property insecure and trying to seize power by violence" may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. The fact that the party had not been outlawed is immaterial, that being a matter of expediency.)

1949 F C 152 (Pr 5) [AIR V 36 C 28] : 50 Cri L Jour 880 (FC), *Rex* v. *Amir Hassan.* (U. P. Maintenance of Public Order (Temporary) Act (4 of 1947), S. 3 — Collection of Pakistan coins and secret funds for Hyderabad or holding of

Article 22
Note 24

24. "As soon as may be." — Under clause (5) the detenu is entitled to be informed the grounds of his detention "as soon as may be" after his detention. This time factor is an essential element of the right of the detenu. If the grounds are not communicated to him "as soon as may be", there would be an infringement of his Fundamental Right under the clause and his detention would become illegal forth-

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secret meetings with agents of Hyderabad in order to prepare plans against Union of India, can form good ground for detention *(Obiter).*)

1952 Hyd 112 (118) (Pr 14) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076, *Maqdoom Mohiuddin* v. *State of Hyderabad.* (Mere membership of communist party is not sufficient ground for detention unless there is some prejudicial activity undermining public order or security.)

1951 Bom 33 (Prs 12, 23) [AIR V 38 C 13] : ILR (1951) Bom 546 : 52 Cri L Jour 418 (DB), *In re Maganlal Jivabhai.* (Section 97, Bombay Industrial Relations Act, 1946, speaks of certain conditions, which would make a strike illegal, and if a detaining authority acting under the Preventive Detention Act, 1950, thinks that one or the other of those conditions exists and the strike which is incited to be resorted to by the person to be detained is illegal on that score, it is open to the detaining authority to take action under the Preventive Detention Act against the person concerned. In this connection it is not correct to argue that no action for detaining a person can be taken under the Preventive Detention Act unless there is a prior determination by a Labour Court or the Industrial Court that the strike is an illegal one.)

1951 Orissa 251 (Prs 10, 18) [AIR V 38 C 59]: ILR (1951) Cut 387: 52 Cri L Jour 679 (DB), *T. V. Narasimhamurty* v. *The State.* (Selling in black market amounts to interfering with normal supply to community at large. It hampers the scheme set on foot by Government responsible for good social order for ensuring distribution of supplies, essential to the community and for keeping the same for going on particularly in times of scarcity and shortage of food-grains.)

1951 Pat 47 (Prs 7, 10, 11, 12) [AIR V 38 C 6] : ILR 30 Pat 630 : 52 Cri L Jour 406 (DB), *Dayanand Modi* v. *State of Bihar.* (Entry 3 List 3 of Sch VII of the Constitution talks of preventive detention for reasons, *inter alia,* connected with the maintenance of supplies and services essential to the community. The expression "for reasons connected with" is important; it means that the detention is for reasons connected with the maintenance of supplies and services essential to the community. Such detention may affect the supply of goods but that does not mean that the detention is for an object other than what is contemplated by Entry 3 of the Concurrent List.)

1950 Mad 405 (Prs 3, 4) [AIR V 37 C 182]:51 Cri L Jour 710 (DB), *In the matter of Subramaniam.* (Since the object of the Madras Maintenance of Public Order Act (1 of 1947) is essentially preventive, if the detaining authority is satisfied from the antecedents (including activities outside the Province) of the person sought to be detained that he is likely to act in the same manner hereafter as he had been doing in the past, then it is perfectly open to the detaining authority to pass an order of detention. It is not necessary to wait until mischief is done before preventive sections are invoked.)

1950 Mad 162 (Pr 17) [AIR V 37 C 75]: 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate.* (Madras Maintenance of Public Order Act (1 of 1947), S. 2— Even if a party is declared illegal, the mere association with that party would not justify the inference that the person was acting in a manner prejudicial to public safety.)

1949 Lah 207 (Pr 7) [AIR V 36 C 41] : Pak L R (1949) Lah 205 : 50 Cri L Jour 976, *Muhammad Ali* v. *The Crown.* (Dissuading the Government servants from taking an oath of loyalty to the Constitution or dissuading persons from joining armed forces until they are assured that the Constitution would be based on Islamic Laws are activities prejudicial both to the maintenance of public order and public safety.)

Article 22
Note 24

with.[1] Thus, the Court is entitled to enquire into the question of delay in supplying the grounds of detention to the detenu.[2] When it is complained by the detenu that the grounds of detention have not been communicated to him as soon as may be, it is for the Government to explain to the satisfaction of the Court the reasons for the alleged delay or how there has not been any unreasonable delay in supplying the grounds.[3] The Constitution does not lay down a test as to the length of time that can be permitted under the phrase "as soon as may be" or the "earliest opportunity" in cl. (5). The phrase "as soon as may be" allows the authorities reasonable time to formulate the grounds on the material in their possession. The time element is necessarily left indeterminate because activities of individuals tending to bring about a certain result may be spread over a long or short period or a larger or a smaller area or may be in connection with a few or numerous individuals. The time required to formulate the proper grounds of detention, on information received, is bound to vary from case to case.[4] Thus, the question whether there has been an unreasonable delay in furnishing the grounds of detention to the detenu under cl. (5) is one of fact, which could be answered only with reference to the circumstances of each case. The cases noted below[5] are illustrative on this point.

Article 22 — Note 24

[1] 1951 Bom 30 (Prs 2, 3, 5) [AIR V 38 C 12] : ILR (1951) Bom 190 : 52 Cri L Jour 366 (FB), *In re Pandurang.*

1951 Hyd 43 (Pr 2) [AIR V 38 C 7] (DB), *Ramakishtaypya* v. *State.*

1951 Orissa 251 (Pr 9) [AIR V 38 C 59] : ILR (1951) Cut 387 : 52 Cri L Jour 679 (DB), *T. V. Narasimhamurty* v. *The State.* (Detention not *ab initio* illegal — But further detention becomes illegal.)

1950 Mad 162 (Pr 48) [AIR V 37 C 75] : 51 Cri L Jour 525 (DB), *M. R. S. Mani* v. *District Magistrate.* (Where the delay in communicating the grounds under S. 3 (1), Madras Maintenance of Public Order Act (1 of 1947), or in submitting the case to the Advisory Council under S. 3 (2) or in passing final orders under S. 3 (5) is unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground : Case law discussed.)

[2] 1951 Hyd 128 (Pr 4) [A I R V 38 C 53]: ILR (1951) Hyd 654: 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.*

[3] 1948 Pat 135 (Pr 12) [AIR V 35 C 51] : ILR 26 Pat 628 : 49 Cri L Jour 132 (FB), *Murat Patwa* v. *Province of Bihar.*

1951 Raj 69 (Pr 6) [A I R V 38 C 29] : 1952 Cri L Jour 425 (DB), *Haqiqatullah Khan* v. *The State.*

[4] 1951 S C 157 (Pr 10) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

1951 Hyd 128 (Pr 14) [A I R V 38 C 53] : I L R (1951) Hyd 654 : 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.* (It is, therefore, a question of fact in each case whether there has been delay : AIR 1951 Bom 30 (FB), Rel. on.)

1948 Pat 135 (Pr 12) [A I R V 35 C 51] : I L R 26 Pat 628 : 49 Cri L Jour 132 (FB), *Murat Patwa* v. *Province of Bihar.*

1952 Hyd 112 (116) (Pr 4) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076, *Maqdoom Mohiuddin* v. *State of Hyderabad.* (AIR 1951 Bom 30 (FB), Foll.)

[5] 1952 S C 350 (352) (Pr 9) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.* (Long delay in furnishing grounds adequately explained — Detention is not bad.)

Article 22
Note 24

It must be noted that under cl. (5), there are two time factors. *Firstly*, the grounds of detention are required to be communicated to the detenu as soon as may be and, *secondly*, the detaining authority is required to afford to the detenu the earliest opportunity of making a representation against the order.[6] The requirement as to the detenu

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1951 S C 174 (Pr 5) [AIR V 38 C 25] : 1952 S C R 212 : 52 Cri L Jour 400 (SC), *Tarapada De* v. *State of West Bengal.* (Under the Bengal Criminal Law Amendment Act, 1930, a very large number of persons were detained. The validity of that Act was being challenged in the Calcutta High Court and the judgment was expected to be delivered towards the end of February, 1950. The Preventive Detention Act (1950) was passed in the last week of February, 1950 and the detention orders on all the detenus were served on 26-2-1950—*Held*, that having regard to the fact that the State Government had suddenly to deal with a large number of cases on one day, it could not be said that the grounds of detention served on 14-3-1950 were not communicated "as soon as may be".)

1951 Bom 30 (Prs 2, 3, 5) [AIR V 38 C 12] : ILR (1951) Bom 190: 52 Cri L Jour 366 (FB), *In re Pandurang.* (Desirability of furnishing grounds within a week or 10 days of the detention pointed out.)

1951 Hyd 162 (Pr 7) [AIR V 38 C 58] : 52 Cri L Jour 1527 (FB), *Bompalli Sathia* v. *Govt. of Hyderabad.* (It is a question of fact in each case whether there has been delay or not in communicating the grounds of detention to the detenu under S. 7 of the Preventive Detention Act.)

1951 Hyd 128 (Pr 14) [AIR V 38 C 53] : ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB), *Santhamma* v. *State of Hyderabad.* (Time necessary for formulating grounds must necessarily vary with the activities of the person and the other circumstances of the case. It is therefore a question of fact in each case : AIR 1951 Bom 30 (FB), Rel. on.)

1953 Cal 129 (Pr 23) [AIR V 40 C 42]: 1953 Cri L Jour 361 (DB), *Ananda Sankar* v. *Govt. of West Bengal.* (The detenus were detained in *February 1950* and did receive the particulars of the grounds served in the middle of March, until towards the *end of July 1950.* The so-called supplementary grounds or particulars did not state any new grounds for the orders of detention. They were in the nature of particulars of the rather general grounds given earlier. They merely amplified those grounds giving specific instances to support the general statements made earlier—*Held* that the detenus had been given the grounds of detention "as soon as may be" and had been given "the earliest opportunity of making representation".)

1952 Hyd 112 (116) (Pr 4) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB), *Maqdoom* v. *State of Hyderabad.* (Considering that the grounds for detention covered about thirteen paragraphs, from the large volume of information available to the detaining authority, the time of 14 days which elapsed between the order of detention and the furnishing of grounds held was not unreasonable in view of the provisions of Art. 22, cl. (5) of the Constitution: AIR 1951 Hyd 128 (FB); AIR 1951 Bom 30 (FB), Rel. on.)

1951 Hyd 43 (Pr 2) [AIR V 38 C 7] (DB), *Rama Kishtayya* v. *State.* (Two months after notice served on Government Advocate and three months after detention—Delay is unreasonable.)

1951 Pat 439 (Pr 8) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB), *Mohit Lal* v. *The State.* (*Held* delay of 22 days was not unreasonable.)

1951 Pat 389 (Pr 8) [AIR V 38 C 99] : ILR 29 Pat 992 : 52 Cri L Jour 282 (DB), *Chandra Sheikhar* v. *State of Bihar.* (Delay of 18 days between the date of the order of detention and the actual service of the grounds of detention is not an unreasonable delay.)

[6] 1952 S C 350 (353) (Pr 11) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.* (Inexcusable delay in acquainting detenus with particulars to enable him to make representation against order of detention — He must be released — Particulars may be furnished within a

Article 22
Notes 24–25

being given the earliest opportunity of making a representation against the order of detention may be satisfied after the grounds of detention are communicated to the detenu in compliance with the first part of cl. (5). Hence, although, as far as possible, the grounds first communicated to the detenu must include particulars, which would enable the detenu to make a representation against the order of detention, there is no bar to a second or subsequent communication conveying further particulars to the detenu to enable him to make an effective representation against the order of detention, so long as the rule that the detenu must have the earliest opportunity of making a representation is not violated.

25. Right to make a representation against the order of detention. — Under cl. (5) the detenu is entitled to be afforded the earliest opportunity of making a representation against the order of detention. 'Opportunity of making a representation' does not only mean the physical opportunity of being supplied pen and ink.[1] The clause means that the detenu is entitled to be furnished sufficient particulars and facts about the grounds of his detention to be in a position to make an effective representation against the order of detention. (See NOTES 19, 20, 21 and 22.) It is open to the Court to examine the statement of grounds and particulars given to the accused from this point of view and to see whether the statement is sufficient to enable the detenu to make a representation.[2]

In *State of Bombay* v. *Atmaram Shridhar*,[3] Kania, C. J., observed as follows :

> "In numerous cases that have been brought to our notice, we have found that there has been quite an unnecessary obscurity on the part of the detaining authority in stating the grounds of the order. Instead of giving the information with reasonable details, there is a deliberate attempt to use the minimum number of words

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reasonable time — 'Reasonable time' depends on facts of each case.)
1951 S C 157 (Pr 10) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

Arricle 22 — Note 25

[1] 1951 S C 157 (Pr 7) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

[2] 1951 S C 174 (Pr 8) [A I R V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400 (SC), *Tarapada De* v. *State of West Bengal.*
1951 S C 157 (161, 163) (Prs 7, 12) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*
1952 Cal 26 (Prs 7, 8, 9) [AIR V 39 C 10]: 1952 Cri L Jour 204 (DB), *Raman Lal* v. *Commr of Police.*
1951 Bom 252 (Prs 3, 4, 5) [AIR V 38 C 48]: I L R (1951) Bom 92: 52 Cri L Jour 437 (DB), *Sushila* v. *Commr. of Police, Greater Bombay.*
1951 Cal 194 (Pr 11) [AIR V 38 C 32]: 51 Cri L Jour 1569 (DB), *Safatulla Khan* v. *Chief Secy. W. B. Govt.*
1951 Mad 182 (Pr 8) [AIR V 38 C 17] : 52 Cri L Jour 688 (DB), *Narayana Raju* v. *Secy., Govt. of Madras.*
1951 Pat 47 (Pr 20) [AIR V 38 C 6] : ILR 30 Pat 630 : 52 Cri L Jour 406 (DB), *Dayanand Modi* v. *State of Bihar.*

[3] 1951 S C 157 (Pr 17) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC).

in the communication conveying the grounds of detention. In our opinion this attitude is quite deplorable. While the Constitution gives the Government the privilege of not disclosing in public interest facts which it considers undesirable to disclose, by the words used in ART. 22 (5) there is a clear obligation to convey to the detained person materials (and the disclosure of which is not necessary to be withheld) which will enable him to make a representation. It may be noticed that the Preventive Detention Act may not even contain machinery to have the representation looked into by an independent authority or an Advisory Board. Under these circumstances, it is but right to emphasise that the communication made to the detained person to enable him to make the representation should, consistently with the privilege not to disclose facts which are not desirable to be disclosed in public interest, be as full and adequate as the circumstances permit and should be made as soon as it can be done. Any deviation from this rule is a deviation from the intention underlying ART. 22 (5) of the Constitution. The result of this attitude of some detaining authorities has been that applying the tests mentioned above, several communications to the detained persons have been found wanting and the orders of detention are pronounced to be invalid."

The above observations of the learned Chief Justice were referred to by Patanjali Sastri, J., in *Ramsing* v. *State of Delhi*,[4] who also pointed out the regrettable practice of the Executive not furnishing sufficient details to the detenu to enable him to make a representation against his detention.

But, in the same case, it was held that when detention was ordered on the basis of certain speeches delivered by the detenu, it was enough if the date and place and the general nature and effect of the speeches, as for example creating dissensions between Hindus and Muslims, were given. It was not necessary to point out the offending passages or giving their gist.[5]

A copy of the order of detention must be served upon the detenu in order to enable him to make a representation against it.[6]

This clause does not specify to whom the representation is to be made or how the representation is to be dealt with. Hence, a preventive detention law, which does not make provision as regards these two points, cannot be challenged as being opposed to the clause.[7] Similarly, there is no constitutional right to be heard orally in regard to the representation[8] and a preventive detention law cannot be attacked as

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[4] **1951 S C 270 (Pr 9) [AIR V 38 C 45]: 1951 S C R 451 : 52 CriLJ 904 (SC).**

[5] **1951 SC 270 (Prs 9, 10, 18, 33) [A I R V 38 C 45] : 1951 S C R 451 : 1951 Cri L Jour 904 (SC), *Ram Singh* v. *State of Delhi.***

[6] **1951 Trav-Co 130 (Prs 8, 9, 10) [AIR V 38 C 45] : I L R (1951) Trav-Co 114 : 52 Cri L Jour 845 (DB), *Thiruvadinatha* v. *Dist. Magistrate.***

[7] **1950 SC 27 (Pr 23) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC) *Gopalan* v. *State of Madras.***

[8] **1950 S C 27 (Pr 30) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.***

Article 22
Note 25

being void for not providing for such a right. As seen in NOTE 13, the Advisory Board constituted under the preventive detention law to consider the sufficiency of cause for the detention of a detenu is not bound to afford an oral hearing to him.

The right to make a representation does not also necessarily carry with it a right to engage a lawyer and be represented by a lawyer in regard to such representation.[9]

In *A. K. Gopalan* v. *State of Madras*,[10] Kania, C. J., observed as follows :

> "Again, I am not prepared to accept the contention that the right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to make a defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory."

Nor does the right to make a representation necessarily imply a right to lead evidence and the failure to provide for an opportunity to lead evidence cannot be regarded as an infringement of the constitutional right.[11]

As already stated, a preventive detention law cannot be impeached for not providing as to whom a representation is to be made and how the representation is to be dealt with. Such matters may be provided for by the law which deals with preventive detention. It is not, therefore, necessary that such law must provide for representation to be made to any outside body.[12]

Nor need there be a provision for an independent *judicial* tribunal to consider the representation.[13] Even in the United States of America the right to judicial trial is not absolute.[14] In the *United States* v. *Ju Toy*,[15] a question arose about the exclusion from entry into the States, of a Chinese who claimed to be a citizen of the United States. At page 263 of 198 U. S. Reports the majority judgment contains the following passage :

> "If for the purpose of argument, we assume that the 5th Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That

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[9] 1950 SC 27 (Prs 28, 30, 37, 245) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[10] 1950 S C 27 (Pr 30) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC). (*Local Government Board* v. *Alridge*, 1915 App Cas 120, Quoted and Foll.)

[11] 1950 S C 27 (Prs 28, 31) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Right to lead evidence against facts supected to exist is not essential in the case of preventive detention.)

[12] 1950 S C 27 (41) (Pr 24) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[13] 1950 S C 27 (43, 122) (Prs 29, 245) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[14] *See* 1950 S C 27 (Pr 29) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[15] (1904) 198 U S 253 (263) : 49 Law Ed 1040 (1044).

is the result of the cases which we have cited, and the lamost necessary result of the power of the Congress to pass exclusion laws. That the decision may be intrusted to an executive officer, and that his decision is due process of law, was affirmed and explained (in several cases). It is unnecessary to repeat the often-quoted remarks of Curtis J. speaking for the whole Court, in *Den* v. *Hoboken Land and Improvement Co.*,[15a] to show that the requirement of a judicial trial does not prevail in every case."

Thus, the right to a make a representation does not necessarily involve and carry with it a right to a judicial trial or a judicial enquiry by an outside body. It was, however, observed by Fazl Ali, J., in *A. K. Gopalan* v. *State of Madras*[16] as follows :

> "It must be remembered that this provision (cl. (5)) is intended to afford protection to and be a safeguard in favour of a detained person, and it cannot be read as limiting any rights which he has under the law or any other provisions of the Constitution. If Art. 21 guarantees that before a person is deprived of his liberty he must be allowed an opportunity of establishing his innocence before an impartial tribunal that right still remains. In point of fact, there is no express exclusion of that right in the Constitution and no prohibition against constituting an impartial tribunal. On the other hand, the right to make a representation which has been granted under the Constitution must carry with it the right to the representation being properly considered by an impartial person or persons. There must, therefore, be some machinery for properly examining the cases of the detenus and coming to the conclusion that they have not been detained without reason. If this right had been expressly taken away by the Constitution, there would have been an end of the matter, but it has not been expressly taken away and I am not prepared to read any implicit deprivation of such a valuable right, The mere reference to an Advisory Board in Art. 22 (4) (a) does not, if my interpretation of the provision is correct, exclude the constitution of a proper machinery for the purpose of examining the cases of detenus on merits. The constitution of an Advisory Board for the purpose of reporting whether a person should be detained for more than three months or not is a very different thing from constituting a Board for the purpose of reporting whether a man should be detained for a single day. In the view I take, all that Parliament could do under cl. 7 (a) of Art. 22 was to dispense with an Advisory Board for the purpose contemplated in cl. (4) (a) of that article and not to dispense with a proper machinery, by whichever name it may be called, for the purpose of examining the merits of the case of a detained person."

But Fazl Ali, J.'s view was not acceptable to the rest of the Judges in the Supreme Court in the above case who were not inclined to regard the absence of a provision for an independent tribunal to consider

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15a. (1855) 18 How 272 (280) : 15 Law Ed 372 (376).

16. 1950 S C 27 (Pr 90) [AIR V 37 C 6] : 1950 S.C R 88 : 51 Cri L Jour 1383 (SC).

the representation of the detenu under cl. (5) as a fatal objection to the validity of a preventive detention law.

26. Clause (6). — Under clause (6) of this article the detaining authority is entitled to withhold from the detenu any fact or facts which such authority considers to be against the public interest to disclose. The first thing to be noticed about this clause is that it only applies to *facts* and not to grounds. The distinction between grounds and facts or particulars has already been explained in NOTES 19, 21 and 22. The Government is not entitled under cl. (6) to refuse to disclose to the detenu any *ground* on which the order of detention was made. But with regard to the facts which constitute the particulars of the grounds the detaining authority is given a discretion under this clause to refuse to communicate any of them if it considers it to be against the public policy to do so.[1] The discretion is vested in the detaining authority to determine what facts should not be disclosed in public interest and this discretion is not one which is open to examination by the Court on the merits. But the discretion must not be exercised arbitrarily, capriciously or *mala fide* and the Court has power to see whether the exercise of discretion by the detaining authority in this matter is tainted in such a manner.[2] The reason is that the exercise of discretion arbitrarily, capriciously or *mala fide* is no exercise of discretion at all and therefore is not within the limits of the power allowed to the detaining authority under cl. (6).

In *In re Maganlal Jiwabhai Patel,*[3] Vyas, J., of the Bombay High Court observed as follows :

> "I must point out that we have noticed a general, but definite, tendency amongst the detaining authorities to say in their affidavits in a vague way that whatever is stated in the grounds of detention is the only material which could be furnished to the detenu and that any further disclosure is against public interest . . . . . Now, I must express disapproval of the omnibus manner in which recourse is taken to ART. 22 (6) of the Constitution for claiming privilege. In my opinion, such general, indefinite and omnibus expression, as is employed in paragraph 12 of the detaining authority's affidavit, is open to a real danger that it may be used sometimes to shut out some possible contentions which a detenu may take in order to challenge his detention. That surely could never have been the intention of the Constituent Assembly in enacting cl. (6) of ART. 22 . . . . It is true that it is not for the Court but entirely for the

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Article 22 — Note 26

[1] 1950 S C 27 (Pr 23) [AIR V 37 C 6] : 1950 S C R 88: 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*
1951 Cal 194 (Pr 20) [AIR V 38 C 32] : 51 Cri L Jour 1569 (DB), *Safatulla Khan* v. *Chief Secy., W. B. Govt.*

[2] 1951 Bom 252 (Pr 3) [AIR V 38 C 48] : I L R (1951) Bom 92 : 52 Cri L Jour 437, *Sushila* v. *Commr. of Police, Greater Bombay.*

[3] 1951 Bom 33 (Pr 21) [AIR V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

detaining authority to decide about the sufficiency or otherwise of the grounds for detention. But it is certainly obligatory upon the detaining authority to communicate the grounds, i. e., facts on which the detention is based, to the detenu. He knows what facts he has considered it against public interest to disclose; for instance it is he who knows whether, in his opinion, it is against public interest to mention in the grounds of detention the time, place, manner, method and nature of activities, person or persons, class of person or persons affected by those activities, etc., and he ought to specify those points which according to him are privileged under ART. 22 (6)."

Clause (6) shows that, subject to the exception enacted therein, that means to say, with the exception of facts which the detaining authority considers, in the *bona fide* exercise of discretion, to be against the public interest to disclose, the detaining authority has no power to refuse to communicate to the detenu whatever facts may be necessary to make an effective representation against the order of detention.[4] But at the same time it must be noted that the clause does not imply that the detaining authority is under an obligation to disclose all the facts except those which it considers against the public interest to disclose.[5] The rule is that the detaining authority must disclose all the facts *which are necessary to enable the detenu to make an effective representation* except the facts which it considers to be against the public interest to disclose.

To sum up, the detaining authority is not entitled to withhold any of the *grounds* of detention under cl. (6). But as regards facts or particulars relating to these grounds, the detaining authority has a discretion. While it is generally bound to communicate all the facts, which are necessary to enable the detenu to make an effective representation against the order, it may keep back such facts as it considers to be against the public interest to disclose.

27. Fresh order of detention.—There is nothing in the chapter on Fundamental Rights and in ART. 21 or ART. 22 to prevent the inclusion in a preventive detention enactment of a clause permitting the making of fresh order of detention against the same person and on the same grounds after the revocation of a prior order of detention.[1] Hence, S. 13 (2) of the Preventive Detention Act (4 of 1950), which permitted such a fresh order of detention being passed, was held to be not open to objection under the Constitution.[2] Hence there is nothing

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[4] 1951 Bom 252 (254) [AIR V 38 C 48]: I L R (1951) Bom 92: 52 Cri L Jour 437 (DB), *Sushila* v. *Commr. of Police, Greater Bombay.*

[5] 1951 S C 157 (Pr 11) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (SC), *State of Bombay* v. *Atmaram Shridhar.*

Article 22 — Note 27

[1] 1950 S C 27 (Pr 36) [AIR V 37 C 6]: 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[2] 1950 S C 27 (Pr 36) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.* (Section 13 (2) as it stood before the Amendment Act of 1952 was attacked on ground that under it, even after a previous order of detention had been revoked a fresh order might be made on the *same* grounds—

Article 22
Note 27

unconstitutional in revoking an order of detention which is found to be defective for any reason and passing a fresh order against the same person and on the same grounds, where the preventive detention law allows such a course.[3]

Even prior to the Preventive Detention Act, 1950, the position in this respect was the same. In *Basant Chandra* v. *Emperor*,[4] the late Federal Court of India laid down two propositions : (i) where an earlier order of detention is defective merely on formal grounds, there is nothing to preclude a proper order of detention being passed on the same grounds especially in cases in which the sufficiency of the grounds is not examinable by the Courts, and (ii) if at any time before the Court directs the release of the detenu a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. In such cases, the question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner.[5] The principle that a fresh order can be made on the same grounds and against the same person where the first order did not comply with the requirements of the law, has also been accepted under the English law.[6]

However, the observations of Sarjoo Prosad, J., in *Ratan Roy* v. *State of Bihar*[7] are worth noting in this connection. In the above case, his Lordship observed as follows :

> "I consider that it is not open to any State to play with the life and liberty of its citizens, and in providing legislation for preventive detention, it must always pay due care and attention, so that the legislation, so enacted or promulgated, is beyond exception. A State must, therefore, exercise due care and attention in framing all such laws and legislations, lest it may be accused of bad faith on

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Kania, C. J., observed : "This clause appears to be inserted to prevent a man being released if a detention order was held invalid on some technical ground"— After stating that there was nothing in Part III and Arts. 21 and 22, to prevent the inclusion of such a provision in Parliamentary legislation his Lordship said. "Art. 20 (2) may be read as a contrast on the point.")

Under S. 13 (2) of the Preventive Detention Act, *substituted* by S. 11 of the Preventive Detention (Second Amendment) Act 61 of 1952, a second order of detention is authorised only on *fresh* facts arisen after expiry or revocation of previous order.

[3] 1952 S C 106 (Prs 9, 10) [AIR V 39 C 20] : 1952 S C R 395 : 1952 Cri L Jour 656 (SC), *Naranjan Singh* v. *State of Punjab (I)*.

1951 Pat 68 (Pr 4) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB), *Subodh Kumar* v. *The State*.

[4] 1945 F C 18 (Pr 20, 21) [AIR V 32] : 1945 F C R 81 : I L R (1945) Kar (FC) 13 : I L R 24 Pat 187 : 46 Cri L Jour 559 (FC).

[But see 1950 Orissa 107 (Pr 12) [AIR V 37 C 17] : I L R (1949) 1 Cut 821: 51 Cri L Jour 891 (FB), *Prahalad Panda* v. *Province of Orissa*.]

[5] 1952 S C 106 (Pr 8) [AIR V 39 C 20] : 1952 S C R 395 : 1952 Cri L Jour 656 (SC), *Naranjan Singh* v. *State of Punjab (I)*.

[6] (1941) 2 All E R 749 (757), *Ex Parte Budd*. (Release from detention under first order and re-arrest under fresh order held good.)

[7] 1950 Pat 332 (Pr 53) [AIR V 37 C 88] : I L R 29 Pat 410 : 51 Cri L Jour 1251.

Article 22
Note 27

account of any hasty or ill-advised move taken in that direction. Successive legislations and orders of detention, passed under legislations which have ultimately to be abandoned as found to be defective and void on technical grounds, may in most cases lead to the unfortunate result of detaining a person for a period much beyond that contemplated by ART. 22 of the Constitution of India. A State must, therefore, guard against any such unfortunate action."

Even if a High Court has declared a detention under a particular law as being illegal as such law had expired, and the fresh order of detention is made under the proper law although on the same grounds as previously, the fresh order would not be open to question *ipso facto* as being *mala fide*.[8] But where the High Court has held that the order was not *properly* made, a fresh order of detention on the same grounds, merely with a view to get round and nullify the decision of the High Court, would be *mala fide* and in spite of its being made under the colour of another enactment, it would be illegal.[9]

Once a man is detained under a provincial preventive detention measure on the basis of his prejudicial activities, he can, on the expiry of the term, again be detained under a central Act on the same grounds, if there is no change in the position as regards the apprehension as to his conduct if he should be released.[10]

Where a number of persons were already under detention under a certain Act, but in order to avoid doubts about the validity of the Act they were again served with orders of detention under the Preventive Detention Act, 1950, there is no question about the authorities making up their minds without applying their minds to the question of a satisfaction, as the satisfaction was already there. So, there is no question of *mala fides* in such a case.[11]

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[8] 1949 Cal 633 (Pr 18) [AIR V 36 C 180] : 51 Cri L Jour 169 (FB), *Bhupendra De* v. *Govt. of West Bengal.*
[*See also* 1953 Pat 334 (336) (Pr 9) [AIR V 40 C 116] : I L R 32 Pat 480 : 1953 Cri L Jour 1690 (DB), *Karamvir Singh* v. *State of Bihar.* (First order held illegal by High Court and detenu released—Fresh order on same grounds not necessarily *mala fide.*)]

[9] 1949 Cal 633 (Pr 18) [AIR V 36 C 180] : 51 Cri L Jour 169 (FB), *Bhupendra De* v. *Govt. of West Bengal.*

[10] 1951 All 18 (Prs 4, 5, 6) [AIR V 38 C 5] : 1952 Cri L Jour 422 (DB), *Ram Adhar* v. *State.*
1951 Mad 182 (Prs 18, 19) [AIR V 38 C 17] : 52 Cri L Jour 688 (DB), *Narayana Raju* v. *Secy., Govt of Madras.* (The detaining authority can fall back upon the grounds existing prior to the original detention of the detenu under the Madras Maintenance of Public Order Act of 1948 for his fresh detention under the Preventive Detention Act in 1950. The past acts would furnish safe *criteria* of the likely future activities of the detenu.)
1951 Orissa 27 (Pr 3) [AIR V 38 C 10] : 52 Cri L Jour 110 (DB), *Ananta Charan* v. *The State.*
1950 All 69 (Pr 36) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*
[*See also* 1951 Pat 68 (Pr 9) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB), *Subodh Kumar* v. *The State.*]

[11] 1951 S C 174 (Pr 11) [AIR V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400 (SC), *Tarapada De* v. *State of West Bengal.*

Where a person is already under detention under a prior order of detention and a fresh order is passed against him based on the same grounds, it does not follow that the fresh order is necessarily *mala fide* or that the satisfaction of detaining authority was purely mechanical and that the mind did not go with the pen. If the authority satisfied himself that the original ground was still available and that there was need for detention on its basis, no *mala fides* can be attributed to the authority from this fact alone.[11a]

As already stated above, where in a *habeas corpus* proceedings, it is found that a valid order of detention has been passed and at the time of the Court's decision the detention is legal, the fact that previously the order of detention was not legal would not be a ground for ordering the release of the detenu.[12]

Where a fresh order of detention is passed after revoking a prior order, the order cannot be said to be *mala fide*, merely because it is made pending a *habeas corpus* petition for the release of the detenu.[13]

Even though a fresh order of detention after revoking a prior order is not illegal or unconstitutional, the detenu must be furnished under cl. (5) the grounds of detention, so as to enable him to make a representation against the order of detention.[14]

As already stated above, where the original order of detention was not bad for any technical defects but was bad on account of there not being relevant grounds for making such an order against the detenu and was declared void by the High Court for that reason, to pass a fresh order on the same materials and allegations would be a *mala fide* order intended to nullify the decision of the High Court and therefore would be illegal.[15]

Although a fresh order of detention on the revocation of a prior order is not illegal, when it is found that the prior detention is not

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11a. 1952 S C 350 (352) (Pr 8) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 1462 (SC), *Ujagar Singh* v. *State of Punjab.*

12. 1952 S C 106 (Pr 8) [AIR V 39 C 20] : 1952 S C R 395 : 1952 Cri L Jour 656 (SC), *Naranjan Singh* v. *State of Punjab (I).*

1945 F C 18 (21) [AIR V 32] : 1945 F C R 81: ILR 24 Pat 187: I L R (1945) Kar (FC) 13 : 46 Cri L Jour 559 (FC), *Basanta Chandra* v. *Emperor.*

[*See also* 1949 Bom 319 (Pr 9) [AIR V 36 C 83] : I L R (1949) Bom 508 : 51 Cri L Jour 184 (FB), *In re Jayantilal Nathubhai.* (Illegal arrest and detention — Legal order for detention passed subsequently—Person cannot be ordered to be released — It is not as if in this case, after an illegal order for detention was made subsequently, because of powers conferred, an order was made continuing the original order for detention, which was in itself illegal — In such cases, where the subsequent order, even though made after the amendment conferring greater powers, continued the original order for detention which was bad, the subsequent order is also bad.)]

13. 1951 Pat 68 (Pr 5) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB), *Subodh Kumar* v. *The State.*

14. 1951 Punj 119 (Pr 5) [AIR V 38 C 25 (I)] : 52 Cri L Jour 1451 (DB), *Madan Lal* v. *Dist. Magistrate.*

1950 All 69 (Pr 36) [AIR V 37 C 22] : 51 Cri L Jour 337, *S. S. Yusuf* v. *Rex.*

15. 1949 Cal 633 (Pr 18) [AIR V 36 C 180] :51 Cri L Jour 169 (FB), *Bhupendra De* v. *Govt. of West Bengal.*

legal, the detenu must be first released before he is detained under the fresh order.[16]

(See notes on ART. 226 relating to *habeas corpus*.)

Right against Exploitation.

Prohibition of traffic in human beings and forced labour.

23. (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

COGNATE PROVISIONS.

Offence — Definition of — See ART. 367 (1) read with the General Clauses Act, 1897, S. 3 (38).

The State — Interpretation of — See ART. 12.

Synopsis

1. Scope of the article.
2. Analogous law — Amendment XIII of the American Constitution.
3. 'Slavery' — 'Involuntary servitude'—'Peonage.'
4. Traffic in human beings.
5. Begar.
6. "Other similar forms of forced labour".
7. Compulsory service for public purposes—Clause (2).
8. Work as punishment for crime.

1. Scope of the article. — This is one of the two articles which the Constitution provides in the chapter on Fundamental Rights in the group entitled "Right against Exploitation". The article categorically prohibits all traffic in human beings and *begar* and other similar forms of forced labour. Further, it makes any contravention of this prohibition an offence punishable in accordance with law.

In this respect, the article may be compared with ART. 17 under which untouchability is abolished and its practice in any form is forbidden. Just as ART. 17, after prohibiting the practice of untouchability proceeds to enact that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law, similarly under this article also, the provision that traffic in human beings and *begar* and other similar forms of forced labour are prohibited, is followed by the clause that any contravention of the provision shall be an offence punishable in accordance with law.

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[16] *See* 1951 Mad 583 (Pr 15) [AIR V 38 C 163] : 52 Cri L Jour 294 (DB), *In re Kumaramangalam.*

Under both the articles, the punishment for the contravention of the provision is not prescribed in the articles themselves. But both the articles require that the contravention of their provisions *shall* amount to an offence punishable by law.

It is not exactly clear what is the effect of such a provision or how the provision is going to be given effect to. In other words, it is not clear how the State is going to be compelled to make a law making a violation of the provisions of these articles an offence. If the provision simply means that contravention shall be an offence where there is a law to that effect, it seems to be a thoroughly otiose enactment. Perhaps, the articles only mean that in the opinion of the Constituent Assembly the State should deem it as its bounden duty to make a law making it an offence to contravene the sublime principles enacted in these articles. Looked at from that point of view, the provision that a contravention of these articles shall be an offence punishable in accordance with law seems to have no higher status in the Constitution than a provision in Part IV relating to Directive Principles of State Policy. Article 37 occurring in Part IV expressly states that the provisions contained in the Part shall not be enforceable by any Court but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It seems to us that the effect of the provision that a contravention of these articles, i.e., ARTS. 17 and 23, shall be an offence punishable according to law, is no higher than what is imported by ART. 37, inasmuch as there does not seem to be any practical way of enforcing the duty of the State to make a law punishing the contravention of the provisions as an offence. Hence, all that this part of the section seems to amount to, is that the State has got the power of making the law punishing as an offence trafficking in human beings and *begar* and the enforcement of similar forms of forced labour.

In this connection, reference may be made to the 13th Amendment to the Constitution of America. The Amendment contains two sections. The first section professes to abolish slavery and involuntary servitude and the second section enacts that the Congress shall have *power* to enforce the article by appropriate legislation. It seems to us that the effect of the second part of cl. (1) of this article is no higher than that of S. 2 of the 13th Amendment to the American Constitution. Hence, the meaning of the provision seems only to be that the State shall have *power* to make it an offence to traffic in human beings, or subject people to *begar* or other similar forms of forced labour.

Clause (2) of the article saves the power of the State to impose compulsory service for public purposes and provides that in imposing such service the State shall not make any discrimination on grounds *only* of religion, race, caste or class or any of them. The latter part of the clause may be compared with ART. 15 under which the State shall not discriminate against any citizen on grounds only of religion, race, caste, sects, place of birth, or any of them. It may be noted that while ART. 15 mentions 'sex' and 'place of birth', ART. 23 (2) does not mention them. On the other hand, while ART. 23 (2) mentions 'class', ART. 15 (1) does not mention class. But in both provisions it is stated that there shall be no discrimination on grounds *only* of religion, race, etc. Thus, in both the provisions discrimination is permitted where religion, race, etc., constitute only one of the factors on the basis of which discrimination is made. For further aspects of the subject, see notes on ART. 15.

The provision that traffic in human beings and *begar* and other similar forms of forced labour are prohibited is a self-executing provision like the similar provision in the 13th Amendment of the American Constitution.[1] It stands in contrast with the latter part of cl. (1) which requires the aid of *legislation* to be given effect to.

2. Analogous law — Amendment XIII of the American Constitution. — The 13th Amendment of the American Constitution provides as follows :

> *Section 1.*—"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
>
> *Section 2.* — "The Congress shall have power to enforce this article by appropriate legislation."

Comparing this provision with ART. 23 of our Constitution, it may be noted that ART. 23 does not expressly refer to abolition of *slavery*. But the expressions "traffic in human beings" and "forced labour" are wide enough to cover slavery. The expression "forced labour" corresponds to "involuntary servitude" in the 13th Amendment. While the 13th Amendment prohibits involuntary servitude of all forms, this article only prohibits *begar* and other *similar* forms of forced labour. Forms of forced labour which are not similar to *begar* are not within the prohibition of this article.

The 13th Amendment makes express provision for excepting from its purview, involuntary servitude as a *punishment for crime*. There is no similar express provision in our ART. 23.[1] On the other hand, the 13th Amendment of the American Constitution does not contain an express provision empowering the State to impose compulsory service for public purposes, although it is well established under the 13th Amendment that the well-recognised power of the

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Article 23 — Note 1

[1] (1905) 197 U S 207 (217) : 49 Law Ed 726 (729, 730), *Clyatt* v. *United States*. (By its own unaided force and effect it abolished slavery and established universal freedom. Still legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it and to prescribe proper modes of redress for its violation in letter or spirit.)

Article 23 — Note 2

[1] Section 53 of the Indian Penal Code contained a provision for *penal servitude* as a mode of punishment. This has now been repealed by Act 17 of 1949.

State in this matter is not affected by the provision. As already seen in NOTE 1, the second section of the 13th Amendment has its prototype in the second part of cl. (1) of this article, which says that a contravention of the provisions of the article shall be an offence punishable in accordance with law.

3. 'Slavery' — 'Involuntary servitude' — 'Peonage.'—The 13th Amendment of the American Constitution has already been quoted in NOTE 2.

In *Bailey* v. *Alabama*,[1] the object of the 13th Amendment was described as follows by Hughes, J., of the Supreme Court of America while delivering the opinion of the Court :

> " The plain intention was to abolish slavery of whatever name and form and all its badges and incidents ; to render impossible any state of bondage ; to make labour free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

The 13th Amendment expressly refers to *slavery* and abolishes it. Slavery implies involuntary servitude, though involuntary servitude is also separately mentioned in the article. Slavery means a state of bondage, the ownership of mankind as a chattel, or at least the control of the labour and services of one man for the benefit of another and the absence of a legal right to the disposal of his own person, property and services. The use of the word "servitude" in the article was intended to prohibit the use of all forms of forced labour of whatever class or name.[2]

The 13th Amendment does not expressly mention *peonage*, but peonage is also a form of involuntary servitude and is, therefore, prohibited by S. 1 of the 13th Amendment. The word "peonage" is a term descriptive of a condition which has existed in the Spanish America and especially in Mexico. The essence of peonage is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid.[3]

Under Amendment XIII, it is well established that the rule enacted therein is subject to exceptions, as for instance, in the case of the service of a sailor, the obligations of a child to its parents, or an apprentice to his master. Further, the power of the Legislature to make unlawful and punish criminally an abandonment by an employee of his post of labour in any extreme case has also been recognised under the 13th Amendment.[4]

Article 23 — Note 3

[1] (1911) 219 U S 219 (242) : 55 Law Ed 191.
[*See also* (1872) 16 Wall 36, (69, 71, 72) : 21 Law Ed 394 (406, 407), *Slaughter House Cases*. (Object of 13th Amendment was protection of *Negroes*.)]

[2] (1905) 197 U S 207 (217, 218) : 49 Law Ed 726 (730), *Clyatt* v. *United States*.
(1896) 163 U S 537 (542) : 41 Law Ed 256, *Plessy* v. *Ferguson*.

[3] (1911) 55 Law Ed 191 (201) : 219 U S 219, *Bailey* v. *Alabama*.
(1905) 197 U S 207 (215) : 49 Law Ed 726 (727), *Clyatt* v. *United States*.

[4] (1905) 197 U S 207 (216) : 49 Law Ed 726, *Clyatt* v. *United States*.

The 13th Amendment is not violated by a law which requires separate accommodation for white and coloured persons on railroads.[5] Obviously such a law does not amount to the forcing of *slavery* on Negroes.

4. Traffic in human beings. — The word "traffic" in this context means trade as if in chattels. Thus, although the word "slavery" is not expressly used in this article, it is directly hit by it. As noted in NOTE 3, slavery implies absence of a right on the part of a person to the disposal of his own *person*, property and services.

"Traffic in human beings" would include traffic in women and children for immoral purposes.[1]

5. Begar. — This refers to the system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion. The term "*begar*" is an Indian term and has a varying local connotation, as regards the *kind* of labour exacted by force. In Karnataka, for instance, *begary* is the performance of the lowest village offices without pay, but requited by fees in grain or rent-free land.[1]

6. "Other similar forms of forced labour." — As pointed out in NOTE 2, this article only prohibits *begar* and other *similar* forms of forced labour. The article does not prohibit *every* form of forced labour as the 13th Amendment of the American Constitution does.

Where a person is prohibited from refusing to render service to another merely on the ground that the latter belongs to a scheduled caste, he is not thereby subjected to forced labour similar in form to *begar*.[1] Thus, an Act like the U. P. Removal of Social Disabilities Act (14 of 1947), does not contravene this article.[2]

Where a person enters into a contract to perform certain service, it will not amount to *forcing* him to perform any service if he is only held to his *civil* liability under the contract. In such a case, there is no attempt to *coerce* him or to punish him for not performing the service. But where it is made an *offence* to refuse to perform a certain service which a person has contracted to perform for another, this would clearly amount to an imposition of forced labour. The fact that the person has *contracted* to perform the service will not in any way affect the question whether it is forced labour or voluntary labour.[3]

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[5] (1896) 163 U S 537 (542) : 41 Law Ed 256, *Plessy* v. *Ferguson.*

Article 23 — Note 4

[1] 1953 Cal 522 (524) (Pr 7) [AIR V 40 C 198] : 1953 Cri L Jour 1187 (DB), *Raj Bahadur* v. *Legal Remembrancer.*

Article 23 — Note 5

[1] See Wilson's Glossary, (1940) page 108.

Article 23 — Note 6

[1] 1951 All 615 (Pr 5) [AIR V 38 C 162] : 52 Cri L Jour 899, *State* v. *Banwari.*

[2] 1951 All 615 (Pr 5) [AIR V 38 C 162] : 52 Cri L Jour 899, *State* v. *Banwari.*

[3] (1911) 219 U S 219 (242, 243) : 55 Law Ed 191 (201, 202), *Bailey* v. *Alabama.*

Article 23
Note 6

In *Bailey* v. *Alabama*,[4] Justice Hughes of the Supreme Court of America observed as follows:

> "The fact that the debtor contracted to perform the labour which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created which would be not less involuntary because of the original *agreement* to work out the indebtedness. The contract exposes the debtor to liability for the *loss* due to the breach but not to *enforced labour*."

But in *Robertson* v. *Baldwin*,[5] Mr. Justice Brown of the Supreme Court of America was inclined to take a contrary view as regards the meaning of "involuntary servitude". He observed as follows:

> "Does the epithet 'involuntary' attach to the word 'servitude' continuously and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude; and characterise it as unlawful because unlawfully entered into? If the former be the true construction, then no one not even a soldier, sailor or apprentice can surrender his liberty, even for a day; and a soldier may desert his regiment upon the eve of battle or the sailor abandon his ship at any intermediate port or landing or even in a storm at sea, provided only he can find means of escaping to another vessel."

The above passage clearly brings out the opposite point of view, namely, that when a person has voluntarily made a *contract* of service, forcing him to carry out that contract will not amount to subjecting him to forced labour. But, as already stated, the view is clearly contrary to the decision of the Supreme Court of America in the later case of *Bailey* v. *Alabama*[6] cited above. Further, the logical conclusion of the view of Mr. Justice Brown will lead to absurd and preposterous results, as it would mean that a person could validly sell himself into even lifelong slavery.

In *Durbar Goala* v. *Union of India*,[7] a view similar to that of Justice Brown in *Robertson* v. *Baldwin*[8] above referred to was expressed by Bose, J., who observed: "The very idea of a contract or agreement negatives any suggestion of forced labour." With great respect, voluntariness of the *contract* is not the same as the voluntariness of the *labour* contracted to be done. Where there is coercion in respect of the latter, it must be held to amount to forced labour, in spite of the fact that the contract under which the labour was exacted was quite voluntary and free from coercion.

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[4] (1911) 219 U S 219 (242) : 55 Law Ed 191 (201).

[5] (1897) 165 U S 275 (280, 281) : 41 Law Ed 715.

[6] (1911) 219 U S 219 : 55 Law Ed 191.

[7] 1952 Cal 496 (498) (Pr 6) [AIR V 39]. (Contract by Railway porters at Howrah Station to do labour for two extra hours daily.)

[8] (1897) 165 U S 275 : 41 Law Ed 715.

Another comment which has to be made on the above case is about the question of payment for the labour. In giving reasons for holding that the labour exacted was not forced labour, Bose, J., has emphasized the fact that the labour was paid for. With great respect, the question of payment seems to be irrelevant in determining whether there is forced labour although *begary* in some parts of the country seems to imply the absence of payment. (See NOTE 5.) In this connection, reference may be made to the undermentioned case,[9] in which a certain Act of which the very name was *Paid* Forced Labour Act and which made provision for payment of the forced labour was held to be invalid.

Notwithstanding these criticisms of the reasoning of Bose, J., in the above case, the actual decision seems to be supportable on the ground that there was *no* coercion or compulsion of the labourers to carry out their contracts.

But, as already seen in NOTE 3, under the American Constitution, Amendment XIII, abolishing slavery and prohibiting involuntary servitude in any form is recognised as subject to well established exceptions such as the service of sailors, etc., in which, from time immemorial, it has always been admitted that a person cannot have the option of leaving his service at any moment he likes.

We have seen in NOTE 3 that "peonage" means a system in which a person, who has borrowed money from another, has to work for the latter by way of repayment of the loan. If the element of coercion is removed from such an arrangement and a person borrows money from another under an arrangement by which he undertakes to repay the loan in the form of labour or service, he cannot be said to be subjected to forced labour or involuntary servitude. He can always quit the service in spite of his contract like any other contractor breaking his contract and making himself liable to damages for breach of contract. The test is whether the law can compel him to physically perform the service without any option of paying damages for breach of contract.[10]

A law, under which, where a person is convicted for an offence and sentenced to pay a fine, another can pay the fine for him on condition that the latter must serve him in repayment of the fine paid by him, would be a law sanctioning forced labour and therefore void.[11]

As an illustration of forced labour, reference may be made to S. 2 of the Workmen's Breach of Contract Act, 1859, which has now been repealed. Under that section, if a workman or labourer, who had received an advance from the employer, had failed to carry out the work or perform the labour, the matter might be taken before a Magistrate and the Magistrate might order him to perform the work undertaken within a certain time. If the workman failed to comply with the order, he might be sentenced to imprisonment. Such a provision is an instance of what we have already referred to above, namely, a man being compelled under coercive process of the penal law to perform the work he has contracted to perform. The above Act has now been repealed and has only been referred to here for purpose of illustration.

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[9] 1953 Him Pra 18 (19) (Pr 3) [AIR V 40 C 8] : 1953 Cri L Jour 400, *State* v. *Jorawar*.

[10] (1905) 197 U S 207 (216) : 49 Law Ed 726, *Clyatt* v. *United States*.

[11] *See* (1914) 235 U S 133 (149, 150) : 59 Law Ed 162 (168, 169), *United States* v. *Reynolds*.

There were sections in the Penal Code of a similar nature. For instance, S. 490 ran as follows:

> "Whoever being bound by a lawful contract to render his personal service in conveying or conducting any person or any property from one place to another place, or to act as servant to any person during a voyage, or journey, or to guard any person or property during a voyage or journey, voluntarily omits so to do, except in the case of illness or ill-treatment, shall be punished with imprisonment of either description . . . . ."

Amongst the illustrations, we have the following:

> "A cooly being bound by lawful contract to carry a person's baggage from one place to another runs away in the middle of the stage. The cooly commits the offence defined in the section."
>
> Another illustration is: "*A*, a proprietor of bullocks, being bound by a legal contract to convey goods on his bullocks from one place to another, omits to do. *A* commits an offence under the section."
>
> The above section has also been now repealed. But if it had been in force, it would have been void under this article read with ART. 13.

Section 492 of the Penal Code ran as follows:

> "Whoever, being bound by lawful contract in writing to work for another person as an artificer, workman or labourer, for a period not more than three years, at any place within British India to which by virtue of the contract he has been or is to be conveyed at the expense of such other, voluntarily deserts the service of that other during the continuance of his contract, or without reasonable cause refuses to perform the service which he has contracted to perform, such service being reasonable and proper service, shall be punished with imprisonment of either description . . . . ."

The above section also has been repealed. But if it had not been repealed, it would have become void under ART. 13 read with this article, as it is clearly a case of subjecting a person to forced labour by coercing him with a threat of punishment.

Under S. 491 of the Penal Code —

> "Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own

wants, voluntarily omits so to do, shall be punished with imprisonment . . . . ."

This section has not been repealed and is still on the statute book. It is conceived that this section, in spite of its undoubtedly having the effect of subjecting a person to *forced* labour, will not be void under this article. This article does not prohibit every form of forced labour but only forced labour of such forms as are similar to *begar*. It is conceived that the kind of labour contemplated by S. 491 of the Penal Code is not similar to *begar*.

7. Compulsory service for public purposes—Clause (2).— Clause (2) expressly reserves the power of the State to impose compulsory service for public purposes.[1] In America it has been held that the State has inherent power to require every able-bodied man within its jurisdiction to labour for a reasonable time on public roads near his residence without direct compensation.[1a]

The words "public purposes" have not been defined anywhere. They occur not only in this article but also in other articles and other provisions of law. For instance, the phrase occurs in ART. 31, cl. (2). The phrase "public purposes" must include an object or aim in which the general interest of the community, as opposed to particular interests of individuals, is directly and vitally concerned.[2]

Military service would be clearly a service for a public purpose. As observed by the Supreme Court of America,[3] "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."

McReynolds, J., delivering the opinion of the Supreme Court of America in *Butler* v. *Perry*,[4] observed that the 13th Amendment of the American Constitution

> "introduced no novel doctrine with respect to services always treated as exceptional and certainly was not intended to interdict the enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."

Article 23 — Note 7

[1] 1952 Pat 359 (366) (Pr 16) [AIR V 39] : I L R 31 Pat 493 (SB), *Atma Ram Budhia* v. *State of Bihar.*

[1a] (1916) 240 U S 328 (333) : 60 Law Ed 672 (674, 675), *Butler* v. *Perry.*

[2] 1952 S C 252 (290) (Pr 106) [AIR V 39] : I L R 31 Pat 565 : 1952 S C R 889, 1020, 1056 (S C), *State of Bihar* v. *Kameshwar Singh.*

1914 P C 20 (21, 22) [AIR V 1] (PC), *Hamabai Framjee Petit* v. *Secy. of State.* (Resumption of lands for erecting building for the use of Government officials is for public purpose as it will redound to public benefit by helping the Government to maintain the efficiency of its servants.)

[3] (1918) 245 U S 366 (378) : 42 Law Ed 349, *Arver* v. *United States.*

[4] (1916) 240 U S 328 (333) : 60 Law Ed 672.

Similarly, the compulsory service of seamen in fulfilment of their contracts is not a violation of the 13th Amendment of the American Constitution which prohibits "involuntary servitude".[5]

Under cl. (2), the State has power in a taxing statute to require assistance in the collection of the tax imposed. Thus, for instance where a tax is imposed on passengers in motor buses, the bus owners may be required to collect the tax and pay it over to the Government.[6] The entertainment tax, though levied on members of the public attending the entertainment, is also required to be collected by the person who conducts the entertainment.

In the undermentioned case,[7] it was held that the imposition of compulsory service, for the purpose of carrying a load of Government property, by the Tahsildar or any Government servant, in normal times would not be covered by cl. (2) of this article and that the imposition of such labour by public officers cannot be regarded as being for a "public purpose". It was observed:

> "Conscription for the defence of the country, or for social services, are possible instances of imposition of compulsory service for public purposes. That cannot, however, be said of imposition of compulsory service for the purpose of carrying a load of Government property by the Tahsildar or any Government servant in normal times."

This view is justifiable on the principle that "public purpose" must include an object or aim in which the general interest of the community is concerned and that assisting *individual* Government officers in the matter of transport in normal times is not covered by the expression "public purpose".

In the above case, the legislation in question enabled forced labour to be exacted from "any adult male tiller of the soil or malguzar". Apart from question of the absence of public purpose, on which ground the Act was condemned by the Judicial Commissioner of Himachal Pradesh, the Act was clearly in conflict with the express prohibition of cl. (2) against the State making any discrimination on grounds, *inter alia*, only of *class*.

8. Work as punishment for crime.—The 13th Amendment of the American Constitution expressly excepts from the purview of the article compulsory labour exacted from persons convicted of a crime and sentenced to hard labour as punishment.[1] There is no express provision like this in this article. But it is conceived that in such cases the form of forced labour not being necessarily similar to *begar*, the prohibition enacted in cl. (1) of this article would not apply. Even assuming otherwise, the imposition of the service on convicts sentenced to hard labour may, without undue violence to language, be regarded as an imposition for a 'public purpose', namely, the punishment of crime.

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[5] (1897) 165 U S 275 (280, 281, 282, 283): 41 Law Ed 715, *Robertson* v. *Baldwin*.

[6] 1952 Pat 359 (366) (Pr 16) [AIR V 39]: ILR 31 Pat 493 (SB), *Atmaram Budhia* v. *State of Bihar*. (The Legislature having the power to authorise the tax, it must *a fortiori* possess also the power "to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced". Willoughby on the Constitution of the United States, Vol. 2, p. 666, Ref.)

[7] 1953 Him Pra 18 (19) (Pr 3) [AIR V 40 C 8] : 1953 Cri L Jour 400, *State* v. *Jorawar*.

Article 23 — Note 8

[1] Constitutional Law of the United States by Prof. Willis 1936, page 512.

Prohibition of employment of children in factories, etc.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

COGNATE PROVISIONS

"No child shall be employed"— See Employment of Children Act, 1938 (26 of 1938), S. 3; Factories Act, 1948 (63 of 1948), Ss. 67 and 68; Mines Act, 1952 (35 of 1952), S. 45.

1. Scope of the article. — The Constitution of the United States of America does not contain any provision similar to this article. In other words, there is no express prohibition in the American Constitution against the employment of children in any factory or mine or in other hazardous occupations. In this respect, our Constitution marks an advance over the Constitution of America, by making the prohibition of child labour in hazardous employments a matter of Constitutional law and Fundamental Right.

The existing law of India contains various provisions against the employment of child labour and also for regulating the conditions of such child labour. For instance, the Employment of Children Act, 1938, S. 3, provides that no child, who has not completed his 15th year, shall be employed or permitted to work in any occupation connected with the transport of passengers, goods, or mails by railway. The same section provides further (a) that no child, who has not completed his 15th year, shall be employed or permitted to work in any occupation involving the handling of goods within the limits of any port, and (b) that no child, who has not completed his 12th year, shall be employed or permitted to work in any workshop, wherein any of the processes, set forth in the Schedule to the Act, is carried on. The Schedule includes ten kinds of work, among which occur bidi making, manufacture of matches, explosives and fireworks, mica cutting and splitting, soap manufacture and wool cleaning.

Similarly, there are provisions in the Factories Act, 1948, also in relation to child labour. Under S. 67 of the Act, no child, who has not completed his 14th year, shall be allowed to work in any factory.

[*See also* (1876) 93 Law Ed 889 (890) : 93 U S 396, *Ex parte Karstendick.* (In cases where the statute makes hard labour a part of the punishment, it is imperative upon the Court to include that in its sentence. But where the statute requires imprisonment alone, it is within the power of the Court, at its discretion, to order execution of its sentence at a place where labour is exacted as part of the discipline and treatment of the institution.)]

Another example is S. 45 of the Mines Act, 1952. Under that section no child shall be employed in a mine or be allowed to be present in any part of a mine which is below ground.

There are also provisions as regards employment of child labour in different State enactments relating to Shops and Establishments.

There is nod efinition of 'child' either in the Constitution or in the General Clauses Act. The word 'child' is not identical with the word 'minor'. The age of minority in India is fixed under the Indian Majority Act, 1875, as being 18 years as a general rule and 21 years in certain exceptional cases, which are specified. But there may be provisions in particular statutes in this respect. For instance, the Factories Act, 1948, S. 2 (c), defines a child as a person, who has not completed his 15th year.

It may be notedt hat the Factories Act also defines an 'adolescent' as a person who has completed his 15th but has not completed his 18th year and an 'adult' as a person who has completed his 18th year.

It must be noted that this article is not an absolute bar to the employment of child labour. In the first place, the article only applies to children below the age of 14 years. Secondly, even in the case of such children, the article does not prohibit their employment altogether. Their employment is prohibited only in a factory or mine or in any other hazardous employment.

The words "any other hazardous employment" must be taken *ejusdem generis* with work in any factory or mine. The kinds of work enumerated in Schedule to the Employment of Childrens' Act, 1938, may afford instances of hazardous employment. It must be remembered that the question whether the employment is hazardous must be considered with reference to children and not adults. Although a particular kind of work may not be regarded as hazardous for adults, it may be hazardous for children.

Under Art. 39 (e) the State is required to direct its policy towards securing *inter alia* that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Under Entry 24, List 3 of Sch. VII, the following subjects are within the legislative competence of the Parliament and the State Legislatures:—Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

Right to Freedom of Religion.

Freedom of conscience and free profession, practice and propagation of religion.

25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- *(a)* regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;
- *(b)* providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause *(b)* of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

COGNATE PROVISIONS

Existing Law—Interpretation of—See ART. 366 (10).

The State—Interpretation of —See ART. 12.

"Throwing open of Hindu religious institutions" — Clause (2) (b) — See the following Acts —

Central Provinces and Berar Temple Entry Authorization Act (41 of 1947).

Madras Temple Entry Authorization Act (5 of 1947).

Orissa Temple Entry Authorisation Act (11 of 1948).

Synopsis

1. Scope of the article.
    - (a) Scheme of provision.
    - (b) No State religion in India .
    - (c) Tradition of religious neutrality.
    - (d) Proclamation of Queen Victoria.
    - (e) India a secular State.
2. Corresponding provisions in other constitutions.
    - (a) United States of America.
    - (b) Switzerland.
    - (c) Czechoslovakia.
    - (d) Jugoslavia.
    - (e) Union of Soviet Socialist Republics.
    - (f) Ireland.
    - (g) China.
    - (h) Australia.
3. Freedom of conscience.
    - (a) Religious belief and religious practices—Distinction.
    - (b) Meaning and scope of religious freedom.
4. Freedom of religion. See Note 3.
5. State religion.
6. Right to propagate religion.

Article 25
Note 1

7. Religious organizations and their rights and obligations.
8. "Subject to the other provisions of this Part."
9. Power of State to provide for social welfare and social reform.
10. Bigamy and polygamy — Prohibition of. See Notes 3 and 9.
11. Personal laws of Hindus—Enactments affecting. See Notes 3 and 9.
12. Explanation I.

(a) Scheme of provision

1. Scope of the article. — This article is the first in the series relating to the right to freedom of religion. The article declares and guarantees to every person[1] the freedom of conscience and the right freely to profess, practise and propagate religion.

Clause (1) enunciates the general rule but the enunciation itself is made subject to various factors.[2] Thus, the freedom declared by the clause is made subject to public order, morality and health and to the other provisions of Part III.

Clause (2) lays down certain further exceptions to the right declared by cl. (1). Clause (2) contains two sub-clauses (a) and (b). Sub-clause (a) saves the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. Sub-clause (b) saves the power of the State to make laws providing for social welfare and social reform and also for throwing open Hindu religious institutions of a public character to all classes and sections of Hindus.

The article has two explanations. The first explanation provides that the wearing and carrying of *kirpans* by Sikhs should be deemed to be part of their religion and as such protected by cl. (1). Explanation 2 provides that Sikhs, Jains and Budhists and their religious institutions are included within the purview of clause (2) (b).

It will be seen that the religious freedom guaranteed by this article is not an absolute one. Thus, there is no religious freedom where such freedom comes into conflict with public order, morality or health. Similarly, the power of the State to regulate any secular activity associated with religious practice and also to bring about social reform or to take any ameliorative step is saved.

This article does not specially refer to the freedom to establish and maintain religious institutions, although the freedom to profess, practise and propagate religion is declared in general terms. The right of setting up and maintaining religious institutions is assured to all religious denominations by Art. 26 by express provision. Article 27 provides that no one shall be compelled to pay taxes which are meant for the benefit of any particular religion or religious denomination. Article 28 deals with the question of religious instruction in educational institutions.

Article 25 — Note 1

[1] 1953 Bom 242 (244) (Pr 4) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay*. (All persons and not only *citizens* of India are given the right under this article.)

[2] 1953 Bom 242 (244) (Pr 4) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay*. (Religious freedom as contemplated by our Constitution is not an unrestricted freedom.)

Thus, while ART. 25 declares the general Fundamental Right of religious freedom the subsequent ARTS. 26, 27 and 28 deal with various aspects of the same right.

This article protects religious freedom as far as *individuals* are concerned.[3] The right is not only given to the citizens of India but to all persons and the right is to profess, practise and propagate religion. Article 26 does not deal with the rights of an individual but deals with the right of a religious denomination or a section of a religious denomination. Therefore, what ART. 26 does is to protect and safeguard collective rights in contradistinction to individual rights safeguarded by this article and the rights safeguarded by ART. 26 are those specified in clauses (a), (b), (c) and (d) of that article.[4]

This article may be compared with ARTS. 14, 15 and 16. Under those articles, the Constitution prohibits discrimination against any person on the ground of religion. Under ART. 19 (1) (a), the Constitution confers the freedom of speech and expression. This right in so far as it relates to religion is the subject of specific enactment in ART. 25.

(b) No State Religion in India

It will be noted that there is no express provision similar to that in the First Amendment of the American Constitution prohibiting the establishment of a religion by law. In spite of this, there is no State religion in India. The religion of the majority of the people in the country is not given any special protection. All religions are given equal protection.

Nor is there any ecclesiastical department of the State. Under the Government of India Act, 1935, there was an Ecclesiastical Department and it was a reserved subject and under the control of the Governor-General. There was also a special section, S. 269, making provisions as to chaplains. Explaining the origin of the Ecclesiastical Department of the Government of India, the Joint Parliamentary Committee stated as follows :

> "The origin of the Ecclesiastical Department is to be found in the obligation imposed by the Charters of the East India Company to provide chaplains on their ships and at their stations; and since 1858, when the rights and obligations of the East India Company finally passed to the Crown, the Government of India have rightly regarded it as their duty to provide for the spiritual needs of British troops stationed in India and so far as circumstances admit, of the European members of the Civil Services. The Secretary of State in Council has under his general powers established and maintained for this purpose a cadre of official chaplains appointed by himself and has authorised grants-in-aid out of Indian revenues for the

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[3] 1953 Bom 242 (244) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[4] 1953 Bom 242 (244) (Pr 4) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.* (Where the right alleged to be infringed is that of *jains* as individuals and not of a *religious denomination* as such, article applicable is Art. 25 and not Art. 26.)

> maintenance of churches and of a certain number of non-official chaplains, the present annual expenditure of the Department being approximately 40 lakhs. Since the Indian Church Act, 1927, and the Indian Church Measure of the same year, by virtue of which the Church in India became an autonomous body, Indian bishops are no longer appointed by the Crown." (Joint Parliamentary Committee Report, Para. 185.)

The above will show clearly the place of the Ecclesiastical Department in the Government of India prior to the Constitution. No such department now exists in the Government of India nor can be created under the Constitution of India with reference to any religion. This is one important feature which establishes that there is no *State religion* under the Constitution of India.

(c) Tradition of religious neutrality

Although there was an Ecclesiastical Department, under the Government of India Act, 1935, and previous to that also, the tradition of religious neutrality and non-interference in the religious affairs of the Indian people is a very old tradition of British rule in India dating from the time of Warren Hastings. Under S. 298 of the Government of India Act, 1935, it was expressly provided that no subject of His Majesty domiciled in India shall on grounds only of *religion*, place of birth, descent, colour or any of them be ineligible for office under the Crown in India or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation or trade, business or profession in British India.

This provision has its prototype in ARTS. 15 and 16 of this Constitution. Thus, even prior to the coming into force of this Constitution there was a sort of declaration of Fundamental Rights in this matter in the Government of India Act, 1935.

(d) Proclamation of Queen Victoria

The provisions of the Government of India Act, 1935, and the principle of freedom of religion found memorable expression in Queen Victoria's Proclamation of 1858 in the following passage:

> "Firmly relying Ourselves on the truth of Christianity, and acknowledging with gratitude the solace of religion, We disclaim alike the right and the desire to impose Our convictions on any of Our subjects. We declare it to be Our Royal will and pleasure that none be in any wise favoured, none molested or disquieted by reason of their religious faith or observance; but that all shall alike enjoy the equal and impartial protection of the law, and We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the religious belief or worship of any of Our subjects, on pain of our highest displeasure. And it is Our further will that so far as may be, Our subjects, of whatever race or creed, be freely and impartially admitted to offices in Our service, the duties of which they may be qualified, by their education, ability and integrity duly to discharge."

(e) India a secular State

The principle of religious neutrality which has had such a long tradition in our country except for the maintenance of an Ecclesiastical Department by the late Government of India has been given expression to in our Constitution. In other words, the policy which has been adopted in the Constitution is one of non-interference with all religions in the State and equal treatment to all religions.

At various periods in the world's history the existence of a common religious faith among the members of the State has been regarded as essential to its existence. Such was the dominant element in the composition of the ancient Jewish theocracy. In the period following the Reformation in Europe, heretical belief was considered by both Protestants and Catholic monarchs an *offence* against the State and was punished as such. With the growth of the policy of religious tolerance, such a view of the State has passed. The civil authority and the civil bond among the citizens are disassociated from their religion. The Indian Constitution has been modelled on the basis of the most modern ideas in this respect.

The absence of any State religion and equality of treatment assured to all religions mark the Constitution as one of the most advanced types of a secular State. In spite of the fact that Hindus constitute a vast majority of the population, India is not a Hindu State. This has to be specially pointed out, inasmuch as there was a school of opinion that India should be made a Hindu State, just as Pakistan has declared itself to be an Islamic or Shariat State. In other words, there has been a school of thought which has been in favour of there being a State religion, although it recognizes that followers of other religions should be guaranteed protection and fair treatment. This view has been rejected by the Constitution makers.

A secular State does not, however, mean that the State must promote secularism or irreligion or that it should be indifferent to religion. Further, as pointed out by Mr. Justice V. Ramaswami of the Patna High Court in his learned article in the Indian Law Review, Vol. III, p. 93, a secular State does not mean that laws are to be disassociated from ethical standards. In fact, the Constitution expressly enacts in cl. (1) of this article that considerations of *morality* shall be paramount to the principle of religious neutrality of the State and religious equality enacted in the clause.

The doctrine of non-interference by the State in religious matters is also reflected in the principle that Courts cannot take judicial cognizance of disputes as to religious rites or doctrines and adjudicate upon them except in so far as such disputes may relate to the right to property or office. It is not the province or duty of the Court to pronounce on the truth of religious tenets nor to regulate religious rites or ceremonies.[5]

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[5] 1939 Mad 757 (759) [AIR V 26] (DB), *Aiyanchariar* v. *Sadagopachariar.* (A question as to whether a particular *namam* or mark should be placed on the God's head is at best one pertaining to religious ritual and as such is excluded from the cognizance of a civil Court.)

1939 Mad 494 (495) [AIR V 26], *Narayana Mudali* v. *Kalathi Mudali.*

1935 Bom 361 (362) [AIR V 22] (DB), *Devchand Totaram* v. *Ghanasham.* (Whether particular cult is within Vedic religion or not, civil Court is not competent to decide.)

Article 25
Notes 1–2

In the *Advocate-General of Bombay* v. *Yusuf Ali*[6] Marten, J., observed as follows:

> "The protection of the law in religious matters is confined to the protection of religious property or a religious office. The Court will not decide mere questions of religious rites or ceremonies (see Civil Procedure Code, S. 9), nor will it, I think, pronounce on any religious doctrine (see *Attorney General* v. *Pearson*[7]) unless it is necessary to do so in order to determine rights to property, as in (*Free Church of Scotland* v. *Covertown*[8]). As put by Mr. Justice Melville, in *Vasudev* v. *Vamnaji*[9]: 'it is the policy of the State to protect all religions, but to interfere with none'."

The doctrine of equality of religions does not import as a function of the State the obliteration of the differences between several religious systems. The doctrine means only equality in the matter of *freedom* to profess and practise any religion.

(a) United States of America

2. Corresponding provisions in other constitutions.—The First Amendment to the American Constitution provides, *inter alia*, as follows: "The Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . ."

Article 6 of the American Constitution provides, *inter alia*, that the Senators and the Representatives and the members of the several State Legislatures and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States. The religious guarantees in the federal Constitution are limitations only on the Federal Government. They do not apply

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1929 Mad 526 (527) [AIR V 16], *Ramalinga* v. *Sundara.*

1917 Low Bur 43 (51) [AIR V 4] (DB), *Maung Chit Maung* v. *Ma Yait.* (Determining question of orthodoxy by the civil Court would be invidious task.)

1915 Mad 877 (882) [AIR V 2] (DB), *Thiruvengadachariar* v. *Krishnasami Thathachariar.* (Whether an individual may repeat any particular *mantram* or portion of the *prabandham.*)

('10) 6 Ind Cas 864 (866) (DB) (Cal), *Gour Mani Debi* v. *Chairman of the Panihati Municipality.*

('06) 16 Mad L Jour 150 (157) (DB), *Vanamamalai Bhashyakar* v. *Krishnaswami Thathachariar.*

('05) I L R 32 Cal 1072 (1076) (DB), *Loke Nath Misra* v. *Dasarathi Tewari.* (Location of the idol.)

('92-96) 1892-1896 Upp Bur Rule 59, *Maung Vit* v. *Ma Ni.* (Order passed by Buddhist Ecclesiastical authorities.)

('92) I L R 15 Mad 355 (356) (DB), *Maine Moilar* v. *Islam Amanath.*

('84) I L R 7 Mad 91 (92) (DB), *Karuppa Goundan* v. *Kolanthayan.*

('82) I L R 6 Bom 116 (121) (DB), *Rama* v. *Shivram.* (Right to parade bullocks on certain days.)

(1863) 1 Mad H C R 301 (308), *Striman Sadagopa* v. *Kristna Tatachariyar.*

[*See* (1845) 3 Moo Ind App 359 (382) (PC), *Namboory Setapaty* v. *Kanoo-Colanoo Pullia.* (*Quære.*)]

[6] 1921 Bom 338 (355) [AIR V 8].

[7] (1817) 36 E R 135 (155) : 3 Mer 353.

[8] (1904) 1904 App Cas 515 (613) : 20 T L R 730.

[9] ('81) I L R 5 Bom 80 (82) (DB).

to State Governments, except in so far as the due process clause of the 14th Amendment may confer protection against interference with religious liberty. The 14th Amendment has been held to confer such protection and it has been held that the fundamental concept of liberty in the 14th Amendment embraces the liberties guaranteed by the 1st Amendment including freedoms of speech and religion.[1]

Apart from the protection under the due process clause of the 14th Amendment, the several State Constitutions have guarantees protecting religious liberty. Among these guarantees the leading one is that there shall be no establishment of any religion by law. There are also restraints upon interference with the free exercise of religion according to the dictates of one's own conscience and also upon interference with expression of religious beliefs.

(b) Switzerland

The Swiss Constitution contains several provisions relating to freedom of religion. Thus, ART. 49 provides *inter alia* as follows :

> "Liberty of conscience and creed is inviolable. No person may be compelled to become a member of any religious association, submit to any religious instruction, perform any act of religion, or incur any penalties, of any kind whatsoever, by reason of his religious opinions.
>
> * * * * *
>
> The exercise of civil or political rights may not be limited by any ecclesiastical or religious requirements or conditions of any kind whatsoever."

Article 50 of the same Constitution provides that the free exercise of religion is guaranteed within limits compatible with public order and morality.

(c) Czechoslovakia

Article 121 of the Czechoslovakian Constitution provides : "Liberty of conscience and of religion shall be guaranteed." There are various other provisions dealing with the several aspects of religious freedom.

(d) Jugoslavia

Article 12 of the Jugoslavian Constitution runs as follows : "Liberty of religion and of conscience shall be guaranteed. All recognised religions shall be equal before the law and may be practised in public . . . . . ."

(e) Union of Soviet Socialist Republics

Article 124 of the Russian Constitution: In order to ensure to citizens freedom of conscience, the Church in the U. S. S. R. is separated from the State and the school from the Church. Freedom of religious worship and freedom of anti-religious propaganda is recognised for all citizens. It is noteworthy that it is only freedom of anti-religious propaganda that is protected. Freedom of religious *worship* alone is protected and not freedom of religious *propaganda*. Our Constitution protects the right of religious propaganda as well as anti-religious propaganda. The right to anti-religious propaganda is not covered by ART. 25

Article 25 — Note 2

[1] (1941) 315 U S 568(570-571): 86 Law Ed 1031, *Chaplinsky* v. *New Hampshire.* (1940) 310 U S 296 (303) : 84 Law Ed 1213, *Cantwell* v. *Connecticut.*

but is covered by the freedom of speech and expression clause in ART. 19 (1) (a).

(f) Ireland

Article 44, S. (2) (1), Irish Constitution : "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen." Sub-sec. (3) of the same section provides as follows : "The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status." There are also other provisions dealing with other aspects of religious liberty.

(g) China

Article 13 of the Chinese Constitution provides : "The people shall have the freedom of religious belief."

(h) Australia

Section 116 of the Australian Constitution : "The Commonwealth shall not make any law for establishing any religion or for imposing any religion or for imposing any religious observance or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

We have set forth above by way of illustrative examples provisions from various Constitutions to show that the right of religious liberty guaranteed by this article is the subject-matter of similar guarantees in written constitutions generally all over the world in modern times.

It may be noted that the American Constitution and the Australian Constitution contain express provisions against the establishment of a State religion. We shall discuss this question further in NOTE 5.

(a) Religious belief and religious practices — Distinction

3. Freedom of conscience. — This article guarantees to all persons freedom of conscience and the right freely to profess, practise and propagate religion. The article is prefaced with the words "subject to public order, morality and health and to the other provisions of this Part". These words can obviously have no reference to freedom of *conscience*. In *U. S.* v. *Ballard*,[1] Mr. Justice Douglas delivering the opinion of the Supreme Court of America observed as follows :

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect : *Watson* v. *Jones*.[2] The First Amendment has a dual aspect. It not only forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship but also safeguards the free exercise of the chosen form of religion : *Cantwell* v. *Connecticut*.[3] Thus, the amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but in the nature of things the second cannot be."

Thus, the restrictions that are possible under the article can only have reference to the external acts of persons by way of professing, practising or propagating religion. So far as mere belief is concerned, it cannot be subject to any legal or State control.

Article 25 — Note 3

[1] (1944) 322 U S 78 (86) : 88 Law Ed 1148.

[2] (1871) 20 Law Ed 666 (676) : 13 Wall 679.

[3] (1940) 310 U S 296 (303) : 84 Law Ed 1213 (1217).

In *State of Bombay* v. *Narasu Appa Mali,*[4] Chagla, C. J., observed as follows :

> "Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious *practices* run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

In *Ratilal* v. *State of Bombay,*[5] Chagla, C. J., observed as follows :

> " 'Religion', as used in ARTS. 25 and 26, must be construed in its strict and etymological sense. Religion is that which binds a man with his Creator. . . . . Even where you have a religion which does not believe in a Creator, every religion must believe in a conscience and it must believe in ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men, that alone can constitute religion as understood in the Constitution. A religion may have many secular activities, it may have secular aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution. There are religions which bring under their own cloak every human activity. There is nothing which a man can do, whether in the way of clothes or food or drink, which is not considered a religious activity. But it would be absurd to suggest that a Constitution for a secular State ever intended that every human and mundane activity was to be protected under the guise of religion."

In the same case, Shah, J., observed :

> "The expression 'religion' as used in the Constitution is not defined in the Constitution, nor in the General Clauses Act which is made applicable to the construction of the Constitution. In the very nature of things it would be extremely difficult, if not impossible, to define the expression 'religion' or 'matters of religion'. Essentially religion is a matter of personal faith and belief, or personal relation of an individual with what he regards as his Maker or his Creator, or the higher agency which, he believes, regulates the existence of sentient beings and the forces of the Universe. . . . . It may not be possible to devise a precise definition of universal application as to what is religion or what are matters of religion, but

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[4] 1952 Bom 84 (Prs 5, 6) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB).

[*See also* 1953 Bom 183 (187) [AIR V 40 C 55] (DB), *Syedna Taher Saifuddin* v. *Tyebbhai Moosaji.*]

[5] 1953 Bom 242 (244, 251) [A I R V 40 C 78] (DB). (Bombay Public Trusts Act (29 of 1950) — The provisions of the Act, particularly Ss. 18, 31, 32, 35, 36, 37, 44, 47, 48, 50 (a) and (g), 55, 56, 57, 58, 59 and 62, do not contravene the Fundamental Rights embodied in Arts. 25 and 26 of the Constitution nor is any provision of the Act beyond the competence of the State Legislature.)

that is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right freely to profess religion or to practise religion or propagate religion, or to what extent the Constitution sought to protect the right to manage the affairs of religious denominations in matters of religion."

In *Reynolds* v. *United States,*[6] Chief Justice Waite delivering the opinion of the Supreme Court of America observed as follows :

> "Laws are made for the government of *actions*, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil Government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil Government to prevent her carrying her belief into practice ?"

The same principle was laid down in *Cantwell* v. *Connecticut.*[7] There it was held that freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose is absolute and cannot be restricted by law but the free exercise of the chosen form of religion involving *acts* is subject to regulation for the protection of society.

The principle of distinction between belief and practices was expressed in the following words in *United States* v. *Ballard,*[8] by Mr. Justice Douglas delivering the opinion of the Supreme Court of America :

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences, which are as real as life to some may be incomprehensible to others, yet the fact that they may be beyond the ken of mortals, does not mean that they can be made suspect before the law."

In *Church of Scotland* v. *Overtown,*[9] Lord Halsbury, L. C., declared that a court of law has nothing to do with the soundness or unsoundness of a particular religious doctrine and this principle was also affirmed in *United States* v. *Ballard.*[10] In the latter case certain persons were prosecuted for using the mails to defraud people by obtaining money from them by representations as to investiture with divine authority and endowment with supernatural powers. It was held that the Court could not consider the truth or falsity of the religious beliefs or doctrines professed by the accused and that they were by reason of the constitutional guarantee of freedom properly excluded from consideration. At the same time, it was held by the majority of the Court that the Court could consider whether or not the accused believed in their own professions and that if they did not believe, they would be guilty.

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[6] (1879) 25 Law Ed 244 (250) : 98 U S 145.
[*See also* (1889) 133 U S 333 (344) : 33 Law Ed 637 (640), *Davis* v. *Beason.* (98 U S 145 : 25 Law Ed 244, *Reynolds* v. *United States,* Foll.)]

[7] (1940) 310 U S 296 (303) : 84 Law Ed 1213.

[8] (1944) 322 U S 78 (86, 87) : 88 Law Ed 1148.

[9] (1904) 1904 App Cas 515 (613) : 91 L T 394.

[10] (1944) 322 U S 78 (88) : 88 Law Ed 1148.

The meaning of the word 'religion' as explained in some of the decisions may also be considered. In *Reynolds* v. *United States*,[11] Waite, C. J., of the Supreme Court of America observed as follows :

> "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision (1st Amendment) was adopted. The precise point of the enquiry is, what is the religious freedom which has been guarantied ?"

The Chief Justice observed as follows in the course of the discussion :

> "In the Preamble of this Act (12 Hen. Stat. 84) religious freedom is defined ; and after a recital 'that to suffer a Civil Magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty', it is declared 'that it is time enough for the rightful purposes of civil Government for its officers to interfere when principles break out into overt acts against peace and good order'. In these two sentences is found the true distinction between what properly belongs to the Church and what to the State."

In *Davis* v. *Beason*,[12] Justice Field, delivering the opinion of the Supreme Court of America, observed as follows :

> "The term 'religion' has reference to one's views of his relations to his Creator and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect but is distinguishable from the latter. The 1st Amendment to the Constitution in declaring that Congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect. The oppressive measures adopted and the cruelties and punishments inflicted by the Governments of Europe for many ages to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control

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11. (1879) 25 Law Ed 244 (249) : 98 U S 145.

12. (1889) 133 U S 333 (342, 343) : 33 Law Ed 637.

Article 25
Note 3

> the mental operations of persons and enforce an outward conformity to a prescribed standard led to the adoption of the Amendment in question. It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose and the manner in which an expression shall be made by him of his belief on those subjects no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity and the morals of its people are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

In *West Virginia State Board of Education* v. *Barnette*,[13] Mr. Justice Douglas said : "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

Two principles emerge from the above discussion : (i) So far as a person's *beliefs* are concerned there is an absolute protection, and in spite of the fact that the article clubs together "freedom of conscience" and the other rights, namely, the right to profess, practise and propagate religion and the *whole* provision is prefaced with the words "subject to public order" and so on, in the nature of things no restriction can be imposed by the State on what is a mere matter of *belief*. (ii) In so far as beliefs find expression in overt acts and practices, the jurisdiction of the State to control such expression is undeniable where such control is necessary in the interests of public order, morality and health.

(b) Meaning and scope of religious freedom

It is thus clear that it lies within the province of the State to prohibit or regulate any practice although it may be honestly felt by the parties concerned as being a *religious* practice. Thus, in America polygamy has been prohibited by law and the law has been upheld as being valid although it was contended that polygamy was, with the parties, a matter of religious belief and conviction. The basis of the American decision on this subject is that polygamy is immoral.

In *Late Corporation of Latter Day Saints* v. *United States*,[14] Mr. Justice Bradley of the Supreme Court of America observed as follows in delivering the opinion of the Court :

> "One pretence for this obstinate course (referring to the indulgence in polygamy by Mormons) is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assasi-

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[13] (1942) 319 U S 624 (642) : 87 Law Ed 1628.

[14] (1889) 36 U S 1 (49, 50) : 34 Law Ed 478.

nation was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

"The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised : *Davis* v. *Beason.*[15]"

The right to excommunicate a member of a religious denomination is not a part of religious *faith* and *belief.* At best it can only be a religious *practice*, and as such is subject to regulation by the State.[16]

The freedom guaranteed by this article includes, by necessary implication from the phrase "freedom of conscience", freedom for agnosticism and theism and not only freedom for belief in religion or God.

The freedom that is guaranteed is not only the freedom of belief or unbelief but also the freedom to express that belief by overt acts and to propagate such beliefs, although the latter rights are subject to State control in the interests of public order, morality and health and also to the other provisions of Part III.

Freedom of conscience includes freedom of thought, not only in matters pertaining to God and religion, but also in other matters, as for instance political, social or economic doctrines.

The article says that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. There is no prohibition against the establishment of a State religion as under the American Constitution, but as already seen in NOTE 1, there is also no provision for the preferential treatment of any religion as being the religion of the majority of the population. In fact, ARTS. 27 and 28 guarantee that there should be no preferential treatment for any religion. Thus, there is not only an equal right to profess, practise and propagate religion guaranteed to all persons, but there is also a guarantee of equality of treatment for all religions by the State being forbidden to show any preferential treatment for any particular religion. Under the American Constitution also, the constitutional guarantee of religious freedom means the equal treatment of all religions by the State without preference being shown to any one religion or religious denomination.[17]

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[15] **(1889) 133 U S 333 (343) : 33 Law Ed 637.**

[16] **1953 Bom 183 (187) (Pr 18) [AIR V 40 C 55] (DB),** ***Syedna Taher Saifuddin* v. *Tyebbhai Moosaji.***

[17] **(1944) 322 U S 78(87) : 88 Law Ed 1148,** ***United States* v. *Ballard.***

Any custom which infringes the freedom of religion granted by this article is void.[18] Thus, no one can be forced to accept by reason of any custom the ministrations of particular priests at religious ceremonies against his will.[19]

Although the freedom to practise religion under this article is not absolute, as already explained,[20] the freedom is susceptible of restrictions only to prevent grave and immediate danger to the interests which the State may lawfully protect.[21]

Compelling school students to salute the national flag when they feel a religious objection to doing so on the ground that it amounts to image worship, which is forbidden by their religion, is unconstitutional.[22]

Sections 21, 23, 24 and 54 of the Madras Hindu Religious and Charitable Endowments (Act 19 of 1951), vest very large powers in the Commissioner and are calculated to interfere with the practice of religion, that is, the carrying on of worship and the propagation of religion by instructing the disciples and initiating them into the fold of religion, and therefore constitute an infringement of this article.[23]

In America, it has been held that the denial by a State Court of an application for admission to the State Bar, on the ground that the applicant, because of a conscientious belief in non-violence, cannot take in good faith the required oath to support the State Constitution, where such support is supposed to include willingness to serve in the State militia when required, does not violate the principle of religious freedom involved in the 14th Amendment.[24] The reason given is that in view of his religious beliefs the petitioner could not agree freely to serve in the State militia. Therefore he was not barred because of his *religion* but because he could not in good faith take the prescribed oath even though he might be willing to do so.

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[18] 1951 Him Pra 32 (Prs 8, 9) [AIR V 38 C 9], *Baijnath* v. *Ram Nath.*

[19] 1951 Him Pra 32 (Prs 8, 9) [A I R V 38 C 9], *Baijnath* v. *Ram Nath.* (A custom, whereunder hereditary *yogis* can force their ministrations on their *yajman*, if proved, would be void and unenforceable under Art. 13, Constitution of India, as such a right infringes the Fundamental Right of freedom of religion conferred on all persons under Art. 25.)

[20] 1952 Mad 193 (Pr 4) [A I R V 39 C 95] : I L R (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.*

[21] (1942) 319 U S 624 (639) : 87 Law Ed 1628, *West Virginia State Board of Education* v. *Barnette.*

[22] (1942) 319 U S 624 (642) : 87 Law Ed 1628, *West Virginia State Board of Education* v. *Barnette.* (310 U S 586: 84 Law Ed 1375, *Minersville School Dist.* v. *Gobitis*, Overruled.)

[23] 1952 Mad 613 (Pr 39) [A I R V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E. Madras.*

[24] (1944) 325 U S 561 (565) : 89 Law Ed 1795, *Re Summers.* [*See also* (1945) 328 U S 61 (65) : 90 Law Ed 1084, *Gironard* v. *United States.* (Statutory requirement that applicant for admission to citizenship should take an oath to support and defend the Constitution and laws of the U. S. A. against all enemies, does not operate to exclude from citizenship one unwilling to take up arms in the country's defence.)]

The acquisition of wakf property compulsorily has nothing to do with the right of mutwalli to profess his religion under this article, and therefore does not contravene it.[25]

The State has a right to teach in educational institutions what it considers necessary for inspiring patriotism and love of country among the students. But the compulsion of students to declare a belief is unconstitutional.[26]

Entry 5 of LIST 3 (CONCURRENT LIST) of SCH. VII includes as subjects of legislation marriage, divorce, adoption, joint family and partition, etc. The basis of this classification is not religion. Hence, legislation affecting these subjects cannot be treated as legislation affecting the freedom of religion under the article.[27] Polygamy or bigamy is not a practice based on *religion* among Hindus and its prohibition does not affect the freedom of religion under this article.[28]

4. Freedom of religion. — See NOTE 3.

5. State religion.—It has already been seen in NOTE 1 that although there is no express provision in the Constitution prohibiting the establishment of any religion by law, there is also no provision for the recognition of any religion as the State religion as being the religion of the majority of the population. Nor is there any provision for any Ecclesiastical Department as there was under the Government of India Act, 1935. To bring out this point we may refer to the Irish Constitution, ART. 44 (1), (2), which runs as follows: "The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the great majority of the citizens." The Constitution of the Union of Burma also contains a similar provision with regard to Budhism as the faith professed by the majority of the citizens of the Union.

Even in America whose Constitution contains an express provision against the establishment of religion by law, it is the opinion of

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[25] 1951 All 674 (Pr 81) [A I R V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Govt.*

[26] (1942) 319 U S 624 (631): 87 Law Ed 1628 (1634), *West Virginia State Board of Education* v. *Barnette.* ("The State may require teaching by instruction and study of all in our history and in the structure and organization of our Government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with a flag salute, so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to arouse loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan".)

[27] 1952 Mad 193 (195, 196) (Prs 3, 4) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.*

[28] 1952 Bom 84 (86) [AIR V 39 C 16] : I L R (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa.*
1952 Mad 193 (Pr 4) [A I R V 39 C 95] : I L R (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.*
[*See also* (1878) 25 Law Ed 244 (250) : 98 U S 145, *Reynolds* v. *United States.* (Constitutional guarantee of religious freedom was not intended to prohibit legislation with respect to polygamy.)]

Prof. Willis that the Constitution did not establish equality of religions or complete freedom in the matter of religious beliefs. He observes as follows at p. 501 in his book on CONSTITUTIONAL LAW (1936 Edition):

> "The purpose of these provisions (1st Amendment and ART. 6 of the main Constitution) was, therefore, threefold: to guarantee freedom from religious qualifications for office, freedom from the establishment of any religion, and freedom to exercise one's own religion. This prohibited a union of Church and State and established an equality of the sects. Its real purpose, therefore, was to prevent religious persecution. It did not establish equality of religions or complete freedom in the matter of religious beliefs. Christianity is probably a part of the common law and a part of our law. It was not the purpose of this Amendment to advance Mohammedanism or Judaism or infidelity. An oath can be required; marriages can be compelled 'in the face of the Church'; Sunday laws and laws against blasphemy are upheld and probably even reading of the Bible in the schools, all of which shows that the Constitution does not protect religious liberty in the broad sense."

In this context, it is instructive to see what exactly is meant by the establishment of religion by law or meaning of an established Church. In *Marshall* v. *Graham*[1] Phillimore, J., observed as follows:

> "A Church which is established is not thereby made a department of the State. The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions."

In *Everson* v. *Board of Education*,[2] Mr. Justice Black delivering the opinion of the Supreme Court of America observed as follows:

> "The 'establishment of religion' clause of the 1st Amendment means at least this: Neither a State nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practise religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of

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Article 25 — Note 5

[1] (1907) 2 K B 112 (126): 76 L J K B 690.

[2] (1946) 91 Law Ed 711 (723): 330 U S 1 (15, 16).

Article 25
Notes 5-6

separation between Church and State', *Reynolds* v. *U. S.*[3]''

It has been held in America that the provision for payment of bus fares to children attending Catholic schools does not amount to establishment of religion under the 1st Amendment, its purpose merely being to provide in the interest of public welfare for the safe transportation of school children irrespective of their religious faith.[4]

6. Right to propagate religion. — This article expressly guarantees the right freely to propagate religion. The Soviet Constitution, as has been seen in NOTE 2, guarantees freedom of worship and freedom of anti-religious propaganda. Freedom of religious propaganda is not guaranteed. Although this article expressly guarantees only the right to propagate *religion*, it is conceived that freedom of conscience guaranteed by it and the right to freedom of speech and expression under ART. 19 (1) (a), are wide enough to cover anti-religious propaganda.

The right to propagate religion entitles people to dedicate property by way of trust to the purpose of sustaining and propagating definite religious doctrines.[1] The right not to be deprived of one's liberty without due process of law under the 14th Amendment in the American Constitution also covers the right to do religious propaganda.[2] Religious propaganda is not immune from restraint by the State merely as religious propaganda. In other words, "Jehovah's witnesses" are not above the law. But where there is no infringement of public health, order, morality, etc., the right to spread one's faith must not be curtailed.[3]

The question about restricting the right of distribution of various forms of religious literature has come up before the Supreme Court of America frequently. Distribution of handbills, leaflets and other forms of religious literature, has been regarded as a matter of right of religious propaganda and is entitled to protection under the constitutional guarantee of religious freedom.[4] It has been held that the distribution of religious literature is not to be prohibited merely because it is provocative or abusive or because it attacks other religions, the reason given being that the dissemination of views cannot be suppressed merely because they are unpopular, annoying and distasteful.[5] But it is to be noted that the right to do religious propaganda is subject to considerations of public order and therefore when public order is jeopardised, provocative propaganda is susceptible to restraint by the State.

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[3] (1879) 25 Law Ed 244 (249) : 98 U S 145 (164).

[4] (1946) 330 U S 1 (17, 18) : 91 Law Ed 711, *Everson* v. *Board of Education*. [*See also* (1952) 96 Law Ed 954 (960): 343 U S 306, *Zorach* v. *Clauson*. (Separation of church and State does not prevent public institutions from making adjusmtents of their schedules to accommodate the religious needs of the people— Releasing students to attend, during school hours, religious instructions outside school premises is not unconstitutional—*See* annotation on Page 968 of 96 Law Ed for an exhaustive note on the whole subject of religious freedom under American Constitution.)]

Article 25 — Note 6

[1] (1871) 20 Law Ed 666 (675) : 13 Wall 679, *Watson* v. *Jones*.

[2] (1939) 310 U S 296 (303, 304) : 84 Law Ed 1213, *Cantwell* v. *Connecticut*.

[3] (1942) 319 U S 105 (116) : 87 Law Ed 1292, *Murdock* v. *Pennsylvania*.

[4] (1945) 326 U S 501 (508) : 90 Law Ed 265, *Marsh* v. *Alabama*. (This right applies even to person distributing religious literature on the streets of a company-owned town contrary to the wishes of the town management.)
(1942) 319 U S 141 (149) : 87 Law Ed 1313, *Martin* v. *Struthers*. (Ordinance making ringing door-bells in order to distribute to the inmates of homes leaflets advertising religious meeting is unlawful — Such ordinance is unconstitutional

It has been held that S. 116 of the Australian Constitution (see NOTE 2) does not prevent the Commonwealth Parliament from making laws prohibiting the advocacy of doctrines or principles which though advocated in pursuance of religious convictions are prejudicial to the prosecution of a war in which the Commonwealth is engaged.[5a]

A law requiring a permit or licence for the solicitation of funds for a religious cause is an invasion of religious freedom.[6] But a *general* and non-discriminatory regulation in public interest, of solicitation, which does not involve any religious test, and which does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection may be for a religious purpose.[7]

Sections 21, 23, 24 and 54 of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951) vest very large powers in the Commissioner and are calculated to interfere with the practice of religions, i. e., the carrying on of worship and the propagation of religion by instructing the disciples and initiating them into the fold of religion and, therefore, constitute an infringement of this article.[8]

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invasion of right of freedom of speech and press, since the ordinance, by failing to distinguish between house-holders who are willing to receive the literature and those who are not, is extended farther than is necessary for the protection of the community.)

(1942) 319 U S 105 (110) : 87 Law Ed 1292, *Murdock* v. *Pennsylvania.* (Ordinance imposing license tax for canvassing or soliciting within municipality, when applied to religious colporteurs, engaged in the dissemination of their religious beliefs through the sale of books and pamphlets by solicitations from house to house is an unconstitutional invasion of freedom of press and religion. Right to propagate includes not only the evangelism of the orthodox types but includes spreading of religious beliefs or the preaching of the gospel through the distribution of religious literature and through personal visitations.)

(1942) 318 U S 413 (416) : 87 Law Ed 869, *Jamison* v. *Texas.* (Constitutional right to distribute in the streets handbills for purpose of furthering a religious activity is not affected by the fact that they contain an invitation to purchase books, related to such activity and by so doing to contribute to its support.)

[5] (1942) 319 U S 105 (116) : 87 Law Ed 1292, *Murdock* v. *Pennsylvania.*

[5a] (1943) 67 C L R 116, *Adelaide Co.* v. *Commonwealth.*

[6] (1942) 319 U S 105 (115) : 87 Law Ed 1292, *Murdock* v. *Pennsylvania.* (The fact that the licensing ordinance is not discriminatory does not relieve it from attack upon the ground that it violates the constitutional guarantee of freedom of speech and of press.)
(1939) 310 U S 296 (303) : 84 Law Ed 1213, *Cantwell* v. *Connecticut.*

[7] (1939) 310 U S 296 (305) : 84 Law Ed 1213, *Cantwell* v. *Connecticut.*

[8] 1952 Mad 613 (Pr 39) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

7. Religious organizations and their rights and obligations. — Article 26 expressly guarantees the right to establish and maintain institutions of a denominational character. The identity of a religious community described as a church consists in the unity of its doctrines, creeds, confessions, formularies and tests.[1] Courts having no ecclesiastical jurisdiction cannot revise or question ordinary acts of church discipline. Their only judicial power arises from conflicting claims of the parties as regards the church property and the use of it.[2] The rights of property or of contract, of religious organizations, are under the protection of the law, and the action of their members is subject to its restraints.[3]

8. "Subject to the other provisions of this Part." — By virtue of these words this article is subject to ART. 31. Hence, the property of a wakf may be acquired under ART. 31 for a public purpose. The right of the *mutawalli* under ART. 25 is not affected by such acquisition. At any rate, ART. 31 controls the right conferred by this article.[1]

9. Power of State to provide for social welfare and social reform. — The right of religious freedom under cl. (1) is expressly made subject to the power of the State to make laws for social welfare and for social reform (cl. (2) (b)). This power has been conferred on the State in addition to the power of the State under cl. (1) itself, to impose restraints and restrictions in the interest of public order, morality and health. Hence, a law, which is enacted for the purpose of introducing social reform, cannot be impeached as violating the right freely to profess, practise and propagate religion conferred by cl. (1).[1] The power of the State to punish acts, which are recognized by general consent as a proper matter for prohibitory legislation, cannot be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.[2] (See

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Article 25 — Note 7

[1] (1904) 1904 App Cas 515 (612, 613) : 91 L T 394, *Free Church of Scotland* v. *Overtown*.

[2] (1871) 20 Law Ed 666 (678) : 13 Wall 679, *Watson* v. *Jones*.

[3] (1871) 20 Law Ed 666 (670) : 13 Wall 679, *Watson* v. *Jones*.
[*See also* (1889) 136 U S 1 (46) : 34 Law Ed 478, *Late Corporation of Latter Day Saints* v. *United States*. (Congress has power to revoke the charter of the Church of Jesus of Latter-day Saints in the territory of Utah — Congress and the Courts have the power to cause the property of the said Corporation to be seized and taken possession of and held for proper disposition.)]

Article 25 — Note 8

[1] 1951 All 674 (Pr 81) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Government*.

Article 25 — Note 9

[1] 1952 Bom 84 (86, 87) (Pr 7) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa*.
[*See also* (1889) 33 Law Ed 637 (640) : 133 U S 333, *Davis* v. *Beason*.]

[2] (1889) 133 U S 333 (343) : 33 Law Ed 637 (640), *Davis* v. *Beason*.

Article 25
Note 9

Note 3). Justice Field observed as follows in *Davis* v. *Beason*[3]:

> "It was never intended or supposed that the Amendment (the 1st Amendment of the American Constitution) could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

As regards what is meant by social reform, the question has been raised as to whether it is for the Legislature to decide what constitutes social reform. On this question the Bombay High Court has pointed out that it must not be forgotten that in a democracy the Legislature is constituted by the chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is for them to determine what legislation to put upon the statute book in order to advance the welfare of the State.[4]

In virtue of the power of the State to legislate for the purpose of social reform, a law compelling monogamy and prohibiting bigamy and polygamy will be valid.[5] The right of the State to legislate on questions of marriage cannot be disputed. Marriage is clearly a social institution, an institution in which the State is vitally interested. Although there may not be universal recognition of this fact, still very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution.[6] Hence, the

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(1879) 25 Law Ed 244 (250) : 98 U S 145, *Reynolds* v. *United States.* (Religious belief cannot be accepted as a justification for an overt act made criminal by the law of the land.)

[3] (1889) 133 U S 333 (342, 343) : 33 Law Ed 637.

[4] 1952 Bom 84 (Pr 7) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa.*

[5] 1952 Bom 84 (94) (Pr 28) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa.*
1952 Mad 193 (196) (Prs 4, 5) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.*
(1889) 133 U S 333 (344, 345) : 33 Law Ed 637, *Davis* v. *Beason.*
(1879) 98 U S 145 (166, 167) : 25 Law Ed 244, *Reynolds* v. *United States.*
(1889) 136 U S 1 (49, 50) : 34 Law Ed 478, *Late Corporation of Latter Day Saints* v. *United States.*

[6] 1952 Bom 84 (Pr 7) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa.*
(1889) 133 U S 333 (341, 344) : 33 Law Ed 637, *Davis* v. *Beason.* (Bigamy and polygamy are crimes by the laws of all civilised and Christian countries and the 1st Amendment cannot be invoked against a legislation for their punishment.)

Bombay Prevention of Bigamous Marriages Act (25 of 1946)[7] and Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949)[8] are valid pieces of legislation which are covered by cl. (2) (b) of this article. Apart from their being covered by cl. (2) (b) of this article, the two Acts also may be upheld as not in any way interfering with religious freedom at all.

As to whether enactments relating to social reform, which affect the followers of a particular religion alone, can be treated as offending ARTS. 14 and 15 and the principle of equality and non-discrimination embodied in them, see notes on those articles.

As to the aspect of this kind of legislation being covered by the subjects as to which the Legislatures have been expressly empowered to enact laws under Entry 5 of LIST 3 of SCH. VII, see NOTE 3. There it is pointed out that, in such cases, there is no question of legislating with reference to religion or affecting religious freedom and that "personal law" relating to the subjects enumerated in Entry 5 is not concerned with religion.

10. Bigamy and polygamy—Prohibition of.—See NOTES 3 and 9.

11. Personal laws of Hindus — Enactments affecting. — See NOTES 3 and 9.

12. **Explanation I.** — Clause (1) of this article guarantees the equal right of all persons freely to profess any religion they like. The word "profess" in this context necessarily means the affirmation of one's faith. Such affirmation may take several forms. The wearing of symbols or emblems is one such form.

Explanation I gives constitutional recognition to the right of the followers of the Sikh religion to wear and carry on their person *kirpans* as an emblem of their religion.[1] An 'emblem,' according to Webster's NEW INTERNATIONAL DICTIONARY, means a visible sign of an idea; an object or the figure of an object, symbolizing or suggesting another object or an idea by natural aptness or by associations; as, a balance is an emblem of justice; a sceptre, the emblem of sovereignty.[2]

As this article only allows the wearing of *kirpans* as an emblem of religion, it only contemplates the wearing of only one *kirpan*. And further, the Explanation only applies to the particular *kirpan* which is actually used as a religious emblem, but not to a stock of *kirpans* out of which one may be used as an emblem. The use of the plural (*kirpans*) in the Explanation does not, in view of the fact that a *kirpan* is only intended to be carried as an emblem of religion, indicate that more than one *kirpan* can be carried without licence.[3]

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[7] 1952 Bom 84 (Pr 7) [AIR V 39 C 16] : ILR (1951) Bom 775 : 1952 Cri L Jour 354 (DB), *The State of Bombay* v. *Narasu Appa.* (Assuming that polygamy is a recognized institution according to Hindu religious practice, an Act compelling Hindus to become monogamists, is a measure of social reform, and the State is empowered to legislate with regard to social reform under Art. 25 (2) (b), notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion. In this view, the Bombay Prevention of Bigamous Marriages Act (25 of 1946) does not contravene Art. 25 (1).)

[8] 1952 Mad 193 (196) (P 4) [AIR V 39 C 95] : ILR (1953) Mad 78 : 1952 Cri L Jour 434 (DB), *Srinivasa Aiyar* v. *Saraswathi Ammal.*

Article 25 — Note 12

[1] 1952 All 53 (55) (Pr 15) [AIR V 39 C 15] : 1952 Cri L Jour 218, *Rex* v. *Dhyan Singh.*

[2] 1952 All 53 (55) (Pr 15) [AIR V 39 C 15] : 1952 Cri L Jour 218, *Rex* v. *Dhyan Singh.*

A *kirpan* means a sword and its size and shape has not been prescribed by the Sikh religion. It may be a sword of any size or shape.[4]

Ordinarily and in the absence of an express exemption, the possession of *kirpans* under the Arms Act requires a licence. But by reason of Explanation I a constitutional right to carry one *kirpan* as a religious emblem is conferred on every Sikh, and there are also corresponding rules under the Arms Act permitting the carrying of *kirpans* by the Sikhs as a religious emblem.[5]

Freedom to manage religious affairs.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(*a*) to establish and maintain institutions for religious and charitable purposes;

(*b*) to manage its own affairs in matters of religion;

(*c*) to own and acquire movable and immovable property; and

(*d*) to administer such property in accordance with law.

Synopsis

1. Scope of the article.
    (a) General.
    (b) Right to manage its own affairs in matters of religion (cl. b).
    (c) Right to administer property (cl. d).
    (d) Right to own and acquire property (cl. c).

(a) General

1. Scope of the article. — This article deals with a special aspect of the subject of religious freedom which has already been dealt with under Art. 25. Under this article, every religious *denomination* or sect is given the right to found and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion. Among the rights specifically granted are also the rights to own and acquire movable and immovable property and to administer such property in accordance with law. The right guaranteed under Article 25 is an individual right, while the right guaranteed under this article is the collective right of a religious denomination or sect as such.[1]

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[3] 1952 All 53 (Prs 16, 18) [AIR V 39 C 15] : 1952 Cri L Jour 218, *Rex* v. *Dhyan Singh*. (AIR 1924 Lah 600, Rel. on; AIR 1930 Bom 153, Disting.)

[4] 1952 All 53 (Pr 13) [AIR V 39 C 15] : 1952 Cri L Jour 218, *Rex* v. *Dhyan Singh*. (AIR 1924 Lah 600, Rel. on.)

[5] Rule 17 of the U. P. Arms Rules and Orders, 1935, also exempts from the operation of the Arms Act *kirpans* carried or possessed by Sikhs as a religious emblem : *See* AIR 1952 All 53 (para 8.)

The Dictionary meaning of the word "denomination" is given by Webster as a collection of individuals, classed together under the same name (now almost always), especially a religious sect or body having a common faith and organization and designated by a distinctive name. There being several religions in India, such as Islam, Christianity, Zoroastrianism and Hinduism, it may not be wrong to take Hinduism and the members of that religion as constituting a religious denomination in a larger sense, or if it should be taken in a limited sense, *Advaitism, Dwaitism, Visishtadwaitism, Shaivism, Vaishnavism, etc.*, may be another classification and the members of each faith may be treated as members of one denomination. Even taking the meaning of "denomination" in the sense of a sect, the division of the members of the Hindu religion based upon a system of a philosophy which is adopted by a group of members may be treated as a denomination or sect and any section of that denomination and a division may, either on territorial or sectional basis, be treated as a section thereof.[2] The Goud Saraswat Brahmin community is a religious denomination, or at any rate, a section of a religious denomination.[3]

Every religious sect, under the article, has the right to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion. It is also permissible for such a sect to own and acquire movable and immovable property and to administer such property in accordance with law.[4] The right to maintain implies the right to continue the institution according to the established usage, to carry on the worship and to make it function in the manner in which it has been functioning according to long established usage.[5] Except on the ground of public order and morality and health this right cannot be in any manner affected by legislation.[6]

Article 26 — Note 1

[1] 1953 Bom 242 (244) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay*.

[2] 1952 Mad 613 (Pr 40) [A I R V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr. H. R. E. Madras*.

[3] 1953 Mad 149 (151) (Pr 3) [AIR V 40 C 45] (DB), *Devaraja Shenoy* v. *State of Madras*.

[4] 1952 Mad 613 (Pr 40) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras*.

[5] 1952 Mad 613 (Pr 40) [A I R V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras*. (Religious denomination is an autonomous body, and whether or not a fluctuating body can acquire and own property, a religious denomination is given the right by the Constitution.)

[6] 1953 Bom 242 (244) (Pr 4) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay*.

Article 26
Note 1

The denomination contemplated by the article is not a closed body like a corporation but it includes a religious sect or members of a religious persuasion.[7]

(b) Right to manage its own affairs in matter of religion (cl. (b))

It has been held by the Madras High Court that it is difficult to disassociate the religious affairs of an institution from its property or its secular affairs. The secular affairs are only directed for the purpose of better management of the religious affairs for which alone the institution exists. They are inextricably mixed up.[8] But the Bombay High Court has expressed a contrary view and observed that "when you have a case where the religious denomination is managing its own affairs connected with property, it cannot be said that those affairs are in matters of religion".[9]

According to the Bombay High Court, what is safeguarded under cl. (b) is the right of a religious denomination to manage its own domestic affairs provided those affairs only relate to matters of religion; it was held that what was obviously contemplated was that when a religious denomination is dealing with things like dogmas, religious ceremonies and matters concerning its day to day affairs, the State should not interfere.[10]

A religious denomination cannot be said to be managing its own affairs in matters of religion when it excommunicates a member of the denomination and thereby deprives him of his rights and privileges as such member. The reason is that excommunication is a matter of religious *practice* and not of *religion* in the sense of a man's faith and belief.[11]

State legislation regarding administration of funds of religious institutions is not inconsistent with the right of a religious denomination to manage its own affairs in matters of religion.[12] Similarly, a provision requiring an auditor auditing accounts of trust funds to carry out certain specified duties and report cases of irregular, improper and illegal expenditure is no infringement of a right under cl. (b).[13] The provision requiring accounts of trust funds to be maintained regularly and in the prescribed form will not be an infringement of the right of a religious denomination to manage its own affairs in matters of religion.[14] So also, reasonable provisions enabling Government Officers to inspect trust properties cannot be an infringement of the right of a religious denomination to manage its own affairs in matters religious, where there is provision that due regard should be paid to the religious practices and usages of the denomination and also that previous reasonable notice should be given before entering on any trust property for purpose of inspection.[15] Similarly, the imposition of reasonable restrictions on the alienation of trust properties or requiring trust funds to be invested in public securities will not amount to an infringement of the right under cl. (b).[16]

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[7] 1952 Mad 613 (Pr 41) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[8] 1952 Mad 613 (Pr 41) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr. H. R. E. Madras.*

[9] 1953 Bom 242 (245) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[10] 1953 Bom 242 (245, 254) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[11] 1953 Bom 183 (188) [A I R V 40 C 55] (DB), *Syenna Taher Saifuddin* v. *Tyebbhai Moosaji.* (AIR 1948 P C 66, distinguished. To recognise a right of excommunication is one thing. To hold that a law abolishing such right is *ultra vires* is another.)

[12] 1953 Bom 242 (254) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[13] 1953 Bom 242 (255) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

(c) Right to administer property (cl. (d))

Under cl. (d) of the article, the right of a religious denomination or section to administer its property must be "in accordance with law". The expression "in accordance with law" must now be understood, in the light of the decision in *Gopalan* v. *State of Madras*,[17] as meaning statute-law or law enacted by a competent Legislature. The "law" need not, therefore, necessarily be the established law such as the law relating to trust or property but may extend to any statute law that may be enacted by a competent Legislature providing for the regulation or the administration of the properties.[18] But regulation does not mean destruction or annihilation of the right. It is a question of degree whether in a given case the enacted law merely regulates or substantially takes away the right leaving to the denomination a mere vestige of the right. It need not be a total deprivation of the right, and it would be enough if there was a substantial deprivation of the right to administer the property. A law which causes such substantial deprivation will be invalid.[19] Hence, where the head of a mutt belonging to a religious denomination is substantially deprived of his rights of managing the mutt properties under an enactment, the enactment will be void.[20]

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[14] 1953 Bom 242 (254) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[15] 1953 Bom 242 (255) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[16] 1953 Bom 242 (255) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[17] 1950 S C 27 (39, 72, 103, 114, 115) (Prs 18, 109, 196, 228) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

[18] 1952 Mad 613 (Pr 41) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[19] 1952 Mad 613 (Pr 41) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr. H. R. E. Madras.*

[20] 1952 Mad 613 (Prs 42, 78) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Shivalli Brahmin Community is a religious denomination—Provisions of Madras Hindu Religious and Charitable Endowments Act (19 of 1951) unduly interfere with the right to administer the religious and secular affairs of the community and are void. Under the Act the appointment of an agent or manager requires the approval of the Commissioner and if it was decided to frame a scheme or notify a temple the Commissioner or the Government, as the case may be, has the sole and exclusive right to appoint a paid executive officer. The Podu Dikshitars of Chidambaram are a religious denomi-

In considering the above question, it must be remembered that the article is concerned with religious institutions and the question whether there is any beneficial ownership in the properties of the institution by the members of the denomination is irrelevant, as it is solely concerned with the institution which exists for spiritual and not for material benefit.[21]

Clause (d) clearly enables the State to enact laws to regulate the right of a religious denomination or sect to administer its property. Any views that a religious congregation or religious denomination may hold with regard to property cannot constitute those views a part of "religion" as understood by the Constitution.[22] Hence, it is not necessary that the law made by the State should accord with the views of the denomination.[23]

A law regulating the administration of trust properties held by religious denominations may, for instance, provide for the imposition of charges for registration of the trust or for the levy of a contribution.[24] Similarly, a legal provision for the application of trust funds of a denominational institution *cy pres* and for the extension of the *cy pres* doctrine beyond its recognized scope will be covered by cl. (d), which empowers the State to regulate the administration of trust funds of religious institutions.[25] Clause (d) means that the property of a religious denomination must be administered in accordance with the State-made laws, whatever may be the beliefs of any particular denomination or section thereof regarding the manner in which the property should be utilized or maintained.[26]

In order to claim the benefit of the article, it is unnecessary that a religious denomination should be capable of holding all the four rights mentioned in the four clauses of the article. Each clause

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nation and the above Act which affects their rights under this article is void to that extent.)

[*See also* 1953 Mad 149 (151, 152) (Prs 3, 5) [A I R V 40 C 45] (DB), *Devaraja Shenoy* v. *State of Madras.* (Temple owned by Goud Saraswat Community — Madras Hindu Religious and Charitable Endowments Act, (19 of 1951)—Provisions held *ultra vires* in its application to the temple.)]

[21] 1952 Mad 613 (Pr 42) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[22] 1953 Bom 242 (245) (Pr 4) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.* (Argument : Because Jains think that certain religious efficacy or certain religious qualities attach to certain property the State cannot deal with the property — Answer : Although in its wide sense it may be part of Jain religion, it is not part of the religion in the constitutional sense and being concerned with the administration of the property, the State is entitled to legislate about it.)

[23] 1953 Bom 242 (245) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[24] 1953 Bom 242 (254) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[25] 1953 Bom 242 (254) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

[26] 1953 Bom 242 (254) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

recognizes a distinct and separate right. The denomination may exercise all or any of those rights and it is unnecessary that it should own all the rights before it can claim recognition as a religious denomination.[27]

(d) Right to own and acquire property (cl. (c))

Article 26 (c) confers on every religious denomination the right to own and acquire property, but it does no more than this and there is no ground for holding that it prevents or was intended to prevent property belonging to a religious body being acquired by authority of law.[28]

Freedom as to payment of taxes for promotion of any particular religion.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Synopsis

1. Scope of the article.
   - (a) Tax, meaning of.
   - (b) 'Tax' distinguished from 'fee.'
   - (c) "Person."
   - (d) Appropriation of tax for benefit of particular religion or sect.
   - (e) Taxation levied for benefit of particular religion or sect.
   - (f) American Precedents.

1. Scope of the article.—This article makes it unconstitutional for the State to impose any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. There are three essential elements in the article. Firstly, the imposition must be a *tax*. Secondly, it must be a tax imposed on a *person*. And thirdly, it must be a tax, the proceeds of which are specifically appropriated for the promotion or maintenance of any particular religion or religious denomination.

(a) 'Tax,' meaning of

Taking these elements one by one, a 'tax' is the contribution of the wealth of a person or body of persons for the services of the public powers.[1] Cooley in his book on CONSTITUTIONAL LIMITATIONS says :

> " A tax is a contribution imposed by the Government on individuals for the services of the State. It is distinct from a subsidy certain and orderly, which is shown in its derivation from Greek, order or arrangement . . . . The revenues of a State are a portion that each subject gives of his property, in order to secure or to have the agreeable enjoyment of the remainder : Montesquieu : SPIRIT OF THE LAWS. In its most enlarged sense, the word 'taxes' embraces all the regular impositions made by the Government upon the

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[27] 1952 Mad 613 (Pr 43) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[28] 1951 All 674 (Pr 82) [AIR V 38 C 182]: ILR (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.*

Article 27 — Note 1

[1] 1952 Mad 613 (Pr 47) [A I R V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Citing Nicholson's Principles of Political Economy.)

person, property, privileges, occupations and enjoyments of the people for the purpose of raising public revenue.[2]"

Willoughby on the CONSTITUTION OF THE UNITED STATES adopts Cooley's definition when he says :

> "Taxes have been defined by an eminent authority to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. The same author in another work observes that they differ from forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law and by some rule of proportion which is intended to ensure uniformity of contribution and a just apportionment of the burdens of Government."[2a]

From the above definitions it will be clear that a tax has the following characteristics :

(1) it is a compulsory contribution ;
(2) it is a contribution of the wealth of a person or body of persons;
(3) it is a contribution imposed by the State ;
(4) it is a contribution imposed for the services of the public powers ;
(5) it is a contribution imposed by law and not merely by executive authority ;
(6) it is a contribution based upon some rule of proportion intended to ensure uniformity of contribution and a just apportionment of the burdens of the Government.

According to the above tests, the levy of a certain percentage of the income of a religious institution under an enactment would be a 'tax' where the levy is for services rendered by the Government and its officers.[3]

Thus, the levy of five per cent. of the income of a religious institution under S. 76 (1) of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951), would be a tax within the meaning of ART. 27.[4] It is a compulsory and uniform contribution, inasmuch as the section directs that every religious institution shall pay the contribution. The levy of the contribution is also for the services of public powers as the section itself expressly makes it clear.

(b) 'Tax' distinguished from 'fee'

A tax must be distinguished from a 'fee.' When the contribution is a fee and not a tax, it will not come within this article.[5] In determining whether a contribution levied is a tax or a fee, neither the compulsory nature of the levy nor the uniformity of the levy may each, by itself, or even cumulatively, help in deciding the question whether the contribution is a tax or is only a fee.[5a] A quantum of the levy, however, is a relevant factor in deciding whether the contribution is a tax or a fee.

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[2] *See* 1952 Mad 613 (Pr 48) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Quoting from Cooley's Constitutional Limitations.)

[2a] Quoted in 1952 Mad 613 (Pr 48) [A I R V 39] (DB), *Lakshmindra Teertha Swamiar* v. *Commr., H. R. E., Madras.*

[3] 1952 Mad 613 (641) (Pr 52) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Section 76 (1) of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951) imposes a "tax".)

[4] 1953 Mad 149 (151) (Pr 3) [A I R V 40 C 45] (DB), *Devaraja* v. *State of Madras.*

1952 Mad 613 (Pr 50) [A I R V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr. H. R. E. Madras.*

[5] 1953 Bom 242 (249) [A I R V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.* (Contribution levied under Bombay Public Trusts Act (29 of 1950) held to be 'fee' and not 'tax'—A I R 1952 Mad 613, Distinguished.)

Where a contribution up to a maximum of five per cent. on the annual income of a religious institution is leviable under an enactment and the contribution is stated to be in respect of the services rendered by the Government and its officers, the question arises whether the contribution is a tax or a fee for services rendered. In determining this question, it has to be seen whether there is any proportion between the amount levied from any institution and the services rendered to it. Where there is no necessary connection or relation between the services rendered by the Government and its officers and the contribution, and the contribution bears a fixed proportion to the income of the religious institution, the indication is that the levy is not a fee but a tax. The reason is that in such a case, it is the capacity to pay, and not the benefit conferred, that seems to be the guiding principle fixing the quantum of contribution that a religious institution can be called upon to pay under the enactment.[6]

In *Ratilal Panachand* v. *State of Bombay*,[6a] Chagla, C. J., also pointed out that in order to constitute a tax as distinguished from a fee, the levy when collected must form part of the public revenues of the State intended to be spent for general governmental purposes and must not be a *quid pro quo* for services rendered by Government to be utilized in connection with those services. The learned Chief Justice observed as follows :

> "If a section of the public pays a certain levy and if that levy does not form part of the public revenues and if that levy is utilised by Government in connection with the services that the Government is to render to that section in respect of the levy paid by it, then it is not a tax because it does not form part of the public revenues nor is it used for the whole public or for Government purposes.

[*See* 1952 Mad 613 (Pr 52) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Contribution under S. 76 (1) of Madras Hindu Religious and Charitable Endowments Act is 'tax' and not 'fee'.)]

5a. 1953 Bom 242 (249) [AIR V 40 C 78] (DB), *Ratilal Panachand* v. *State of Bombay.*

1950 Orissa 47 (52) (Prs 20, 22) [A I R V 37 C 7] : I L R (1949) 1 Cut 656 (DB), *Gadadhar Ramanuj Das* v. *Province of Orissa.*

6. 1952 Mad 613 (Pr 52) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

6a. 1953 Bom 242 (247) [AIR V 40 C 78] (DB).

[*See also* 1950 Orissa 47 (52) (Prs 20, 22) [AIR V 37 C 7] : ILR (1949) 1 Cut 656 (DB), *Gadadhar Ramanuj Das* v. *Province of Orissa.* (Where the imposition is in respect of the benefit taken by the person, who is required to make the contribution or else where the imposition is for the service rendered by the authorities under an Act and for the purpose of execution of that Act and such contributions are not credited into the general revenues they are not classified as taxes.)]

The very essence of a tax is that it could be used by Government for the whole public for any purpose connected with the administration of the State. But when you have a levy raised for a specific purpose, when you have that levy earmarked for a specific purpose, and when that levy is taken for services rendered, then that levy is not a tax but a fee."

(c) Person

The second essential element for the applicability of the article is that the tax must be levied on a *person*. The question has arisen whether the tax imposed on a religious institution under S. 76 (1) of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951), is a tax imposed on a *person*. Without deciding the question, whether a religious institution is a person, the Madras High Court has held that in view of the provisions of S. 78 of the Act, under which the obligation to discharge the liability under S. 76 fell upon the head of the religious institution, the tax was a tax levied on a *person*.[7]

(d) Appropriation of tax for benefit of particular religion or sect

The third factor which is necessary for the applicability of the article is that the proceeds of the tax must be specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. It is not really necessary that the Act imposing the tax should also provide for the appropriation of the proceeds of the tax before it can be brought within the mischief of this article. In fact, such an appropriation is impossible within the scheme of the Constitution. When the Constitution therefore speaks in this article of specific appropriation, it can only refer to the appropriation contemplated by the Constitution and not any other independent or specific appropriation not permitted or warranted by the Constitution. Under the Constitution the appropriation has to be made by a special Appropriation Act under ART. 204. Hence an enactment which simply provides that in respect of services rendered by Government and their officers, every religious institution shall, from the income derived by it, pay to the Government a certain contribution, is within the mischief of this article. The fact that there is no specific appropriation of the proceeds of the tax for the promotion or maintenance of any particular religion or religious denomination in the Act itself does not take it out of the purview of the article. If, under the Act, the obligation is laid on the Government to meet the expenditure of the services of the Government and its officers referred to in the enactment, it means that the Government is bound under a statutory obligation to provide for the necessary appropriation in the Appropriation Acts to be passed by the Legislature. Hence, the appropriation referred to in this article is not the appropriation made in the particular enactment imposing the tax at all as such appropriation is impossible under the Constitution and has to be made by a separate Appropriation Act. If under the Act imposing the tax the Government is obliged to have an appropriation made in the Appropriation Acts for the purpose of meeting the expenses in connection with any particular religion or religious denomination, the Act will come within the mischief of this article.

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[7] **1952 Mad 613 (Pr 55) [A I R V 39] (DB),** ***Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.***

(e) Taxation levied for benefit of particular religion or sect

Where the tax is levied for the purpose of meeting the expenses of any particular religion, it is void under this article, although the particular religious denomination may be the same as that to which the person or the institution which is taxed may belong. Thus, a tax imposed on Hindu religious institutions will be void even though the appropriation is for the benefit of Hindu religious institutions.[8]

Before a person can impeach a tax as being invalid under this article, it is not necessary that it must have been actually levied from him. Where an Act is passed authorising the collection of the tax and the liability to pay the tax has arisen, the person on whom the burden of tax will fall is entitled to apply to the High Court for appropriate relief by way of declaration and writ of prohibition.[9]

It has already been stated above that "fees" for services are not taxes within the meaning of the article and, therefore, do not become void under it. Thus, the imposition of audit fees leviable under S. 76 (2) of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951), on religious institutions having more than a certain annual income, is not *ultra vires.*[10]

(f) American precedents

Under the 1st Amendment of the American Constitution it is provided as follows: "The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." As to the validity of payments made by the State for certain causes connected with religious institutions, the ground of impeachment of such payments has been that they violate the provision against the establishment of religion by law which is contained in the 1st Amendment above quoted. For instance, in *Bradfield* v. *Roberts*[11] the Congress had made some appropriation of money for the treatment of poor patients in a hospital. The hospital was under the management of a religious society. The appropriation was attacked on the ground that it was a contribution to a religious society and, therefore, contravened the 1st Amendment. This contention was overruled by the Supreme Court of America and it was held that inasmuch as the hospital was a public hospital, incorporated under an Act of the Congress, the mere fact that the management was in the hands of a religious society did not make the contribution for the treatment of patients in the hospital, a contribution to a religious society.

In *Everson* v. *Board of Education,*[12] Mr. Justice Black, delivering the opinion of the Supreme Court of America, observed as follows,

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[8] 1952 Mad 613 (Pr 57) [A I R V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Madras Hindu Religious and Charitable Endowments Act, S. 76 (1)—Tax under.)

[9] 1952 Mad 613 (Pr 58) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[10] 1952 Mad 613 (Pr 56) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[11] (1899) 175 U S 291 (295) : 44 Law Ed 168.

[12] (1946) 330 U S 11 (16) : 91 Law Ed 711.

Article 27
Note 1

with reference to the meaning of the establishment of religion clause in the 1st Amendment of the American Constitution above referred to: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practise religion." This passage puts in a nutshell the principle embodied in this article.

In the above case the question arose about the validity of a law under which the expenses in connection with the transportation of school children by bus to their schools were paid out of public funds. The ground of attack on the law was that the payment under that law was also made in regard to the bus fares of children attending church schools of a particular denomination and hence the law was a violation of the due process clause in the 14th Amendment of the Constitution as well as of the 1st Amendment. It was held that inasmuch as the law was a general law and was not confined to children attending the particular church schools it did not offend the Constitution.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

COGNATE PROVISION

The State—Interpretation of—See ART. 12.

Synopsis

1. Scope of the article.
    - (a) Imparting of religious instruction in schools.
    - (b) Compelling attendance at religious instruction classes.
    - (c) Moral instruction.
    - (d) This article and Art. 29 (2).

(a) Imparting of religious instruction in schools

1. Scope of the article. — Article 25 guarantees the right to propagate religion, to all persons. One form of propagating religion will be by means of religious instruction in schools and colleges. This right is not abrogated by this article. But this right can, in the nature of things, apply only to private educational institutions, that is, educational institutions not maintained out of public funds. In the latter class of educational institutions, necessarily religious instruction will have to be given, if at all, by the State. But where there are a number of faiths in the country, it is practically impossible for the State to give any religious instruction in its schools and colleges without violating the principle of equality enunciated in ARTS. 15 and 16 and also in the provisions of ART. 27. The reason is that instruction in such cases can only be in some one or other of the religions or, at the most, in some of them. This will necessarily mean a denial of equality to the followers of other religions. Moreover, it will also mean that public funds are being utilized for promotion or maintenance of particular religions or religious denominations. Hence, while the right of the followers of particular religions or religious denominations to impart religious instruction in their own schools is recognized and not interfered with, the article prohibits the imparting of religious instruction in educational institutions wholly maintained out of State funds. This prohibition is contained in cl. (1) of this article.

Clauses (2) and (3) do not refer to educational institutions wholly maintained out of State funds. Hence, in their case, the prohibition of religious instruction does not apply. This is expressly provided for in cl. (2), which says that nothing in cl. (1) shall apply to any educational institution which, though administered by the State, has been established under any endowment or trust which requires that religious instruction shall be imparted in such institutions. Clause (3) refers to educational institutions which are neither wholly maintained out of State funds nor administered by the State under private endowments. The clause refers to educational institutions recognized by the State or receiving aid out of State funds. The clause clearly proceeds upon the assumption that in such institutions the imparting of religious instruction is not prohibited.

In educational institutions, which do not come under any of these categories, that is, which are neither maintained out of State funds nor administered by the State out of private endowment, nor are recognized by the State nor receive aid out of State funds, clearly, there is no prohibition against imparting of religious instruction. In other words, in purely private institutions, which are not receiving any aid from State funds and are also not "recognized" by the State, there is no bar to the imparting of religious instruction. This right is clearly guaranteed under ART. 25 and is not affected by anything in this article.

(b) Compelling attendance at religious instruction classes

Another matter, with which this article deals, is the question of compelling students to attend religious instruction in those cases in which there is no bar against the imparting of religious instruction. The article provides that in the institutions to which it applies, there

Article 28
Note 1

shall be no compulsion in the matter of attendance at religious worship or religious instruction in such institutions. As seen above, the question can arise only in the case of educational institutions which are not wholly maintained out of State funds but which are administered by the State under private endowments or are recognized by the State or receive aid out of State funds.

Just as the prohibition against imparting religious instruction does not apply to purely private institutions, neither receiving aid from nor being recognized by the State, so also the prohibition against compulsion of attendance at religious worship or instruction does not apply to such institutions.

(c) Moral instruction

The article only applies to *religious* instruction. It does not apply to *moral* instruction either as regards the imparting thereof or as regards compulsory attendance at the instructions.

(d) This article and Article 29 (2)

In connection with this article, ART. 29 (2) also may be seen. Under that clause no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them. This provision, read with ART. 28, clearly ensures that there should be no difficulty felt by the children of any community joining any educational institution which is maintained out of State funds or is recognized by or receives aid out of State funds. While ART. 29 ensures that no student is denied admission on the ground only of his religion, ART. 28 ensures that no student is compelled to attend any religious instruction against his will or that of his parents.

Cultural and Educational Rights

Protection of interests of minorities.

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

COGNATE PROVISIONS

The State—For interpretation of, see ART. 12.

Power of the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes, see ART. 15 (4).

Synopsis

1. Scope of the article.
    - (a) The language question.
    - (b) Comparison with other Constitutions.
    - (c) Admission into educational institutions (clause 2).
    - (d) Special provision for benefit of backward classes (Art. 15 (4).)
    - (e) Right under clause (2) is individual right.
    - (f) Ground of discrimination, etc.
    - (g) Directive Principles of State Policy.

Article 29
Note 1

(a) The language question

1. Scope of the article.—Under ART. 343, the official language of the Union shall be Hindi in Devanagari script. But for a period of 15 years from the commencement of the Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement. Under ART. 345, the Legislature of a State may, by law, adopt any one or more of the languages in use in the State, or Hindi as the language to be used for official purposes. Until the State Legislature makes such law, the English language is to be continued to be used for official purposes within the State. There are provisions also for the language of the Supreme Court and High Courts, etc. The judgments of the Supreme Court and the High Courts are required to be in English. Similarly, there are provisions as to the language of Bills and Acts. All these provisions are contained in Part XVII, ARTS. 343 to 351.

The object of cl. (1) of this article is that notwithstanding the above-mentioned provisions relating to language and script to be used for purposes of the State, the right of every section of the citizens of India to the conservation of their own language, script or culture, should be protected and guaranteed by the Constitution.

(b) Comparison with other Constitutions

An *exact* parallel for this provision in other Constitutions of the world is not found. But the constitutional right of *parents* to give their children such education as they like is recognized generally in democratic Constitutions. Thus, in *Meyer* v. *Nebraska*,[1] Mr. Justice McReynolds, delivering the opinion of the Supreme Court of America, observed as follows :

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787 declares : 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall for ever be encouraged.' Corresponding to the right of control it is the natural duty of the parent to give his children education suitable to their station in life."

It was held in the above case that forbidding by law the teaching of any other than the English language in schools to children below a certain age was against the 14th Amendment of the American Constitution. At the same time, it was held that there was no objection to making a rule that instruction should be given only in English.

So also in *Pierce* v. *Society of Sisters Holy Names*,[2] it was held that the compulsion of children to attend only *public* schools unconstitutionally interferes with the *liberty* of parents and guardians to direct the upbringing and education of children under their control. Mr. Justice McReynolds, delivering the opinion of the Supreme Court of America, observed as follows in that case :

Article 29 — Note 1

[1] (1922) 262 U S 390 (400) : 67 Law Ed 1042.

[2] (1925) 268 U S 510 (534) : 69 Law Ed 1070.

Article 29
Note 1

"No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing must be taught which is manifestly inimical to the public welfare . . . . . The fundamental theory of liberty upon which all Governments in this Union repose excludes any general power of the State to standardise its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State. Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In the Irish Constitution, ART. 42 specifically recognizes the inalienable right and duty of parents to provide according to their means for the religious, moral, intellectual, physical, and social education of their children. The same section also prohibits the State from compelling parents in violation of their conscience and lawful preference to send their children to schools established by the State or to any particular type of school designated by the State.

The Canadian Constitution (S. 93) guarantees to Canadian citizens the right to have denominational schools.

The recognition of the right of the parents to give their children such education as they think proper is allied to the right which is guaranteed by cl. (1) of this article to every section of the community to conserve its own language, script or culture.

(c) Admission into educational institutions (cl. (2))

The article consists of two clauses; the first clause deals with the right to conserve its own language, script and culture which is guaranteed to every section of the people. Clause (2) deals with the right of citizens to equality in the matter of admission into educational institutions maintained by the State or receiving aid out of State funds. The clause provides that no citizen shall be denied admission into any such educational institution on grounds only of religion, race, caste, language or any of them. The general provision as to non-discrimination on any such ground is contained in ART. 15, and cl. (2) of this article is a specific provision as to non-discrimination with reference to admission into educational institutions maintained or aided out of State funds.

It will be noted that clause (2) does not include *sex* as one of the forbidden grounds of discrimination in the matter of admission into educational institutions. This gives rise to the question whether discrimination on the ground of *sex* in the matter of admission into educational institutions is permissible under the Constitution. As to this, see ART. 15, NOTE 13.

Clause (2) applies both to State-maintained and State-aided educational institutions, while ART. 15 (1) being directed only against the

State, will only apply to State-maintained and not State-aided institutions.[3]

(d) Special provision for benefit of backward classes (Art. 15 (4))

Clause (2) of this article is subject to the exception enacted in cl. (4) of ART. 15. As to the genesis and scope of that clause, see NOTE 21 on ART. 15. As stated in that note, the object of that clause which was introduced by means of an amendment by the Constitution (First Amendment) Act, 1951, is to enable the State to make any special provision that it may consider necessary for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Two features about cl. (4) of ART. 15 are to be noted here. Firstly, any provision that the State may make under that clause and which is covered by that clause, cannot be questioned although it has the effect of discriminating against any citizen purely on the ground of religion, race or other matter specified in ART. 15. Similarly, any such provision cannot be attacked as having the effect of denying admission into a State or State-aided educational institution to a citizen purely on the ground of his religion, race, caste or language.

Secondly, the clause only enables the State to make special provision for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes. Thus, the State can provide for reservation of a certain proportion of available seats for members of such classes. (Compare ART. 16 (4).) The clause does not enable the State to make any special provision for the benefit of any other class of people. For instance, the State cannot make any special provision under the clause for the economically backward unless they are also socially and educationally backward. Similarly, the State has no power under the clause to make special provision for members of particular castes or communities as such except in the case of Scheduled Castes or Scheduled Tribes. Hence, notwithstanding the amendment of ART. 15 by the introduction of the above clause, the State will have no power to allocate jobs under the Government or seats in Government educational institutions in proportions according to various castes and communities in the country.

Thus, the enactment of cl. (4) of ART. 15 does not affect the position laid down by the Supreme Court in *State of Madras* v. *Champakam Dorairajan*[4] that a State Government has no power to fix the number of seats available for admission into Government educational institutions according to the caste or religion of the applicants for admission.

(e) Right under cl. (2) is individual right

The right conferred by cl. (2) of this article is a right conferred on a citizen as an *individual* and not as a member of a class.[5] Hence, where a citizen is denied admission into an educational institution on any of the grounds mentioned in the clause, it is no answer to say that other citizens belonging to the same religion or caste or speaking the same language have been admitted. Thus, for instance, where a Brahmin is denied admission into an educational institution under a Government Order fixing the proportion of seats for each caste, and the academical qualifications of the Brahmin are such that he would have been admitted, had he not been a Brahmin but had belonged to some other caste, the denial to him of admission is clearly on the sole ground that he is a Brahmin. In such a case, the denial of admission cannot be defended under the Constitution on the plea that, inasmuch as other Brahmin candidates have been admitted, there is no exclusion of Brahmins as a class. The reason is that this article is not concerned with the rights of *classes* but of *individual* citizens.

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[3] 1954 Mad 67 (Pr 5) [AIR V 41 C 13], *University of Madras* v. *Shantha Bai*. (Article 15 (1) does not apply to the Madras University which is only a State-aided and not State-maintained institution.)

[4] 1951 S C 226 (Pr 11) [AIR V 38 C 40] : 1951 S C R 525 (S C). (AIR 1951 Mad 120 (FB), Affirmed.)

[5] 1951 S C 226 (Pr 7) [AIR V 38 C 40] : 1951 S C R 525 (SC), *State of Madras* v. *Sm. Champakam Dorairajan*. (AIR 1951 Mad 120 (FB), Affirmed.)

In *Missouri Ex Pel Gaines* v. *Canada*,[6] Hughes, C. J., observed as follows :

> "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the White race, whether or not other Negroes sought the same opportunity."

The same principle was laid down in *McCabe* v. *Atchison*.[7] In that case it was held as follows :

> "It is the individual who is entitled to the equal protection of the laws, and if he is denied by the common carrier, acting in the matter under the authority of a State law, a facility or a convenience in the course of his journey, which, under substantially the same circumstances, is furnished to another traveller, he may properly complain that his constitutional privilege has been invaded."

(t) Ground of discrimination, etc.

As under ART. 15 and ART. 16 so also under cl. (2) of this article, what is prohibited is discrimination on the *sole* ground of religion or other factor mentioned therein. In other words, cl. (2) will only apply where a citizen is denied admission solely on the ground of religion, race, caste or language.[8] The phraseology of cl. (2) "on grounds only. . . . or any of them" is quite similar to that of ART. 15 and ART. 16. The force of the word "only" and the words "any of them" has been discussed in ART. 15, NOTE 10 and NOTE 15, and those notes may be referred to for the purpose of this article also.

The principal of a college can, without communicating the reasons, inform a student studying in the college that he cannot be admitted into the college during the next session, where the principal comes to the conclusion that such an action is necessary in the interests of discipline among the students. Such an action of the principal is not hit by cl. (2) of this article.[9]

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[6] (1938) 305 U S 337 (351) : 83 Law Ed 208 (214).

[7] (1914) 235 U S 151 (161, 162) : 59 Law Ed 169.

[8] 1951 Punj 93 (Pr 17) [A I R V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab*.

(g) Directive Principles of State Policy

Under ART. 46 which enacts one of the Directive Principles of State Policy, the State is enjoined to promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and the Scheduled Tribes. Under ART. 37 it is expressly provided that the Directive Principles of State Policy laid down in Part IV shall not be enforceable by any Court, although they are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. By reason of the express provision of ART. 37, it will not be open to the State under ART. 46 to take any action, which will amount to an infringement of the Fundamental Right guaranteed under cl. (2) of this article. In other words, it will not be open to the State to refuse admission to educational institutions on the grounds mentioned in cl. (2), although such refusal may be the consequence of any special measure taken by the State under ART. 46 unless such measure is justified under some provision on the chapter on Fundamental Rights. In other words, the chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order except to the extent provided in the appropriate article in Part III. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter on Fundamental Rights.[10]

The above principle was laid down by the Supreme Court in *State of Madras* v. *Champakam Durairajan*[10] cited above. After the decision of the Supreme Court was passed, ART. 15 was amended by the Constitution (First Amendment) Act, 1951, by the introduction of cl. (4) into ART. 15. As explained above, this clause was introduced to arm the State with power to take special steps for the advancement of backward classes and Scheduled Castes and Tribes, even though such steps might impinge upon the general Fundamental Right conferred under ART. 15 or cl. (2) of this article. But notwithstanding the enactment of cl. (4) of ART. 15, the principle laid down in the Supreme Court decision cited above continues still to be applicable. No exception can be made by the State to the principle enacted in ART. 15 or cl. (2) of

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[9] 1953 All 90 (91) (Pr 4) [AIR V 40 C 36] (DB), *Ramesh Chandra* v. *Principal, B. B. I. College.*

[10] 1951 S C 226 (Pr 8) [AIR V 38 C 40] : 1951 S C R 525 (SC), *State of Madras* v. *Champakam Dorairajan.* (AIR 1951 Mad 120, Affirmed.)
[But see 1951 Punj 93 (Prs. 18, 19) [A I R V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab.* (If it is incumbent on the State to promote the educational and economic interest of Scheduled Castes then it can well do that by reserving certain seats in educational institutions for these castes. If Art. 37 makes Art. 46 a fundamental principle of the governance of this country, then a correct way of interpreting would be to read Art. 46 as an exception to Art. 29 (2), and it could not have been the intention of the Constituent Assembly to make Art. 29 (2) as an article overriding Art. 46. AIR 1951 Mad 120, Dissent. Note—On this point the decision must be treated as overruled by AIR 1951 S C 226.)]

Article 29
Note 1

this article merely relying on the provisions of ART. 46. Whatever exception the State may desire to make will have to come strictly within the terms of ART. 15 (4), in order to be valid. If it is not covered by ART. 15 (4), it cannot be validated by recourse to ART. 46.

Right of minorities to establish and administer educational institutions.

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

COGNATE PROVISION

The State—Interpretation of—See ART. 12.

Synopsis

1. Scope of the article.
    (a) Analogous provisions in other Constitutions.

1. Scope of the article. — This article protects the rights of minorities in the matter of having their own educational institutions. Under ART. 45, the State is enjoined to endeavour to provide for free and compulsory education for all children until they complete the age of 14 years. This obligation of the State under ART. 45 will not, however, entitle the State to force children to attend only State schools and not private schools. The principle of this has been explained in the notes on ART. 29. Subject to certain broad reservations of power in the hands of the State to reasonably regulate all schools, the fundamental theory of liberty excludes any general power of the State to standardise its children by forcing them to accept instructions from public teachers only.[1]

This article is based on this principle and it guarantees to every religious and linguistic minority the right to establish and administer educational institutions of its own choice. Not only is the right to establish and manage such institutions guaranteed but it is further provided that no discrimination shall be made by the State in granting aid to educational institutions on the ground that any institution is managed by a linguistic or religious minority. Thus, equality is assured even in regard to State aid for educational institutions run by minorities.

The right conferred by this article is allied to the right under ART. 29 under which all sections of the citizens of India have been guaranteed protection for conserving their own language, script or

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Article 30 — Note 1

[1] (1925) 268 U S 510 (535) : 69 Law Ed 1070, *Pierce* v. *Society of Sisters of Holy Names*.

culture. It is obvious that one important method of conservation of language, script or culture is through educational institutions. Thus, this article may be said to carry forward the policy laid down in ART. 29.

Similarly, under ART. 28 is recognized the right of every religious denomination to have schools of its own and to impart religious instruction in such schools, provided there is no compulsion against any one to attend such religious instruction. The provision in ART. 28 in this matter is in a negative form and is to the effect that no one should be compelled against his will to attend religious instruction in State recognized or State-aided institutions. Although this necessarily implies the constitutionality of the imparting of religious instruction in such institutions, the right of religious minorities to have schools of their own choice is expressly conferred under this article, which also provides for equality of treatment in the matter of granting State aid.

Under ART. 26, every religious denomination or section thereof is given the right to establish and manage its own institutions for religious and charitable purposes. Under this article religious and linguistic minorities are given a right to establish and manage their own educational institutions.

In order that this article may apply, two conditions are necessary. First of all, there must be a religious or linguistic minority.[2] A minority based on any other principle of classification will not come under this article. For instance, minority based on caste distinctions will not come under this article. Further, the persons, who are alleged to be such a minority, must be a minority in the particular region in which the institution is situated.[3]

Secondly, the educational institution must have been *established* by such a minority. Merely because the majority of the students of an institution happen to be members of a minority community will not entitle the minority to administer the institution unless the institution has been founded by the minority.[4]

Not only religious or linguistic minorities can have their own educational institutions, but they can also claim State aid for such institutions like all other educational institutions.

(a) Analogous provisions in other Constitutions

As already seen in notes on ART. 29, it is a general principle recognized in democratic constitutions of the world that the State should allow all reasonable freedom to families and groups within the State to educate and bring up their children according to their own ideas without too much interference by the State. We have cited certain American decisions also under ART. 29 to illustrate the working of this principle under the American Constitution. Under the Swiss

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[2] 1951 Assam 163 (Pr 8) [A I R V 38 C 75] : I L R (1951) 3 Assam 348 (DB), *Ramani Kanta v. Gauhati University.*

[3] *See* 1951 Assam 163 (Pr 8) [AIR V 38 C 75] : I L R (1951) 3 Assam 348 (DB), *Ramani Kanta v. Gauhati University.* (Bengalies in Assam.)

[4] 1951 Assam 163 (Pr 8) [A I R V 38 C 75] : I L R (1951) 3 Assam 348 (DB), *Ramani Kanta v. Gauhati University.*

Article 30
Note 1

Constitution, Art. 49, para. (3), persons exercising the authority of parent or guardian, are entitled to determine the religious education of children up to the age of 16 years. Similarly, the Irish Constitution (1937), Art. 42, runs as follows :

> "(1) The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
>
> (2) Parents shall be free to provide this education in their homes or in private schools or in schools recognized or established by the State.
>
> (3) (i) The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State or to any particular type of school designated by the State.
>
> * * * * *"

The Canadian Constitution contains the following provisions :

> "*S. 93* — In and for each province, the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :
>
> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.
>
> (2) All the powers, privileges and duties at the union by law conferred and imposed in upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.
>
> * * * * *"

The above provisions are samples of the provisions of democratic Constitutions in regard to freedom of minorities in the matter of educating children. Thus, this article is based upon well recognized principles which have been respected in all democratic constitutions of the world.

Right to Property

Compulsory acquisition of property.

31. (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under

any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with res-

pect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

COGNATE PROVISIONS

The State — Interpretation of — See ART. 12.
Existing law — Interpretation of — See ART. 366 (10).
Public notification — Interpretation of — See ART. 366 (19).
Commencement of this Constitution — Meaning of—The Constitution came into force on 26-1-1950 — See ART. 394.

Saving of laws providing for acquisition of estates, etc.

[a][**31A.** (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article,—

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall

also include any *jagir*, *inam* or *muafi* or other similar grant;

(*b*) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.]

a. Inserted and is to be deemed always to have been inserted by the Constitution (First Amendment) Act, 1951, S. 4.

Objects and Reasons

"Another article in regard to which unanticipated difficulties have arisen is ART. 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of ART. 31, formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up." The Constitution (First Amendment) Act, 1951, purports "to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular." — See Statement of Objects and Reasons, Gazette of India, 1951, Part II — S. 2, page 357.

COGNATE PROVISIONS

The State — Interpretation of — See ART. 12.
Existing law — Interpretation of — See Art. 366 (10).

Validation of certain Acts and Regulations.

[a][**31B.** Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any Court or tribunal to the contrary each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.]

a. Inserted by the Constitution (First Amendment) Act, 1951, S. 4 [18-6-1951.]

Synopsis

(Art. 31)

1. **Analogous law.**
    - **(a) Government of India Act, 1935, S. 299.**
    - **(b) Australia.**
    - **(c) American Constitution.**
2. **Cognate provisions.**
3. **Amendments.**
4. **Scope of the article.**
    - **(a) Scheme of article.**
    - **(b) This article and Art. 19 — Correlation.**

- (c) Deprivation of property and placing restrictions on right of property—Distinction.
- (d) Retrospective effect.
- (e) Waiver of right.

5. Clause (1)—Scope.
    - (a) Introductory.
    - (b) "Law"—Meaning of.
    - (c) Protection only against State action.
    - (d) Who can enforce right.
    - (e) "Deprived," meaning of.
    - (f) "Deprived" and "acquired" —Distinction.
    - (g) Clauses (1) and (2)—Correlation of.
    - (h) Forms of "deprivation."
    - (i) "Deprivation" of portion of rights.
6. "Deprived of his property"—Meaning of. See Notes 4, 5, 11, 12 and 25.
7. Regulation and taking of property—Distinction. See Notes 4, 5, 11, 12 and 25.
8. "Person."
9. "Eminent Domain"—General.
    - (a) Eminent Domain—Meaning.
    - (b) Power of Eminent Domain not conferred by constitutional provisions.
    - (c) Conditions to which power of Eminent Domain is subject.
    - (d) Conditions whether inherent in the conception of power of Eminent Domain.
    - (e) Bearing of above question on cl. (2).
    - (f) Compulsory acquisition of property — Essential conditions.
    - (g) Eminent Domain not subject to contract. See Note 25.
10. Clause (2)—Scope of.
    - (a) Introductory.
    - (b) Comparison with S. 299 (2) of Government of India Act, 1935.
    - (c) Requisitioning of property.
    - (d) Conditions for acquiring or taking possession of property.
    - (e) Public purpose — Existence of.
    - (f) "Public purpose" and "compensation" — Whether implied from entries in legislative lists.
    - (g) Above conditions, whether implied from 'spirit of Constitution.'
    - (h) "Law" authorising acquisition or taking possession of property.
11. "Acquire."
    - (a) Transfer of title.
    - (b) Power to 'acquire,' if includes power to 'requisition.'
    - (c) "Deprivation" and "acquisition"—Distinction.
    - (d) Substantial interference with property.
    - (e) 'Acquisition' and 'taking' of property—Distinction.
    - (f) "Deprivation" and "taking," distinction—American decisions, applicability of.
12. "Taken possession of."
    - (a) "Taking possession" not synonymous with "requisitioning."
    - (b) Government assuming management of property on behalf of owner—Effect.
    - (c) Taking possession and placing restrictions — Distinction.
13. Requisitioning of property. See Note 12.
14. Taking over of management of properties.
15. Taking over of business concerns. See Note 14.
16. Regulating the relations between landlord and tenant.
17. Accommodation control.
18. Rent reduction and rent control. See Note 16.
19. "Public purposes."
    - (a) "Public purpose"—Meaning: American law compared.
    - (b) Meaning of "public purpose" under the Constitution.
    - (c) Changing conception of public needs.
    - (d) Directive Principles of State Policy.
    - (e) Party programme.
    - (f) "Public policy."
    - (g) Elements of "public purpose."
    - (h) Benefit to section of public.
    - (i) Purposes of Union or State.
    - (j) Raising funds for Treasury.
    - (k) Choses in action.
    - (l) Abolition of estates.

- (m) Other instances.
- (n) Construction of Act to see if it is for public purpose.
- (o) Exercise of power to condemn.
- (p) Question of "public purpose," whether justiciable.
- (q) Provision excluding jurisdiction of Court—Validity.

20. "Compensation."
    - (a) Effect of cl. (2).
    - (b) Compensation and damages—Distinction.
    - (c) English law.
    - (d) War conditions, no exception.
    - (e) Legislative jurisdiction.
    - (f) American law compared.
    - (g) Compensation need not be paid in advance.
    - (h) Who is entitled to compensation.
    - (i) Compensation must be just and fair — Justiciability of question.
    - (j) Market-value.
    - (k) Possibility of increase of value of land acquired for development.
    - (l) Burden of proof.
    - (m) Matters to be considered and excluded from consideration in determining compensation.
    - (n) Deductions.
    - (o) Compensation need not be in cash.
21. Exception to clause (2).
22. Competency of Legislatures to enact laws about compulsory acquisitions of property.
23. Entries in legislative lists as to compulsory acquisition — Conditions implicit.
24. Compulsory acquisition of property — Condition as to public purpose and compensation—If may be implied from the spirit of the Constitution. See Note 10.
25. "Property."
    - (a) "Property"—Meaning of.
    - (b) Different meanings.
    - (c) "Proprietary rights in rem."
    - (d) Totality of rights.
    - (e) Portion of rights taken away—Effect.
    - (f) Movable property.
    - (g) Money.
    - (h) Choses in action.
    - (i) Water supply system.
    - (ii) Space above ground.
    - (j) Decree.
    - (k) Grants from State.
    - (l) Eminent Domain not subject to contract.
    - (m) Trust property.
26. "Interest in, or in any company owning, any commercial or industrial undertaking."
    - (a) Commercial or industrial undertaking whether "property."
    - (b) "Undertaking"—Meaning of.
    - (c) Undertaking owned by company.
27. Property of Rulers of merged States.
28. "Clause (3)."
29. "Clause (4)"—Scope of.
    - (a) General.
    - (b) "Provisions of cl. (2)" — If can be spelt out otherwise.
    - (c) "Notwithstanding.....Constitution."
    - (d) Objection in substance under cl. (2) barred.
    - (e) Entries in legislative lists — Objections based on.
    - (f) Expressum facit cessare tacitum.
    - (g) Objection as to compensation.
    - (h) Objection on other grounds.
    - (i) Strict construction.
    - (j) Article 31A compared.
    - (k) Pending — Meaning of.
    - (l) "Legislature" — Meaning of.
    - (m) "Law so assented to."
    - (n) President's assent — Questioning of.
    - (o) Clause (3) and cl. (4) — Correlation.
30. "Provisions of cl. (2)" — Meaning of. See Notes 10 and 29.
31. Clause (5)—Scope of.
    - (a) Introductory.
    - (b) "Existing law" (Sub-clause (a).)
    - (c) Orders passed under existing law.
    - (d) Law passed within eighteen months before Constitution (cl. 6.)
    - (e) Temporary pre-Constitution Acts.
    - (f) Notification under existing law

- (g) Effect of cls. (5) (a) and (6) read together.
- (h) Sub-cl. (b) of cl. (5).

32. Taxation.
33. Evacuee property.
34. Clause (6) — Scope of.

Arts. 31A and 31B.

35. Article 31A—Scope.
    - (a) Introductory.
    - (b) Article 31 (4) compared.
    - (c) "Rights conferred by this Part."
    - (d) Proviso to cl. (1) — President's assent.
    - (e) Provisions of Part III not inapplicable to laws relating to acquisition of estates.
    - (f) "Estate"—Meaning of.
    - (g) Acquisition.
    - (h) "Extinguishment or modification of any such right."
36. "Estate"—Meaning of.
37. Scope of Art. 31B.
38. Some *Zamindari* Abolition Laws and their validity.

(a) Government of India Act, 1935, Section 299

1. **Analogous law.** — Section 299 of the Government of India Act was as follows :

> "299. *Compulsory acquisition of land, etc.*—(1) No person shall be deprived of his property in British India save by authority of law.
>
> (2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.
>
> (3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.
>
> (4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.
>
> (5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking."

It will be seen that sub-section (1) of S. 299 corresponds to cl. (1) of this article and sub-section (2) corresponds to cl. (2) of this article.

Just as under cl. (5) of this article existing laws are saved, so also under sub-s. (4) of S. 299 the provisions of any law in force on the date of the passing of the Government of India Act, 1935, are saved.

While this article applies to both movable and immovable property, S. 299, sub-s. (2), applied only to immovable property. Similarly, S. 299 (2) only applied to *acquisition* of property and not to requisitioning thereof,[1] while Art. 31 (2) applies to both. (See NOTE 12.)

Articles 31, 31A, 31B — Note 1

[1] *See* 1953 Assam 84 (Pr 10) [AIR V 40 C 35] (DB), *Mahindra Mohan* v. *State of Assam.* (Word 'acquisition' in Government of India Act, 1935, Sch. 7, List 2, Item 9 includes 'requisition'.)

Under sub-s. (3) of S. 299, special provision was made with regard to general legislation the effect of which would be to transfer to public ownership some particular class of property or to extinguish or modify the rights of individuals in it. In such cases certain special precautions were laid down in the form of the previous sanction of the Governor-General or the Governor. The object of this special provision was the protection of the interests of persons who had special rights and privileges in regard to land revenue, such as Jahgirdars, Inamdars, Talukdars, and also Zamindars with whom permanent settlement of revenue had been effected. This protection in the legislative sphere for this class of persons had its counterpart in the sphere of administration under S. 300 of the Act. Under that section special protection was given to the rights, privileges and pensions of persons to whom grants of land or tenure of land or land free of land revenue had been made or confirmed by the British Government. The Joint Parliamentary Committee reported that the rights of these persons were a form of vested interests which required specific protection.

It will be seen that the present Constitution contains no special protection for such vested interests. In fact, on the other hand, Art. 31A even denies to the owners of "estates" the normal protection given by Art. 31 (2) to persons whose properties are compulsorily acquired. The solicitude shown for the rights and privileges of the landed aristocracy by the British Government and reflected in the above provisions of the Government of India Act, 1935, has no place under the present Constitution of India.

(b) Australia

Section 51 of the Commonwealth of Australia Constitution Act enumerates the different subjects on which the Parliament of Australia has power to make laws. Clause (xxxi) of S. 51 is as follows :

> "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."[2]

Thus, the acquisition of property *on just terms* has been made a head or category of legislative power of the Commonwealth Parliament. This shows that under the Australian Constitution the *legislative power itself* in regard to the acquisition of property is circumscribed by the necessity for providing just terms. But under the Indian Constitution, the relevant entries in the Legislative Lists, namely, Entry 33 List 1 and Entry 36 List 2 of Sch. VII, simply provide for legislative power to make laws for the acquisition and requisitioning of property and do not themselves import any condition as to the existence of a public

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1953 Pat 65 (72) (Prs 11, 25) [A I R V 40 C 21] (DB), *Shri Durgaji* v. *State of Bihar*. (Bihar Private Forests Act (9 of 1948)—The provisions of the Act do not amount to acquisition of property and in no way contravene S. 299, Government of India Act and it is not *ultra vires* on that ground.)

[2] (1947) A L R 530: 21 A L J 326, *McClintock* v. *Commonwealth*. (Laws relating to acquisition of property—The constitutional power to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws is not confined to laws for the acquisition of property by the Commonwealth alone.)

purpose or the payment of compensation. These conditions under the Indian Constitution are the subject of specific enactment in the body of the Constitution in ART. 31 (2).[3]

(c) American Constitution

The 5th Amendment to the Constitution of America provides *inter alia* that no person shall be deprived of life, liberty or property without due process of law; "nor shall private property be taken for public use without just compensation."

The 14th Amendment provides *inter alia* that no State shall deprive any person of life, liberty or property without due process of law. It will be seen that the 5th Amendment is general and the 14th Amendment applies to the power of the *States*. In addition to the above provision, the Constitutions of several States also contain provisions similar to the above provision.

The due process clause in the 14th Amendment is the provision which, so far as the *States* are concerned, provides the constitutional protection as regards the power of Eminent Domain, although, unlike the 5th Amendment, it does not specifically refer to this power.[4]

2. **Cognate provisions.**—Article 19 (1) (f) guarantees to every citizen the right to acquire, hold and dispose of property.

Entry 33 LIST 1, SCH VII confers on the Parliament the power to legislate regarding acquisition or requisitioning of property for the purposes of the Union. LIST 2 Entry 36 dealing with the legislative power of the State Legislatures reads as follows : "Acquisition or requisitioning of property except for the purposes of the Union, subject to the provisions of Entry 42 of LIST 3." LIST 3 Entry 42 reads as follows : "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given."

See also the notes given immediately after the text of the article above.

See also the Land Acquisition Act, 1894.

3. **Amendments.**—Articles 31A and 31B have been inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The object of these amendments was to secure the constitutional validity of the Zamindari Abolition Laws in general and certain specified State Acts enumerated in the 9th Schedule to the Constitution in particular. See the Statement of Objects and Reasons extracted above in the notes immediately after the text of ART. 31A. The operation of these articles was made retrospective by providing in S. 4 of the Amendment Act that ART. 31A "shall be deemed always to have been inserted" and in ART. 31B that none of the specified statutes shall be deemed ever to have become void. The validity of the Amendment Act was upheld

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[3] 1952 S C 252 (Pr 91) [AIR V 39]: 1952 S C R 889, 1020 and 1056 ; ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshmar Singh*.

[4] *See* Constitutional Law of the United States by Professor Willis(1936),pp.814,815.

by the Supreme Court in *Shankari Prasad* v. *Union of India.*[1] In the above case in addition to the challenge to the whole Constitution (First Amendment) Act, the validity of ARTS. 31A and 31B was questioned on certain special grounds. These grounds were also rejected by the Supreme Court.[2]

(a) Scheme of article

4. Scope of the article.—This article recognises as a matter of a Fundamental Right the sanctity of private property.[1] Under ART. 19 (1) (f) every citizen is assured the right to acquire, hold and dispose of property. Under cl. (1) of this article every person is guaranteed the right not to be deprived of his property save by authority of law. Thus, no one can be deprived of his property merely by orders of *the Executive.* Unless the Executive acts under the authority of law, the Executive cannot deprive any one of his property. Under cl. (2), it is provided that no private property should be acquired by the State or requisitioned by the State except for a public purpose and on payment of compensation. Clauses (3) to (6) and ARTS. 31A and 31B are concerned with the exceptions to the general provisions of cl. (2).

As to the scope of cl. (1) as compared with cl. (2), see NOTE 5.[2]

Articles 31, 31A, 31B — Note 3

1. 1951 S C 458 (Pr 1) [AIR V 38 C 60] : 1952 S C R 89 : ILR 30 Pat 1176 (SC).
2. 1951 S C 458 (Prs 14, 15) [AIR V 38 C 60] : 1952 S C R 89 : ILR 30 Pat 1176 (SC), *Shankari Prasad* v. *Union of India.* (Articles 31A and 31B inserted in the Constitution do not either in terms or in effect seek to make any change in Art. 226 or in Arts. 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Art. 13 read with other relevant articles in Part III, while Art. 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Art. 13. Hence those articles do not require ratification under proviso to Art. 368. The new articles being essentially amendments of the Constitution, Parliament alone had the power of enacting them. That the laws thus saved relate to matters covered by List II does not in any way affect the position.)

Articles 31, 31A, 31B — Note 4

1. 1953 Raj 78 (83) [AIR V 40 C 26] : I L R (1951) 1 Ra j144 (DB), *Surajmal* v. *Rajasthan State.* (Different ways in which the right of property can be affected and the articles in the Constitution bearing on them analysed.)
2. **Important Note.**—After the Commentary was sent to the Press it has been reported in the newspapers (*vide* 'The Hindu' of Madras dated 18th and 19th December, 1953) that the Supreme Court has in two decisions dissented from Das, J.'s view and held that both cls. (1) and (2) of this article relate to the *same* subject and that in no case can a person be deprived of his property except for a public purpose and on condition of payment of compensation. The judgments have not been reported yet in any law journal, nor have copies of judgments been received. Hence, it is impossible to make a correct appraisal of the above decisions at this stage. But it may be stated that the commentary, which has been written on the hypothesis that clauses (1) and (2) are *distinct* provisions, will require revision in the light of the above Supreme Court decisions.

(b) This article and Article 19—Correlation

It is necessary here to note the scope of this article as compared with ART. 19. As seen in the notes on ART. 19 and ART. 21, in the case of personal liberty, where there is total deprivation of personal liberty the article applicable is ART. 21 and not ART. 19. Similarly, where there is a total deprivation of property, or the acquisition or requisitioning of property the article applicable is ART. 31 and not ART. 19. Therefore, in such a case, the reasonableness of the provisions of the law is not open for consideration by the Court under cl. (5) of ART. 19.[3]

Article 19 may be regarded as corresponding to the Police Power of the State, while cl. (2) of this article corresponds to the power of what is known as "Eminent Domain" under the American Law.[4] Regarding the distinction between the two powers, Professor Willis in his book on CONSTITUTIONAL LAW observes as follows at page 225 :

> "Eminent domain differs from the police power in that the police power is not a taking of any rights, whether of property or a person, from people but the limitation on the exercise of such rights by people although the police power may also result in making people lose their property."

Thus, essentially, ART. 19 is concerned with placing restrictions or restraints on the right of a person with regard to his property, while this article is concerned with his being totally deprived of such property or such property being acquired or requisitioned from him for public use. Thus, the limitations on State power imposed by ART. 19 only apply so long as a person is *not* deprived of his property or of the possession of his property by the State. When he is so deprived, the constitutional validity of the proceeding must be judged in the light of the provisions of this article and not of ART. 19.[5]

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[3] 1953 Mad 252 (256) [AIR V 40 C 95], *Nataraja* v. *Madras State.* (Requisitioning of property under Madras Buildings (Lease and Rent Control) Act (25 of 1949)—Art. 31 and not Art. 19 (1) (f) applies.)

1952 Mad 613 (633) (Pr 31) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

1951 Bom 86 (Pr 5) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. and W. Co.*

1951 Cal 97 (Pr 16) [AIR V 38 C 28], *Md. Safi* v. *State of West Bengal.*

[4] *See* 1953 Raj 78 (81) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (The Indian Constitution being elaborate and written, while construing Art. 31 (1) and (2) it is best to confine to the plain meaning of words used in it without importing unnecessarily expressions like "Police Power" and "Eminent Domain".)

[5] 1951 S C 41 (Pr 74) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

1951 All 674(681) (Pr 28) [AIR V 38 C 182]:ILR (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Government.*

1953 Cal 548 (553) (Pr 28) [AIR V 40 C 205], *Atulya Kumar* v. *Director of Procurement and Supply.* (A legislative enactment empowering Government to acquire property of a citizen compulsorily for a public purpose attracts Art. 31 and not Art. 19. Where it is a composite piece of legislation the Court has to distinguish that part of it which deals with acquisition from the rest.)

1953 Mad 257 (Pr 6) [AIR V 40 C 96], *Fathima Bi* v. *State of Madras.* (Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), S. 3 (8)—Section does not infringe Art. 19 (1) (f) of Constitution—

Subject-matter of requisition directly comes under Art. 31 which excludes general Art. 19.)

1953 Raj 173 (176)(Pr 15) [AIR V 40 C 61] (DB), *Lal Singh* v. *State of Rajasthan.* (Marwar Land Revenue Act (40 of 1949), S. 231 — State taking possession of surface of land for the purpose of working mines—Case falls under Art. 31 and not Art. 19 (5).)

1952 Assam 159 (165, 166) (Pr 11) [A I R V 39] : I L R (1952) 4 Assam 275 (DB), *Union of India* v. *Mohim Chandra.* (Indian Independence Pakistan Courts (Pending Proceedings) Act (1952), S. 3—Act does not contravene Arts. 31, 19, 300 of the Constitution and is *intra vires.* Article 19 (1) (f) can have no application where the State has the right to deprive a person of his property under any law validly enacted under Art. 31. The right to acquire, hold and dispose of property is subject to the qualification that a person may be deprived of his property by authority of law. The right to enforce the decree by execution which was allowed to the decree-holder by Art. 4, cl. (3) of the Indian Independence (Legal Proceedings) Order, 1947, has been taken away by the Act in question and if the right is property it would be taken away by authority of law, but not otherwise, as provided by Cl. (1) of Art. 31.)

1952 Cal 912 (914) (Pr 8) [AIR V 39], *Tulsidas* v. *State of West Bengal.* (It is not open to the Court to go into the question of reasonableness of the provisions of the West Bengal Land Development and Planning Act and declare the Act or any of its provisions *ultra vires* on the ground that the requirements of Art. 19 (5) have not been satisfied.)

1952 Cal 870 (874) (Pr 17) [AIR V 39], *Naba Kumar* v. *West Bengal State.*

1952 Cal 789(797) [AIR V 39]·1952 Cri L Jour 1651, *Shew Pujan Indrasan Ltd.* v. *Collector of Customs.* (Confiscation under Sea Customs Act—Compensation need not be paid—No question of reasonableness of provision arises.)

1952 Cal 679 (682) (Pr 5) [A I R V 39], *Aswini Kumar* v. *State of West Bengal.* (West Bengal Land Development and Planning Act (21 of 1948) — Validity.)

1952 Cal 65 (Pr 19) [AIR V 39 C 21] (DB), *Sudhindra Nath* v. *Sailendra Nath.*

1952 Mad 756 (757) (Pr 4) [AIR V 39] : ILR (1952) Mad 982 (DB), *Padayachi* v. *State of Madras.* (Article 19 (1) (f) must be read subject to Art. 31 (2) and where there is a valid acquisition under that article there is no property in respect of which the rights conferred under Art. 19 (1) (f) could be claimed: AIR 1950 S C 27 (SC); AIR 1951 S C 41 (SC) ; AIR 1951 All 674 (FB) and AIR 1951 Bom 86, Rel. on.)

1952 Mad 613(633, 634) [AIR V 39], *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Madras Hindu Religious and Charitable Endowments Act of 1951—Validity—*Held* a case coming under Art. 19 and not of deprivation of property—Analogy of AIR 1950 S C 27, Applied.)

1952 Punj 9 (Pr 116) [AIR V 39 C 2] : ILR (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*

1952 Madh B 181 (185) (Pr 8) [AIR V 39] (DB), *Shanta Devi* v. *Custodian, E. P.* (Case relating to S. 40, Evacuee Property Act, 1950.)

1952 Raj 74 (Pr 7) [AIR V 39] : ILR (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr., Civil Supplies.*

1951 Bom 440 (Pr 11) [AIR V 38 C 100]:ILR (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.* (AIR 1951 Bom 86, Rel. on.)

1951 Bom 86 (Pr 5) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.*

1951 Cal 111 (Pr 43) [A I R V 38 C 30B] (DB), *W. B. S. K. Co-operative Society* v. *Bella.*

1951 Cal 97 (Pr 16) [AIR V 38 C 28], *Md. Safi* v. *State of West Bengal.*

1951 Mad 979 (Pr 16) [AIR V 38 C 339](DB), *Narasaraopeta Electric Corporation* v. *State of Madras.* (The right to acquire, hold and dispose of property is subject to the right to take away property under Art. 31.)

In connection with the above discussion, the following observation of Shaw, C. J., in *Commonwealth* v. *Alger*,[6] may be quoted :

> "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law as the Legislature under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of Eminent Domain,—the right of a Government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the Police Power ; the power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same."

In *Lakshmindra Theertha Swamiar* v. *Commissioner Hindu Religious Endowments, Madras*,[7] the Madras High Court, pointing out the distinction between Art. 19 (1) (f) and Art. 31 (1), observed that "the distinction between the two articles is the difference between plucking the feathers of a bird one by one and killing it."

In *Kameshwar Singh* v. *Province of Bihar*,[8] Shearer, J., also pointed out the above distinction between Art. 19 and this article and observed as follows :

> "The Constitution, which the Indian people gave to themselves on 26th January 1950, recognises the sanctity or inviolability of property. Article 19 (1) (f) states : 'All citizens shall have the right to acquire, hold and dispose of property.' Under the growing complexities of modern life, the right of an individual to acquire, hold and dispose of property must necessarily be subject to numerous restrictions, ranging, at one end of the scale, from an absolute incapacity in certain individuals to hold certain property, for example, land in certain area in Chota Nagpur, and, at the other, to a provision requiring a resident in a municipal area to obtain the previous sanction of the municipality before making some quite trifling alteration in his premises. Again the right of an individual to retain his property is always subject to the overriding condition that the State may deprive him of it permanently or temporarily in the interests of the community as a whole. The Constituent Assembly recognised the existence of each of these two limitations and embodied the former in Art. 19 (5) and the latter in Art. 31. These two

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[6] (1851) 7 Cust 53 : 61 Mass 53. (Quoted in *Jupiter General Insurance Co.* v. *Rajagopalan*, AIR 1952 Punj 9 (Pr 112).)

[7] 1952 Mad 613 (634) [AIR V 39] (DB).

[8] 1950 Pat 392 (397, 398) (Pr 5) [AIR V 37 C 108] : ILR 29 Pat 790 (SB).

articles, it is clear, deal with matters which are quite separate and distinct."

Thus, this article is not an *exception* to ART. 19 (1) (f).[9] In cases covered by this article, ART. 19 will have no application and hence when property is compulsorily acquired or taken possession of under cl. (2) of the article, the question of just and fair compensation does not fall to be decided under the provisions of ART. 19 (5), but is entirely to be considered with reference to this article.[10] But where property is not totally taken away from a person but only certain restrictions are placed on his rights in regard to it, the case falls under ART. 19 and not this article.[11]

(c) Deprivation of property and placing restriction on right of property — Distinction

From the above it is clear that the Constitution makes a fundamental distinction between placing restrictions on the right of the person with regard to his property and totally depriving him of such property or taking possession of it. Whether the restrictions imposed are such as to amount to a total deprivation of property is often a question of nicety and definite principles do not seem to have been established by the decisions yet.

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[9] 1950 Pat 392 (Pr 39) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

[10] 1951 Cal 111 (Pr 43) [AIR V 38 C 30 B] (DB), *W. B. S. K. Co-operative Society* v. *Bella.*

[11] 1952 S C 339 (342) (Pr 18) [AIR V 39] : 1952 S C R 744 : I L R (1953) Mys 142 (SC), *D. K. Nabhirajiah* v. *State of Mysore.* (Defence of India Rules (1939), Rule 81 (2) (bb)—Regulation of letting and sub-letting is rather the exercise of a Police Power of regulation in public interest than anything done in the exercise of a power of Eminent Domain, in which case alone questions relating to compensation and public purpose will arise.)

1951 All 746 (Pr 89) [AIR V 38 C 194] : I L R (1952) 2 All 838 (FB), *Asiatic Engineering Co.* v. *Achhru Ram.* (Administration of Evacuee Property Act (1950) — Provisions are of a drastic nature, but justifiable under Art. 19 (5)—Art. 31 not applicable.)

1953 Him Pra 95 (99) (Pr 18) [AIR V 40 C 44], *Shiv Dutt* v. *State of Him Pra.* (Owner's name recorded as owner in revenue papers by Government officials—But Government in occupation for a long time without payment of rent — No acquisition according to law—Right under Art. 19 (1) (f) is infringed.)

1953 Hyd 157 (Pr 10) [AIR V 40 C 68] : I L R (1953) Hyd 147 (DB), *Md. Habibuddin* v. *Govt. of Hyderabad.* (Administration of Evacuee Property Act (1950), S. 40—The necessity of confirmation of a sale contained in S. 40 being reasonable, constitutional and in exercise of the Police Power, the absence of any provision relating to compensation which is a limitation on the exercise of the power of Eminent Domain does not make S. 40 contrary to Art. 31 of the Constitution: A. I. R. 1952 S C 339, Rel. on.)

1953 Madh B 236 (239) (Pr 10) [A I R V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of Madhya Bharat.*

1953 Nag 40 (Prs 39, 41) [AIR V 40 C 22] : I L R (1952) Nag 736 (DB), *Bhaskar* v. *Mohammad Alimulla Khan.* (Restrictions placed on landlord's rights in sub-ss. (1) and (3) of S. 73-A of Berar Land Revenue Code.)

1953 Orissa 171 (175) [AIR V 40 C 59] : I L R (1953) Cut 45 (DB), *Sashibhusan* v. *Mangala.* (Tenancy legislation diminishing the rights of the landlord is not a law dealing with acquisition of immovable property for public purposes and is not covered by this article : A. I. R. 1946 P C 127 (PC), Foll.—Orissa Tenants Protection Act (3 of 1948), S. 6 is not confiscatory and does not offend Art. 31 (2).)

1953 Sau 73 (Pr 5) [AIR V 40 C 31] (DB), *Samsudin* v. *Asst. Custodian, E. P.* (Administration of Evacuee Property Act (1950), Ss. 8 to 12—Validity.)

1951 Mad 930 (933) (Pr 14) [A I R V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.* (Administration of Evacuee Property Ordinance (1949) is not for acquisition of property or taking possession.)

In this connection, the observations of Field, J., in his dissenting opinion in *Munn* v. *People of Illinois*,[12] may be referred to. After stating his view that the words "life and liberty" in the 14th Amendment to the American Constitution should receive a liberal construction, he proceeded as follows :

> "The same liberal construction, which is required for the protection of life and liberty in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the Legislature of a State, under pretence of providing for the public good or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special Act for its confiscation or destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or, if he is compelled to take as compensation for its use, less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property as effectually as if the Legislature had ordered his forcible dispossession. If it be admitted that the Legislature has any control over the compensation, the extent of that compensation becomes a mere matter of legislative discretion. The amount fixed will operate as a partial destruction of the value of the property, if it fall below the amount which the owner would obtain by contract, and practically as a complete destruction, if it be less than the cost of retaining its possession. There is, indeed, no protection of any value under the constitutional provision which does not extend to the use and income of the property, as well as its title and possession."

In the above case, the question was whether a law fixing the maximum amount that could be charged as warehouse rent, offended the 14th Amendment of the American Constitution, which prohibited a State from depriving any person of his life, liberty or property, without due process of law. The majority view was that there was no deprivation of property in such a case. Field, J., dissented from such a view. The principle, on which the majority view was based, was that when private property is devoted to a public use, it is subject to public regulation. On this principle, it was pointed out by Waite, C. J., that it has been customary in England from time immemorial and in America from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold.

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[12] **(1876) 24 Law Ed 77 (90) : 94 U S 113.**

Although Field, J.'s opinion was only a dissenting opinion in the above case, his observations point out the practical difficulty of drawing a distinction in particular cases between deprivation of property and its regulation.

(d) Retrospective effect

The article has no retrospective application so as to affect proceedings which had taken place before the coming into force of the Constitution. Thus, where under the law, which was in force prior to the Constitution, a rent controller allotted a house to a *private* party, the order cannot be questioned under this article although the actual dispossession of the landlord in pursuance of the order of allotment took place after the coming into force of the Constitution.[13]

See further, NOTES 5, 11 and 12.

(e) Waiver of right

Where a person complaining of an infringement of his right under ART. 31 is guilty of inordinate delay in applying to the High Court under ART. 226, the High Court may take into consideration such delay in determining whether it should exercise its discretion in his favour.[14]

(a) Introductory

5. Clause (1)—Scope.[1]—Under this clause, which corresponds to ART. 21 (with this difference that while ART. 21 deals with life and personal liberty, this clause deals with the right of property), the sanctity of private property is guaranteed against merely executive encroachment or invasions of the right. The clause provides that unless there is a "law" authorising the deprivation of a person of his property, he shall not be deprived of it. Hence, before the State can deprive a person of his property, it has first to arm itself with a "law".[2] The clause provides that no one shall be deprived of his property save by *authority* of law. This includes the condition that even where the law authorises the Executive to deprive a person of his property under certain circumstances, the Executive is bound to strictly follow the procedure which is laid down by the "law" for the taking of the property.[3] Where a person is deprived of his property under the authority of law and according to the provisions of law, he has no ground for complaint under the Constitution.[4] The provision that no person shall be deprived of his property save by authority of law is in a negative form. Put in a positive form, it means that a person may be deprived of his property by authority of law. This is the measure of the Fundamental Right conferred by this clause.[5]

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[13] 1952 S C 339 (342) [A I R V 39] : 1952 S C R 744 : I L R (1953) Mys 142 (S C), *D. K. Nabhirajiah* v. *State of Mysore.*

[14] 1953 Pepsu 9 (11) (Pr 7) [A I R V 40 C 4] : I L R (1952) Patiala 482, *Devi Dayal* v. *Pepsu State.*

Articles 31, 31A, 31B — Note 5

[1] **Important Note** : — After the Commentary was sent to the Press it has been reported in the newspapers (*vide* 'The Hindu' of Madras dated 18th and 19th December, 1953) that the Supreme Court has in two decisions dissented from Das, J.'s view and held that both clauses (1) and (2) of this article relate to the same subject and that in no case can a person be deprived of his property except for a public purpose and on condition of payment of compensation. The judgments have not been reported yet in any law journal, nor have copies of judgments been received. Hence, it is impossible to make a correct appraisal of the above decisions at this stage. But it may be stated that the commentary which has been written on the hypothesis that clauses (1) and (2) are *distinct* provisions will require revision in the light of the above Supreme Court decisions.

[2] 1950 Pat 392 (Prs 39, 67) [AIR V 37 C 108] : ILR 29 Pat 790 (S B), *Kameshwar Singh* v. *Province of Bihar.* (No person shall be deprived of his property by a mere executive, administrative or prerogative act. If the executive takes the property of any person, it must be prepared to justify that act under the authority of a valid law.)

(b) "Law"—Meaning of.

"Law" in this clause necessarily means a *valid* law. But this means only a valid *State-made* law. The word "law" has the same meaning in this clause as it has under Art. 21, under which it has been laid down by the Supreme Court in *Gopalan* v. *The State of Madras*,[6] that the word "law" means positive State-made law and does not refer to the principles of natural justice. Nor can the validity of a law under which property is taken under this clause be questioned on the ground of its being opposed to a supposed "spirit of the Constitution." No doubt, the word "law" means a *valid* law; but this only means that the

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1953 Raj 78 (81) (Pr 11) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (Rajasthan Public Security Ordinance (23 of 1949), S. 33(1) (a) — Order under S. 33 (1) (a) before expiry of Ordinance — Disobedience after expiry—Action under S. 33 (1) (d) cannot be taken after expiry as it amounts to deprivation of property of the owner against whom the order is passed, within the meaning of Art. 31 (1) of the Constitution. (State was ordered to restore the property).)

1952 Hyd 36 (Pr 4) [AIR V 39 C 17] : ILR (1952) Hyd 180 : 1952 Cri L Jour 340 (DB), *Kistareddy* v. *Commr. City Police.* (Where a citizen is deprived of the possession of his properties by the action of the police without any authority of law, a writ of *certiorari* can be granted to re-deliver the property to the applicant. *Note* :—It may, however, be questioned whether a writ of *certiorari* will lie in such a case.)

1951 Bom 440 (448) [AIR V 38 C 100] : I L R (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.*

(1948) 1 All E R 85 (90) : (1948) 1 K B 349, *Blackpool Corporation* v. *Locker.* (See observations of Scott L. J. at p 90.)

[3] *See* 1951 Nag 22 (Prs 7, 8, 10) [A I R V 38 C 7] : ILR (1951) Nag 228 (DB), *Shankarlal* v. *Additional Deputy Commr., Nagpur.* (An order allotting a house passed without giving notice of the enquiry or affording an opportunity for the landlord applicant to be heard in support of his claim made in the application that the house was needed for his own occupation is not an order passed after "due enquiry" as required by the C. P. and Berar Letting of Houses and Rent Control Order (1949). Such an order seeks to deprive the landlord of the enjoyment of his property quite arbitrarily and in utter disregard of the provisions of the law under which it purports to have been made and therefore is void as being in contravention of Art. 31 (1).)

[4] 1951 Vind Pra 11 (Pr 12) [AIR V 38 C 6], *Sikhar Chand* v. *Bank of Baghelkhand.*

[5] 1952 S C 252 (Pr 102) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State or Bihar* v. *Kameshwar Singh.* (Das, J.)

[6] 1950 S C 27 (Prs 18, 109, 193) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC).

enactment must be within the legislative competence of the Legislature, that it is not opposed to any of the Fundamental Rights granted by the Constitution and it is otherwise in accordance with the provisions of the Constitution. The validity of the law does not signify its consistency with principles of natural justice or the "spirit of the Constitution."[7] The expression means nothing more and nothing less than positive State-made law[8] which is not *ultra vires* the authority by which it has been made on any of the grounds contemplated by the Constitution.

"Law" in this clause means *lex terræ* or law of the land and excludes any law passed for the express purpose of depriving an individual or individuals of their rights to property. But where the Act affects a whole class of people, for example, the proprietors of estates and tenure-holders, and not merely one or more individuals as such, it is not open to objection under this head.[9] It was, therefore, held by the Patna High Court that the Bihar State Management of Estates and Tenures Act (21 of 1949) was not open to objection as contended by the counsel in that case on the ground that it was directed against a particular individual or individuals and was not the law of the land or *lex terræ*.[10]

Further, in view of the decision of the Supreme Court in *Charanjit Lal* v. *Union of India*,[11] it is clear that even a law affecting a single individual or company may be valid if the law is based on the principle of reasonable classification discussed under ART. 14.

As already stated above, "law" under this article must be a *valid* law. In other words, the mere fact that an enactment has been passed by the Legislature will not be sufficient to validate the taking of property under this clause. Under such enactment, it is always open to the person, whose property has been taken, to question the validity of the enactment on the ground that it is beyond the legislative power of the Legislature or that it is opposed to any of the Fundamental Rights conferred by Part III of the Constitution or other ground.[12]

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[7] 1952 S C 252 (Pr 201) [AIR V 39]: 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*. (Courts are not at liberty to declare an Act void, because in their opinion it is opposed to the spirit supposed to pervade the Constitution but not expressed in words : Cooley's Constitutional Limitations, Vol. 1, p. 351, Rel. on.)

[*See* 1950 S C 27 (Prs 26, 132) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (Courts are not at liberty to declare an Act void on the ground of its being opposed to spirit of the Constitution.)].

[8] 1950 S C 27 (Pr 193) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*.

1951 Hyd 1 (Pr 21) [AIR V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State*.

1951 Mad 974 (Pr 10) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras*. ("By authority of law" means by authority of statute law *(obiter)*, A I R 1950 S C 27 (SC), *Ref.*—So, direction to pay additional bonus in an award of Industrial Tribunal is not law.)

[9] 1950 Pat 392 (396) [A I R V 37 C 108] : I L R 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar*. (Case under Government of India Act (1935), S. 299 (1), which exactly corresponds to this clause.)

[10] 1950 Pat 392 (396) [AIR V 37 C 108] : I L R 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar*.

[11] 1951 S C 41 (44) (Pr 8) [AIR V 38 R 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC).

(c) Protection only against State action

This clause is not directed against interference by private individuals. It only applies to State action. Therefore, when a person's right of property is invaded by a private individual or institution, his Fundamental Right under this article is not affected and he is not entitled to invoke his remedy under ART. 32 for the redress of his grievance.[13]

(d) Who can enforce right

When a person's right of private property is invaded under this clause by his being deprived of his property without the authority of law, or when the law under which he is so deprived of his property is not valid, it is only the person whose rights are so invaded that can move the Court for redress and not any other person. Thus, for instance, where a limited liability company is deprived of its property and the law under which it has been so deprived is questioned as being invalid, it is the company that has to move in the matter and it is not open to a shareholder as such to do so, because a company and a shareholder are two different entities in the eye of the law, a company having a distinct legal personality apart from the shareholders of the company.[14] (See notes under ARTS. 13, 32 and 226.)

(e) "Deprived" —Meaning of

It is necessary to appreciate the meaning of the word "deprived" in this clause. It has already been seen in NOTE 4 that while ART. 19 deals with the imposition of restrictions on a person's right of private property, when such restrictions do not amount to his being totally deprived of his property, this article deals with a situation where he is totally deprived of his property. Thus, the Constitution makes a fundamental difference between the imposition of restrictions on the use of property and the deprivation of a person of his property.

There are a number of American decisions some of which are noticed under NOTE 11, according to which if a person is deprived of the *use* of his property in a drastic manner, his property may be

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12. 1950 S C 27 (Pr 113) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras*. (Case under Art. 21.)
1951 Hyd 1 (Pr 21) [AIR V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State*.
1951 Pat 91 (Pr 97) [AIR V 38 C 15]: ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar*.
1950 Pat 392 (Pr 39) [AIR V 37 C 108]: ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar*.
1953 Raj 53 (57) (Pr 7) [AIR V 40 C 18] : ILR (1951) 1 Raj 770 (DB), *Ghamandi* v. *Parshadi*. (Rajasthan Tenants' Protection Ordinance, S. 7, is not invalid under Art. 14 and hence, no objection under Art. 31 (1) arises.)
1951 Bom 440 (448) [AIR V 38 C 100] : ILR (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak*.

13. 1952 S C 59 (Prs 3, 5) [AIR V 39 C 14] : 1952 S C R 391 (SC), *P. D. Shamdasani* v. *Central Bank of India*. (Petitioner's rights interfered with by Central Bank of India Ltd.—Art. 32 cannot be invoked.)

14. 1951 S C 41 (64, 65) (Prs 80, 81) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.
(1912) 226 U S 388 (398): 57 Law Ed 267, *Darnell* v. *Indiana*. (Cited and followed in AIR 1951 S C 41.)

regarded as "taken" from him so as to make just compensation payable to him under the 5th Amendment to the American Constitution. It will be seen in that note that inasmuch as cl. (2) of this article uses the expression "acquired" and not "taken", as the American Constitution does, the property cannot be treated in such cases as "acquired" under cl. (2), under which the word "acquired" has the meaning of a "transfer of title" from the owner of the property to the State, while the word "take" does not necessarily imply a transfer of title. But nevertheless, what amounts to "taking" for purposes of the American Constitution may also amount to "deprivation" of property for purpose of our Constitution, although not to "acquisition" of property.

But one important consideration has to be borne in mind in this connection and it is this: Under the American Constitution there are no distinct provisions like ART. 19 and this article. If it is held, following American precedents, that the *restriction* of a person's right amounts to *deprivation* of his property, the result will be that the reasonableness of the law which authorises such restriction will not be open to question in a Court of law as all that cl. (1) of this article requires is that the deprivation must be according to law. Hence, the result of attributing a wide meaning to the word "deprivation" under this clause will be to curtail the Fundamental Right of citizens by denying to them the opportunity of contesting the reasonableness of the law under which their rights are being affected.

Under the American Constitution there is only one provision, namely, that no one shall be deprived of his life, liberty or property without due process of law and, further, the expression "due process of law" has a different connotation from the words "in accordance with law" in ART. 21 of our Constitution or "by authority of law" in this clause. The result is that while under the American Constitution even when a person is totally deprived of his property, the reasonableness of the law can be questioned under the due process clause, under our Constitution the reasonableness of a law can be questioned only when the effect of the law is merely to impose restrictions on a person's right of property and not when his whole property is taken from him. Hence, in the context of our Constitution, it seems that the word "deprived" has to be given a connotation which is not only distinct from "acquisition" under cl. (2) of this article, but which is also distinct from the restrictions of a person's rights under ART. 19. Hence, although the drastic reduction or the destruction of the use of a property for its owner by State action has been held in America to amount to "taking" of the property so as to entitle the owner to compensation under the 5th or the 14th Amendment, yet the American decisions do not seem to be applicable to the construction of ARTS. 19 and 31 of our Constitution in their entirety.

(f) "Deprived" and "acquired" —Distinction

It has already been seen above that the word "deprivation" in this clause has a different connotation from the word "acquired" in cl. (2). The word "acquired", as will be seen in NOTE 11, implies a transfer of title to the State, while the word "deprived" does not by itself convey any such implication. But the word is wide enough to *cover* the meaning of "acquisition" or "taking possession" of property. In other words, the term "deprived" has a wider connotation than the word "acquired" or the words "taken possession of" in cl. (2) and there may be "deprivation" which is neither acquisition nor requisitioning.[15]

(g) Clauses (1) and (2) — Correlation of

Thus, cl. (1) and cl. (2) are not both of them merely cumulative provisions relating to the compulsory acquisition or taking possession of property by the State. Clause (1) relates to deprivation of a person of his property *simpliciter*. Clause (2) relates to certain forms of such deprivation. It is only where the deprivation is in these forms that the conditions imposed by cl. (2) come into play.[16] When "deprivation"

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[15] 1953 Raj 78 (81) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.*

[16] 1952 S C 252 (Pr 102) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

1951 S C 41 (62) (Pr 78) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

1953 Raj 78 (82) (Pr 14) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (Order under Cr. P. C., S. 133, by Magistrate may require the demolition or destruction of property and such an order will come under Art. 31 (1).)

1951 Bom 440 (449) [AIR V 38 C 100]: ILR (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.* (Article 31 (1) represents principle of Police Power, while Art. 31 (2), that of Eminent Domain. But even in America the line between the two is extremely difficult to define and Judges and Courts have differed from time to time as to whether a particular case falls on one side of the line or the other : AIR 1951 Bom 86, Rel. on.)

1951 Bom 121 (122) [AIR V 38 C 23] : ILR (1951) Bom 656 (DB), *Heman* v. *State of Bombay.*

1951 Bom 86 (Pr 9) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.* (Reversed on appeal by Supreme Court.)

1951 Mad 979 (Pr 16) [AIR V 38 C 339] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras.*

[But see 1951 Hyd 1 (Prs 21, 22) [AIR V 38 C 1] (FB), *Mahbub Bagum* v. *Hyderabad State.* (Article 31 (1) has got to be read in the light of the other subclauses of the article and for interpreting the words "by authority of law" in cl. (1) the whole of the article should be borne in mind. This article as the marginal note shows relates to *compulsory acquisition of property.* Hence the law specified in clause (1) should comply with the provisions of clause (2). The Hyderabad Wali-Ud-Daula Succession (Decision of Disputes) Act infringes Art. 31 (1) of the Constitution as it takes away the property of persons (viz., decree) without providing for any compensation for the same as required by Art. 31 (2) and therefore is not a valid law.)]

Important Note.—After the Commentary was sent to the Press it has been reported in the newspapers (*vide* 'The Hindu' of Madras dated 18th and 19th December, 1953) that the Supreme Court has in two decisions dissented from Das, J.'s view and held that both clauses (1) and (2) of this article relate to the *same* subject and that in no case can a person be deprived of his property except for a public purpose and on condition of payment of compensation. The judgments have not been reported yet in any law journal, nor have copies of judgments been received. Hence, it is impossible to make a correct appraisal of does not amount to "acquisition" or "taking possession", then those conditions do not apply. In such cases, it is not necessary that the "deprivation" should be for a public purpose or that compensation should be paid.[17] The person "deprived" will not also be entitled to question the reasonableness of the law as he would be entitled to under ART. 19, if the law had only limited his rights and had not taken away the whole of his property.

In *Charanjit Lal* v. *Union of India*,[18] Das, J., observed as follows :

> " It is suggested that cls. (1) and (2) of ART. 31 deal with the same topic, namely, compulsory acquisition or taking possession of property, cl. (2) being only an elaboration of cl. (1). There appear to me to be two objections to this suggestion. If that were the correct view, then cl. (1) must be held to be wholly redundant and cl. (2), by itself, would have been sufficient. In the next place, such a view would exclude deprivation of property otherwise than by acquisition or taking of possession. One can conceive of circumstances where the State may have to deprive a person of his property without acquiring or taking possession of the same. For example, in any emergency, in order to prevent a fire spreading, the authorities may have to demolish an intervening building. This deprivation of property is supported in the United States of America as an exercise of "Police Power." This deprivation of property is different from acquisition or taking of possession of property which goes by the name of "Eminent Domain" in the American law. The construction suggested implies that our Constitution has dealt with only the law of "Eminent Domain" but has not provided for deprivation of property in exercise of "Police Powers." I am not prepared to adopt such construction, for I do not feel pressed to do so by the language used in ART. 31. On the contrary, the language of cl. (1) of ART. 31 is wider than that of cl. (2), for deprivation of property may well be brought about otherwise than by acquiring or taking possession of it. I think cl. (1) enunciates the general principle that no person shall be deprived of his property except by authority of law which put in a positive form implies that the person may be deprived of his property, provided he is so deprived by authority of law. No question of compensation arises under cl. (1). The effect of cl. (2) is that only certain kinds of deprivation of property, namely,

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the above decisions at this stage. But it may be stated that the commentary which has been written on the hypothesis that clauses (1) and (2) are *distinct* provisions will require revision in the light of the above Supreme Court decisions.

[17] 1953 Madh B 236 (239) (Pr 10) [AIR V 40 C 88] : 1953 Cri L Jour 1409 (DB), *Mahendra Bahadur* v. *State of M. B.*
1952 Cal 789 (796) [AIR V 39] : 1952 Cri L Jour 1651, *Shew Pujan Indrasan Ltd.* v. *Collector of Customs.*
1952 Madh B 181 (186) (Pr 9) [AIR V 39] (DB), *Shanta Debi* v. *Custodian, E. P.*

[18] 1951 S C 41 (62, 63) (Pr 78) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC).

those brought about by acquisition or taking possession of it, will not be permissible under any law, unless such law provides for compensation. If the deprivation of property is brought about by means other than acquisition or taking possession of it, no compensation is required, provided that such deprivation is by authority of law."

In *Dwarkadas* v. *Sholapur Spinning and Weaving Company,*[19] Chagla, C. J., of the Bombay High Court observed as follows :

> "Turning to ART. 31 (1), it prohibits the deprivation of property except by authority of law and as the Attorney-General has fairly conceded, there are two possible interpretations that can be put upon this clause. One is to read "deprivation" as meaning the same thing as "acquisition" or "taking possession" used in ART. 31 (2). The other interpretation is that "deprivation" is wider in its signification than "acquisition" or "taking possession." It seems to us that the second view is more logical and more consistent with the situations that may arise with which the Legislature may have to deal. If the first view were to be accepted, then there would be no provision at all for a case where the Legislature may wish to deprive a subject of his property without acquiring it or taking possession of it. The second view also presents some difficulty. But that difficulty, when one carefully looks into the matter, is really only on the surface. It is true that under the second interpretation, it would be open to the Legislature to deprive a subject of his property which deprivation may not be of the nature of acquisition or taking possession, without giving any compensation to the subject at all and at first blush it may appear that this would be conferring upon the Legislature dictatorial powers of considerable magnitude. But when one appreciates the principles underlying the American Constitution on which to a considerable extent our own Constitution was based, one must recall to mind the two important and different principles which apply to acquisition of property or taking of property—the expression the American Constitution used in the cases of the United States. There a property may be acquired either on the principle of Eminent Domain or in exercise of Police Power. It is only in the former case that the State is liable to compensate the subject. In the latter case no compensation need be paid to the subject. Therefore, applying the same principle, we have the principle of *Eminent Domain* reproduced in ART. 31 (2) and we have the principle of Police Power reproduced in ART. 31 (1)."

(h) Forms of "deprivation"

The "deprivation" referred to in this clause otherwise than by acquisition or taking possession, which are covered by cl. (2), may take many forms. For instance, destruction of the property will be one of such forms.[20] The confiscation of goods under the Sea Customs Act,

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[19] 1951 Bom 86 (Pr 9) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB).

[20] *See* 1952 S C 252 (Pr 115) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Destruction may take place in the interests of public health or prevention of danger to life or property.)

1878, is an instance of deprivation of property according to law.[21]

In the undermentioned cases there is no deprivation of property.[22]

It has been held that the removal of the head of a Mutt is deprivation of property and not acquisition or requisitioning of property and that if it is done according to law, it will be valid irrespective of the payment of any compensation.[23] It has also been held that where the State assumes control of a business concern like an electric supply company, there is deprivation of property within cl. (1) and if the act of the State is not authorised by valid law, it will be *ultra vires.*[24] See also the undermentioned case.[25]

(i) "Deprivation" of portion of rights

It has already been discussed above whether depriving a person of the use of his property to any extent may itself be regarded as depriving him of his property. In this connection, the meaning of "property" also becomes relevant. The question arises whether the deprivation of a person of some of the rights, which constitute his property, amounts in itself to a deprivation of *property.* In other words, the question arises whether a *portion* of the rights of a person out of the totality of his rights with regard to a certain matter, itself constitutes "property." This question is fully discussed in NOTE 25.

1953 Raj 78 (81) (Pr 12) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (Ordering demolition of dilapidated building on the ground of its being dangerous comes under cl. (1) and no compensation need be paid.)

[21] 1952 Cal 789 (796) [AIR V 39] : 1952 Cri L Jour 1651, *Shew Pujan Indrasan Ltd.* v. *Collector of Customs.*

[22] 1952 Cal 61 (Pr 11) [AIR V 39 C 19-20], *Indra Narayan* v. *State of West Bengal.* (The provisions of para. 8 of the West Bengal Foodgrains (Movement Control) Order, 1951, has not the effect of expropriating the owner of the vehicles in which the prohibited article has been carried. The paragraph provides only for seizure of the vehicles.)

1951 Mad 974 (Pr 10) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.* ("Property" connotes totality of rights — Industrial Tribunal—Award of —Direction to pay additional bonus is not deprivation of property.)

(1896) 165 U S 1 (27) : 41 Law Ed 611, *St. Louis & San Francisco R. Co.* v. *Mathews.* (A statute making every railroad corporation liable for all property injured or destroyed by fire from its locomotives and giving it an insurable interest in the property for its protection, does not deprive the company of its property without due process of law.)

[*See also* 1951 Madh B 159 (Pr 9) [AIR V 38 C 64] : 52 Cri L Jour 1533, *Madan* v. *The State.* (It cannot be said that the provisions contained in Ss. 523 and 524 of the Criminal P. C., deny to any person equality before the law or the equal protection of the laws, or infringe the Fundamental Right of citizens to acquire, hold and dispose of property, or are inconsistent with Art. 31.)]

[23] 1952 Mad 613 (634) [AIR V 39] (DB), *Lakskmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[24] 1953 Raj 78 (83) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.*

[25] 1953 Him Pra 57 (58) (Pr 7) [AIR V 40 C 24], *Hira Singh* v. *State of Him. Pra.* (*A* purchasing a State house from Government — Government reserving right to repurchase it by specific term in sale deed—Notice by Deputy Commissioner asking *A* to vacate house within a month—*A* admitted to be in proprietary possession — Action by Deputy Commissioner amounts to deprivation of *A* by the State of his property not by authority of law and thus constitutes breach of Art. 31 (1) : AIR 1931 P C 248 (PC), Rel. on.)

It will be seen there that the substantial bulk of the rights of a person with reference to a certain matter should itself be treated as constituting property, so that if the substantial bulk of the rights is taken away from him, his *property* must be regarded as taken away from him. The test will be whether what is left with him is of no value or of an illusory nature so far as its value is concerned.[26]

6. "Deprived of his property"—Meaning of. — See NOTES 4, 5, 11, 12 and 25.

7. Regulation and taking of property—Distinction. — See NOTES 4, 5, 11, 12 and 25.

8. "Person."—This article applies to every "person" and is not confined, like ART. 19, to "citizens". As seen in the notes on ART. 5, the definition of "citizen" in this Constitution applies only to natural persons and not to legal persons like corporations. But inasmuch as this article is not confined in its application to "citizens", it will also apply to corporations.[1]

Under the General Clauses Act, S. 3 (42), "person" shall include any company or association or body of individuals whether incorporated or not. By force of ART. 367 of this Constitution, the definitions in the General Clauses Act are applicable to the interpretation of this Constitution and hence the above definition is applicable to the interpretation of the word "person" in this article, so that it includes a company or a corporation.

(a) Eminent Domain—Meaning

9. "Eminent Domain"—General.—As seen in NOTE 5, cl. (1) of this article indicates the principle of Police Power under the American Constitution and cl. (2) indicates the principle of Eminent Domain.[1] The words "Eminent Domain" mean the superior or the

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[26] 1951 S C 41 (Prs 49, 54) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.* (Per *Mukherjea, J.* — The test would certainly be as to whether the owner has been dispossessed substantially from the rights held by him or the loss is only with regard to some minor ingredients of the proprietary right.)

1953 Raj 78 (83) (Pr. 18) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (A person may be deprived of a "property" even though he has not been deprived of *all* the rights that he has in the property—*Mukherjea, J.* in AIR 1951 S C 41 (55) (SC), Foll.)

Articles 31, 31A, 31B — Note 8

[1] 1951 S C 41 (Pr 76) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

Articles 31, 31A, 31B — Note 9

[1] **Important Note.** — After the Commentary was sent to the Press it has been reported in the newspapers (*vide* 'The Hindu' of Madras dated 18th and 19th December, 1953) that the Supreme Court has in two decisions dissented from Das, J.'s view and held that both clauses (1) and (2) of this article relate to the *same* subject and that in no case can a person be deprived of his property except for a public purpose and on condition of payment of compensation. The judgments have not been reported yet in any law journal, nor have copies of judgments been received. Hence, it is impossible to make a correct

Articles 31, 31A, 31B, Note 9

paramount dominion of the State or the power of the State over all property in the State and refers to the power of the State to take for public purposes any property in the State on payment of compensation. In other words, the power of compulsory acquisition of property, which according to every system of jurisprudence the State possesses, is known as the power of "Eminent Domain" on the Continent of Europe and under the American Constitution.

The power of "Eminent Domain" must be distinguished, on the one hand, from the Police Power and on the other from the power of taxation. "The three great legislative powers usually exercised by any Government are the power of taxation, the police power, and the power of eminent domain," says Prof. Willis in his book on the Constitutional Law of the United States. He distinguishes between the three powers as follows:

> "The power of taxation may be defined as the legal capacity of government to impose charges upon persons or their property to raise revenue for governmental purposes. The police power is the legal capacity of the government to control the personal liberty of individuals for the protection of the social interests (on common good) of the people who established such government. The power of eminent domain is the legal capacity of government to take the private property of individuals for a public use upon the payment of just compensation. "Eminent domain" is the superior dominion of the State over all the property within the State. It is not an incident of tenure but an offspring of political necessity. It differs from taxation in that taxation is a contribution levied on people whereas eminent domain is a compulsory sale of property to the Government, although both involve the taking of property. Eminent domain differs from Police Power in that the Police Power is not a taking of any rights whether of property or a person from people, but a limitation on the exercise of such rights by people, although the Police Power may also result in making people lose their property."[2]

Again, in another part of his book[3] Prof. Willis says:

> "The Police Power is the legal capacity of sovereignty, or one of its governmental agents to delimit the personal liberty of persons by means which bear a substantial relation to the end to be accomplished for the protection of those social interests which reasonably need protection. Taxation is a legal capacity of sovereignty or one of its governmental agents to exact or impose a charge upon persons or their property for the support of Government and for the payment for any other public purposes which it may constitutionally carry

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appraisal of the above decisions at this stage. But it may be stated that the commentary which has been written on the hypothesis that clauses (1) and (2) are *distinct* provisions will require revision in the light of the above Supreme Court decisions.

[2] Constitutional Law of the United States by Hugh Evander Willis, 1936 Edn., pages 224-225.

[3] *See* p. 716 of Willis' Constitutional Law of the United States, 1936 Edition.

Articles 31, 31A, 31B Note 9

out. Eminent domain is the legal capacity of sovereignty, or one of its governmental agents, to take private property for a public use upon the payment of just compensation. Eminent domain is not an incident of tenure, but like taxation and the police power, it is an offspring of political necessity. It is the superior dominion of the people as a whole over one individual and the power delegated to an agent of the people to take the private property of such individual."

In the *State of Bihar* v. *Kameshwar Singh*,[4] Mahajan, J., in tracing the origin of the power of the State in respect of the compulsory acquisition of property, observed as follows:

> "This power is a sovereign power of the State. Power to take property for public use has been exercised since olden times. Kent speaks of it as an inherent sovereign power. As an incident of this power of the State is the requirement that property shall not be taken for public use without just compensation...... On the Continent the power of compulsory acquisition is described by the term "Eminent Domain". This term seems to have been originated in 1625 by Hugo Grotius who wrote of this power in his work "DE JURE BELLI ET PACIS" as follows: 'The property of subjects is under the eminent domain of the State so that the State or he who acts for it may use and even alienate and destroy such property not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done, the State is bound to make good the loss to those who lose their property'."

In *Charanjit Lal* v. *Union of India*,[5] B. K. Mukherjea, J., observed as follows :

> "It is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as *eminent domain* in American law, is like the power of taxation, an offspring of political necessity and it is supposed to be based upon an implied reservation by Government that property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner."

In *Kohl* v. *United States*,[6] Strong, J., of the Supreme Court of America, observed as follows :

> "No one doubts the existence in the State Governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of

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4. 1952 S C 252 (270, 271) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C).

5. 1951 S C 41 (Pr 48) [AIR V 38 C 9]: 1950 S C R 869: ILR (1951) Hyd 461 (SC).

6. (1875) 23 Law Ed 449 (451) : 91 U S 367.

[*See also* (1893) 27 Law Ed 1015 (1017) : 109 U S 513, *United States* v. *Jones.* (It is an incident of sovereignty.)]

their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the Government, either mediately or immediately and independent of the consideration whether they would escheat to the Government in case of a failure of heirs. The right is the offspring of political necessity and it is inseparable from sovereignty, unless denied to it by its fundamental law."

In *Pollard* v. *Hagan*,[7] Justice McKinley of the Supreme Court of America observed as follows :

> "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power."

When public need requires acquisition of property, the need is not to be denied because of an individual's unwillingness to sell. When the need arises, individuals may be required to relinquish ownership of property so long as they are given that just compensation which the Constitution requires.[8] This sums up the principle involved in the power of Eminent Domain.

(b) Power of Eminent Domain not conferred by constitutional provisions

This power of Eminent Domain forms the subject-matter of cl. (2) and the subsequent clauses of this article. It will be seen that the clause does not expressly *confer* on the State the power of compulsory acquisition of property or the power to compulsorily take possession of property. The clause merely *imposes certain limitations* on the exercise of the power. But the existence of the power is necessarily implied in the imposition of the limitations.

In the *State of Bihar* v. *Kameshwar Singh*,[9] Mukherjea, J., observed as follows :

> "It cannot be disputed that in every Government there is inherent authority to appropriate the property of the citizens for the necessities of the State and *constitutional provisions do not confer this power though they generally surround it with safeguards.*"

In *United States* v. *Jones*,[10] Field, J., also pointed out that the power of Eminent Domain is an incident of sovereignty and requires no constitutional recognition.

Prof. Willis in his book on CONSTITUTIONAL LAW also points out that the power of Eminent Domain may be *implied* from the limitation on the exercise of this power in the 5th Amendment. He proceeds to say that even if there was no such limitation, undoubtedly it would still be held to be an implied power of the Federal Government.[11]

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[7] (1845) 11 Law Ed 565 (570, 571) : 3 Howard 212.

[8] (1945) 327 U S 546 (554) : 90 Law Ed 843, *United States Ex. Rel. T. V. A.* v. *Welch.*

[9] 1952 S C 252 (279) (Pr 79) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C).

[10] (1883) 27 Law Ed 1015 (1017) : 109 U S 513. (*Mississippi and Rum River Boom Co.* v. *Patterson*, 98 U S 406 : 25 Law Ed 208, Foll.)
[*See also* (1878) 25 Law Ed 206 (207) : 98 U S 403, *Mississippi and Rum River Boom Co.* v. *Patterson.* (To same effect.)]

(c) Conditions to which power of Eminent Domain is subject

The two conditions to which the power of Eminent Domain is subject are that private property can be compulsorily acquired or taken possession of by the State only for a public purpose, and secondly that just compensation must be paid to the owner of the property whenever his property is taken for a public purpose. These conditions are given expression to in the constitutional provisions relating to Eminent Domain not only in our Constitution but also in the American Constitution. The 5th Amendment to the American Constitution provides that private property shall not be taken for public use without just compensation. Clause (2) of this article also lays down the above mentioned two conditions as necessary concomitants of the power of compulsory acquisition or taking possession of private property.

(d) Conditions whether inherent in the conception of power of Eminent Domain

But the question has arisen whether even apart from any specific constitutional requirement the very conception of compulsory acquisition involves, as necessary ingredients of the power, the conditions as to a public necessity and payment of just compensation. Under our Constitution, the question has become purely academical owing to the decision of the Supreme Court in the *State of Bihar* v. *Kameshwar Singh*.[12] In that case, it was held by the majority of the Court that cl. (2) of this article provides for *both* the conditions, namely, the existence of a public purpose and the obligation to pay just compensation.[13] In view of this decision of the Supreme Court, it is a matter of purely academical interest to consider whether the very conception of compulsory acquisition of property necessarily implies, apart from any provision of the Constitution, the elements as to the need of a public purpose and payment of compensation. Still it may be noted that in the above case Mahajan, J., took the view that public purpose was an inherent element in the conception of compulsory acquisition of property by the State but that the obligation to pay compensation, although a necessary *incident* of that power, was not a *part of that conception*. He observed as follows:

> "The sovereign power to acquire property compulsorily is a power to acquire it only for a public purpose. There is no power in

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[11] Willis on Constitutional Law of the United States, 1936 Edn., p. 225.

[12] 1952 S C 252 (272, 273) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C).

[13] 1953 Madh B 97 (Prs 44, 98, 2) [AIR V 40 C 46] (FB), *Maloji Rao* v. *State of Madhya Bharat*. (Per *Dixit and Chaturvedi, JJ., (Shinde C. J. dissenting)*— The existence of a public purpose as a condition precedent to the exercise of the power of compulsory acquisition being a provision of Art. 31 (2), an infringement of such a provision cannot, under Art. 31 (4), be put forward as a ground for questioning the validity of the Act : AIR 1952 S C 252 (S C) Rel. on — (Note : *Shinde, C. J.* has held that *Mukherjea, J.*, has agreed with *Mahajan and Aiyar, JJ.*, in AIR 1952 S C 252.)

[See however 1952 Sau 114 (119) (Pr 13) [AIR V 39] (SB), *Kalika Kumar* v. *Saurashtra State*. (In this case it was held that the majority view in A I R 1952 S C 252 (S C) was that public purpose was not "provided" by cl. *(2).)]*

the sovereign to acquire private property in order to give it to private persons. Public purpose is a *content* of the power itself. Reference in this connection may be made to Willoughby's CONSTITUTIONAL LAW, p. 795. Therein it is stated :

> 'As between individuals no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighbourly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.'

Public purpose is an essential ingredient in the very definition of the expression "Eminent Domain" as given by Nichols and other constitutional writers, even though obligation to pay compensation is not a content of the definition but has been added to it by judicial interpretation. The exercise of the power to acquire compulsorily is conditional on the existence of a public purpose and that being so, this condition is not an express provision of ART. 31 (2) but exists *aliunde* in the content of the power itself and that in fact is the assumption upon which this clause of the article proceeds."

Chandrasekhara Aiyar, J., also agreed with the above view.

But as regards *compensation* even Mahajan, J., conceded that it was not an inherent ingredient of the very definition of compulsory acquisition of property and that although a necessary incident of the power, it stemmed from a different conception. He observed as follows on this aspect :

> "The relationship between the individual's right to compensation and the sovereign's power to condemn is discussed in Thayer's CASES ON CONSTITUTIONAL LAW (Vol. I, p. 953) (mentioned on p. 3 of Nichols on EMINENT DOMAIN) in these words :
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> > 'But while this obligation to make compensation is thus well established and clear, let it be particularly noticed, upon what ground it stands, namely, upon the natural rights of the individual. On the other hand, the right of the State to take springs from a different source, namely, the necessity of government. These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the State and the individual, that the former shall have the property if it will make compensation; the right is no mere right of pre-emption and it has no condition of compensation annexed to it either precedent or subsequent; but there is a right to take, and attached to it as an incident, an obligation to make compensation; this latter, morally speaking, follows the other, indeed like a shadow but it is yet distinct from it, and flows from another source.'
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> Shorn of all its incidents, the simple definition of the power to acquire compulsorily or of the term Eminent Domain is the power of the sovereign to take property for public use without the owner's

consent. The meaning of the power in its irreducible terms is : (a) power to take, (b) without the owner's consent, (c) for the public use. The concept of public use has been inextricably related to an appropriate exercise of the power and is considered essential in any statement of its meaning. Payment of compensation, though not an essential ingredient of the connotation of the term, is an essential element of the valid exercise of such power. Courts have defined Eminent Domain so as to include this universal limitation as an essential constituent of its meaning. Authority is universal in support of the amplified definition of 'Eminent Domain' as a power of the sovereign to take property for public use without the owner's consent upon making just compensation . . . . . I agree with the learned Attorney-General that the concept of acquisition and that of compensation are two different notions having their origin in different sources. One is founded on the sovereign power of the State to take, the other is based on the natural right of the person who is deprived of property to be compensated for his loss. One is the power to take, the other is the condition for the exercise of that power. Power to take was mentioned in Entry 36 (LIST 2, SCH. VII), while the condition for the exercise of that power was embodied in ART. 31 (2) and there was no duty to pay compensation implicit in the content of the entry itself."

See also the undermentioned case.[14]

(e) Bearing of above question on cl. (2)

The question as to whether the elements of public necessity and compensation are inherent in the very definition of "compulsory acquisition of property by the State" has a bearing upon the interpretation of cl. (2) of this article. According to Mahajan, J., as already stated, the element of public purpose being inherent in the definition of the power of compulsory acquisition does not form subject of specific enactment in cl. (2); but the element of compensation not being an inherent ingredient of the very conception of definition of "compulsory acquisition of property" has been made the subject of specific enactment in cl. (2).

The question as to what has been enacted in cl. (2) is relevant for the purpose of understanding cl. (4) under which certain "laws" are expressly protected from being impeached on the ground that they contravene the *provisions* of cl. (2), thereby giving rise to the question as to the meaning of the expression "the provisions of cl. (2)." According to Mahajan, J.'s view, public purpose is not a part of the provisions of cl. (2) and the protection conferred by cl. (4) will not apply to a defect in an enactment due to the absence of public purpose. But a defect due to the absence of proper provision for compensation will be covered by cl. (4) as being a *provision* of cl. (2). According to the majority view in the above-cited decision of the Supreme Court, both elements form part of the provisions of cl. (2) and the controversy as to whether either of them is inherent in the definition of "compulsory

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[14] (1883) 27 Law Ed 1015 (1017) : 109 U S 513, *United States* v. *Jones*.

(f) Compulsory acquisition of property— Essential conditions

requisitioning of property" has, as already said, therefore, become purely an academical matter.

Further, whether regarded as inherent ingredients of the power of compulsory acquisition or not, it is firmly established that the two elements, namely, of public purpose and the obligation to pay compensation, are necessary conditions attached to the power.[15]

In the *State of Bihar* v. *Kameshwar Singh*,[16] Patanjali Sastri, C. J., observed as follows in this connection :

> "The exercise of such power (power of compulsory acquisition of private property by the State) has been recognised in the jurisprudence of all civilised countries as conditioned by public necessity and payment of compensation. All legislation in this country authorising such acquisition of property from Regulation 1 of 1824 of the Bengal Code down to the Land Acquisition Act, 1894, proceeded on that footing."

Thus the following propositions are deducible :

(1) Private property can be taken by the State for a public use on payment of compensation.

(2) Private property cannot be taken for a private purpose even on payment of compensation. (See NOTE 19.)

(3) Private property cannot be taken for a public purpose without paying just compensation.[17]

In *Pennsylvania Coal Company* v. *Mahon*,[18] Holmes, J., observed as follows : "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." These observations were quoted with approval by Das, J., in *Charanjit Lal* v. *Union of India*,[19] where his Lordship pointed out that the mere fact, that the law in question in that case had been passed to redress a situation that had arisen on account of mismanagement and neglect of an important industrial concern which had prejudicially affected the production of an essential commodity and had caused serious unemployment among a certain section of the community, would not entitle the State to take possession of the concern compulsorily and its business without paying compensation. (See also NOTES 10, 19 and 20.)

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[15] 1952 S C 252 (272, 273) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : I L R 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

[16] 1952 S C 252 (262) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C).

[17] 1952 S C 252 (293) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

(1919) 1919 App Cas 744 (744) : 121 L T 361, *Central Control Board* v. *Cannon Brewery Company Ltd.* (Power to take compulsorily raises by implication right to payment.)

(1895) 160 U S 499 (509, 510) : 40 Law Ed 510, *Chappell* v. *United States.*

(1889) 133 U S 553 (562) : 33 Law Ed 740, *Searl* v. *School District No. 2 in the County of Lake.* (The compensation must be just not only to the individual whose property is taken but to the public which is to pay for it.)

(1871) 20 Law Ed 557 (560) : 13 Wall 166, *Pumpelly* v. *Green Bay Co.* (By the general law of European nations and the Common Law of England, it was a qualification of the right of Eminent Domain that compensation should be made for private property taken or sacrificed for public use and the constitutional provisions of the U. S. and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.)

[18] (1922) 260 U S 393 (416) : 67 Law Ed 322.

[19] 1951 S C 41 (63) (Pr 79) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (S C).

(*g*) *Eminent Domain not subject to contract*—See Note 25.

(a) Introductory

10. Clause (2)—Scope of. — The scope of cl. (2) in relation to cl. (1) has already been considered to some extent in NOTES 4 and 5. As stated therein, whereas cl. (1) is concerned with what corresponds to the Police Power of the State under the American Constitution, cl. (2) and the subsequent clauses are concerned with the power of Eminent Domain.[1] As pointed out in NOTE 9, the power of Eminent Domain is usually not expressly conferred on the State by the Constitutions of the world. It is a power which is an inherent part of sovereignty and is assumed to exist without any specific provision for it. The Constitutions only provide the limitations to which that power is subject and the existence of the power is to be inferred from the limitations thereby imposed. In accordance with this universal system, our Constitution also does not in cl. (2) expressly confer a power of compulsory acquisition of property on the State but only enacts the limitations on the powers and leaves the existence of power to be implied from the provisions of these limitations. (See NOTE 9.)

(b) Comparison with S. 299 (2) of Govt. of India Act, 1935

Before considering the conditions prescribed by this clause for compulsory acquisition or taking possession of private property by the State, the other aspects of the clause may be considered. The clause may be compared with sub-section (2) of S. 299 of the Government of India Act, 1935, to which it corresponds. (See NOTE 1.) The first point of difference that may be noticed is that S. 299 (2) only provided for compulsory acquisition of property and did not refer to the compulsory taking possession of property. This gave rise to the question whether

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Articles 31, 31A, 31B — Note 10

[1] **Important Note.**—After the Commentary was sent to the Press, it has been reported in the newspapers (*vide* 'The Hindu' of Madras dated 18th and 19th December, 1953) that the Supreme Court has in two decisions dissented from Das, J.'s view and held that both cls. (1) and (2) of this article relate to the *same* subject and that in no case can a person he deprived of his property except for a public purpose and on condition of payment of compensation. The judgments have not been reported yet in any law journal, nor have copies of judgments been received. Hence, it is impossible to make a correct appraisal of the above decisions at this stage. But it may be stated that the commentary which has been written on the hypothesis that cls. (1) and (2) are *distinct* provisions will require revision in the light of the above Supreme Court decisions.

compulsory requisitioning of property was contemplated by the provision (See NOTES 11 and 12). The next point that may be noticed is that while S. 299 (2) referred to the compulsory acquisition of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, it did not apply to the compulsory acquisition of movable property. Clause (2) of the present article covers both movable and immovable property.

The provisions as to public purpose and compensation in both S. 299 and the present article are similar.

Corresponding to the enlargement of the scope of cl. (2), so as to include the requisitioning of property, the entries in the legislative lists in SCH. VII to this Constitution also refer to the requisitioning of property,[2] as well as the acquisition of property, whereas Item 9 in LIST 2 of SCH. VII to the Government of India Act, 1935, only referred to the compulsory acquisition of land, which led to the decision of the Bombay High Court[3] that the State Legislature had no power to make a law for the requisitioning of property. It is now clear that a law can provide both for the compulsory acquisition as well as compulsory requisitioning of property by the State.[4]

(c) Requisitioning of property

The result of including compulsory requisitioning within the purview of this clause is that even for requisitioning, compensation must be paid by the Government. Further, the requisitioning can only be for a public purpose. A law permitting requisitioning of property for any other purpose will be void.[5]

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[2] 1950 Pat 392 (416) [A I R V 37 C 108] : I L R 29 Pat 790 (SB), *Kameshwar Sin* v. *Province of Bihar.*

[3] 1946 Bom 216 (247) [A I R V 33 C 59] : I L R (1946) Bom 517 : 47 Cri L Jour 594, *Tan Bug Taim* v. *Collector of Bombay.* (Dissented from in AIR 1952 Punj 7 (Prs. 7, 8, 9) (DB).)

[4] 1953 Cal 223 (225) [AIR V 40 C 77], *Abdul Hamid* v. *State of West Bengal.*
1953 Mad 252 (256) [AIR V 40 C 95], *Nataraja* v. *Madras State.*
1952 Punj 70 (Prs 7, 8, 9) [A I R V 39 C 21]: I L R (1951) Punj 438 (DB), *Shyam Krishen* v. *State of Punjab.*
1952 Raj 137 (Pr 6) [A I R V 39] : I L R (1951) 1 Raj 853 (DB), *Jeewan Ram* v. *United State of Rajasthan.* (Rajasthan Premises (Requisition and Eviction) Ordinance (11 of 1949), S. 1—Validity of Ordinance—Provisions of Art. 31 (2) of Constitution have been fully complied with by Ordinance—Ordinance is not void.)

[5] 1953 Cal 223 (225) [A I R V 40 C 77], *Abdul Hamid* v. *State of West Bengal.* (Both for acquisition and requisitioning of property by the State, "public purpose" is necessary and the question is justiciable.)
1952 Bom 16 (22) (Pr 16) [AIR V 39 C 2], *State of Bombay* v. *Heman Santilal.* (Act authorising requisitioning of property for "any purpose" will be void unless it is saved under any of the clauses (3) to (6) of Art. 31.)
1951 Bom 121 (Prs 4, 5) [A I R V 38 C 23] : I L R (1951) Bom 656 (DB), *Heman* v. *State of Bombay.* (Section 6 (4) (a) of the Bombay Land Requisition Act (33 of 1948) entitles the Executive to requisition property not merely for a public purpose but for any purpose and thus clearly contravenes Art. 31 (2) of the Constitution—But as it is an existing law enacted by a competent Legislature more than 18 months before the coming into force of the Constitution, it is saved by

The words "taken possession of" in this clause, however, are not synonymous with the requisitioning of property. The mere fact that the relevant entries in the legislative lists use the expression "requisitioning" is not sufficient to restrict the meaning of the words "taken possession of" in this clause which, although wide enough to *include* the requisitioning of property, are wider than mere requisitioning.[6]

(d) Conditions for acquiring or taking possession of property

As regards the requirements laid down by cl. (2), it is now well-settled that both the conditions which are regarded universally as necessary concomitants of the power of Eminent Domain are prescribed by this clause and as such constitute "provisions" of the clause.[7] The question whether these two elements are inherent in the very definition of the "compulsory acquisition of property" and its bearing on the construction of this clause with regard to what is to be held as "provided for" in cl. (2), has already been discussed in NOTE 9.

(e) Public purpose—Existence of

A further feature of the clause which has given rise to the question whether both public purpose and compensation can be said to be "provided for" by the clause, is the fact that with regard to public purpose, it is not expressly provided in the clause that, unless the law is enacted for a public purpose or authorises the acquisition of property only for a public purpose, the property cannot be acquired. Such a provision is made only with reference to compensation. With regard to public purpose, the clause only refers to the acquisition or compulsory taking possession of property for public purposes under a law authorising the taking of such possession or such acquisition. In other words, the clause assumes the existence of a law authorising the compulsory acquisition of property for public purposes, and does not in terms lay down the existence of a public purpose as a condition precedent for a law authorising the compulsory acquisition of property. Notwithstanding this feature, it is the settled view, as already stated, that this clause provides not only for the payment of compensation but also for the existence of a public purpose as a necessary condition for compulsory acquisition or taking possession of private property by the State.

Art. 31 (5) (a)—It is, therefore, a valid provision of law though it provides for requisition for a purpose other than a public purpose.)

[6] 1950 Pat 392 (416) [A I R V 37 C 108] : I L R 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

[7] 1952 S C 252 (263) (Pr 11) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Per *Patanjali Sastri, C. J., Mukherjea and Das JJ.*)

1951 S C 41 (Pr 48) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

1951 All 674 (681) (Pr 29) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Surya Palsingh* v. *U. P. Govt.*

1952 Punj 70 (Prs 10, 11) [AIR V 39 C 21] : I L R (1951) Punj 438 (DB), *Shyam Krishen* v. *State of Punjab.*

1951 Bom 121 (122) [A I R V 38 C 23] : I L R (1951) Bom 656 (DB), *Heman* v. *State of Bombay.*

1951 Bom 86 (Pr 6) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.*

[*See* 1952 Punj 9 (Pr 29) [A I R V 39 C 2] : ILR (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*]

In this connection, it was pointed out by Patanjali Sastri, C. J., in the *State of Bihar* v. *Kameshwar Singh*,[8] that the clause is worded, so far as this matter is concerned, exactly as sub-section (2) of S. 299 of the Government of India Act, 1935. The opinion of the learned Chief Justice was that the clause was copied with minor variations from S. 299 (2) of the Government of India Act, 1935, which was undoubtedly designed to give effect to the recommendation of the Joint Parliamentary Committee in paragraph 369 of their Report, that two conditions should be imposed on expropriation of private property. The Joint Parliamentary Committee observed as follows in their report :

> "We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation ; in fact, most of the same difficulties would be presented as those which we have discussed above in relation to Fundamental Rights. We do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated ; but we think that it should secure that legislation expropriating or authorising the expropriation of the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal by some independent authority."

As pointed out by Patanjali Sastri, C. J., it is clear from the Joint Parliamentary Committee Report that S. 299 (2) of the Government of India Act, 1935, was intended to secure fulfilment of two conditions, subject to which alone legislation authorising expropriation of private property should be lawful and it is reasonable to conclude that ART. 31 (2) was also intended to impose the same two conditions on legislation expropriating private property. The learned Chief Justice concluded as follows on this aspect of the matter :

> "In other words, ART. 31 (2) must be understood as also providing that legislation authorising expropriation of private property should be lawful only if it was required for a public purpose and provision was made for payment of compensation. Indeed if this were not so, there would be nothing in the Constitution to prevent acquisition for a non-public or a private purpose and without payment of compensation, an absurd result. It cannot be supposed that the framers of the Constitution while expressly enacting one of the two well-established restrictions on the exercise of the right of Eminent Domain left the other to be imported from the common law. Article 31 (2) must, therefore, be taken to provide for both the limitations in express terms."

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[8] 1952 S C 252 (263) [AIR V 39]: 1952 SCR 889, 1020 & 1056: ILR 31 Pat 565 (SC).

As already stated, (see NOTE 9) Mahajan and Chandrasekhara Aiyar, JJ., in the above case were of the view that cl. (2) only "provided" for the payment of compensation and did not "provide" for the legislation being required for a public purpose, although both the learned Judges held that the element of public purpose was an essential factor in the power of compulsory acquisition which, however, (according to them) was to be spelt out, not from cl. (2) itself but otherwise, from the common law, and as an implied element of the entries in the legislative lists relating to compulsory acquisition or requisition of property.

(f) "Public purpose" and "compensation"—Whether implied from entries in legislative lists

The next question is whether the elements of public purpose and compensation can be regarded as implied in the relevant entries in the legislative lists, namely, Entry 33, LIST 1, Entry 36, LIST 2, read with Entry 42, LIST 3. On this question also, the position that must be taken as settled now is that these elements constitute exclusively the subject-matter of "provision" by cl. (2) of this article and do not arise by implication from the entries in the legislative lists. On the question of *compensation*, it was the unanimous opinion of all the Judges of the Supreme Court in the *State of Bihar* v. *Kameshwar Singh*[9] cited above, that compensation is a matter provided for only by cl. (2) and not implied in the entries in legislative lists. Even Mahajan and Chandrasekhara Aiyar, JJ., were of this view. It was only with reference to the element of *public purpose* that there was a difference of opinion, but the majority view was that even public purpose was a matter provided for by cl. (2) and not implied from the legislative entries above referred to.

(g) Above conditions whether implied from 'Spirit of Constitution'

The next question is whether, apart from the provisions of the Constitution, these two elements can be inferred from the "spirit of the Constitution." On this question also, the Supreme Court in the above decision has given a final answer, namely, that in view of the provisions of cl. (2), there is no room for *implication* of these elements from the "spirit of the Constitution." The well-known principle of *expressum facit cessare tacitum* (what is expressed, makes what is silent to cease) shows that in the express and specific provision in cl. (2) there is no room for resort to any general principles of the common law or the "spirit of the Constitution".[10]

The undermentioned decisions[11] holding that cl. (2) of this article and sub-s. (2) of S. 299 of the Government of India Act, 1935, only

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9. 1952 S C 252 (Pr 42) [AIR V 39]: 1952 SCR 889, 1020 & 1056 : ILR 31 Pat 565 (SC).

10. 1952 S C 252 (Prs 201, 231) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

11. 1951 Pat 91 (Pr 33) [A I R V 38 C 15] : I L R 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

1950 Pat 392 (Pr 5) [A I R V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

1951 Mad 979 (Pr 14) [AIR V 38 C 339] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras.* (Section 299 (2), Government of India Act, does not impose a condition that the acquisition should only be for a public purpose as on a plain reading it only requires that provision should be made for payment of compensation for the property acquired either by fixing the amount of compensation provide for compensation and not for public purpose, must be regarded not good law in view of the majority view in the decision of the Supreme Court referred to above.

(h) "Law" authorising acquisition or taking possession of property

In the American Constitution, the 5th Amendment only provides that private property shall not be taken for public use without just compensation. The provision, therefore, does not require that the *law* under which the property is taken must itself provide for the payment of compensation. Under cl. (2) of this article, however, the *law* under which property is acquired or taken possession of compulsorily *must itself provide* for compensation. Under the American Constitution if private property is taken for a public use, the Government becomes subject to an obligation to pay compensation by virtue of the provision in the Constitution itself. Under our Constitution, the obligation to pay compensation is required to be provided for by the *law* under which property is acquired or compulsorily taken possession of. So the obligation arises under our Constitution through the law and not directly from the Constitution itself as in America.[12]

A law for the acquisition or requisitioning of property, although it may satisfy the conditions of cl. (2), will be invalid if it contravenes any other provision of the Constitution.[13]

(a) Transfer of title

11. "Acquire."—"Acquisition" means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or the extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on an acquisition to the acquirer, leaving nothing to the former. In taking possession, on the other hand, the title to the property admittedly remains in the original holder, though he is excluded from possession or enjoyment of the property. Clause (2) of this article makes a clear distinction between "acquisition of property" and "taking possession" of it.[1]

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or at any rate specifying the principles and the manner in which it has to be determined — While a limited restriction in respect of acquisition of land is imposed by sub-section (3) of the section, there is no express language requiring that the acquisition should be only made if it is required for a public purpose.)

[12] *See* (1884) 112 U S 645 (656, 657) : 28 Law Ed 846, *United States* v. *Great Falls Mfg. Co.* (When private property is taken by Government, Government is under implied obligation to pay compensation — Such obligation arises out of implied contract.)

[13] 1952 Bom 461 (462) (Pr 3) [AIR V 39] : ILR (1953) Bom 44 (DB), *Jagwant Kaur* v. *State of Bombay.* (Land requisitioned for Harijan colony—Requisition contravenes Constitution of India, Art. 15 (1) (before amendment).)

Articles 31, 31A, 31B — Note 11

[1] 1951 S C 41 (Prs 49, 54) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

1952 All 703 (704) (Pr 4) [AIR V 39] (FB), *Raman Das* v. *State of Uttar Pradesh.*

1952 Punj 9 (15) (Pr 31) [AIR V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*

1951 Bom 440 (448) [AIR V 38 C 100] : ILR (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.*

Articles 31, 31A, 31B
Note 11

Thus, transfer of ownership to the State from the previous owner is necessary to constitute acquisition, but not for taking possession. In other words, acquisition implies two ideas, namely, the idea of one gaining something and that of another being deprived of it. There must be divesting of one person and the vesting of the property in another person.[2]

(b) Power to 'acquire' if includes power to 'requisition'

Section 299 (2) of the Government of India Act, 1935, only used the expression "acquisition." A question has arisen as to whether acquisition would include also requisitioning, in other words, whether requisitioning of a property was only a form of acquiring it. It has been held by the Bombay High Court that the word "acquisition" would not include the requisitioning of property.[3] But the Punjab High Court has held that "acquisition" would include requisitioning and that requisitioning is only temporary acquisition.[4]

Clause (2) expressly provides for acquiring as well as taking possession of property for public purposes. The words "taken possession of" are wide enough to include requisitioning of property also. But taking possession is not synonymous with requisitioning of property but is a wider term.[5]

(c) "Deprivation" and "acquisition"—Distinction

It has already been seen in NOTE 5 that deprivation of a person of his property is a wider expression than acquisition or taking possession of his property and that acquisition and taking possession are only certain forms of deprivation. Hence, although acquisition requires as a necessary element thereof the transfer of title from the previous owner of the property, deprivation does not necessarily require such transfer of title. In other words, there may be deprivation of property

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1951 Bom 86 (Prs 7, 8) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. and W. Co.* (Transfer of ownership is necessary for acquisition but not for taking possession.)

[2] 1953 Him Pra 95 (Prs 18, 19, 24) [AIR V 40 C 44], *Shiv Dutt* v. *State of Him. Pra.* (Merely entering on and retaining possession without paying rent to the owner of property for a long time, without taking any steps to acquire the land according to law, does not amount to 'acquisition' of property and so long as the owner's title is recognized by the State by entering his name as owner in the revenue records, the right infringed is only under Art. 19 and not Art. 31.)
1953 Raj 78 (81) (Pr 12) [AIR V 40 C 26]: ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* ('Acquisition' means acquisition of title to the property and includes the taking of possession — Beneficial enjoyment by the State is necessary for applicability of cl. (2).)
1952 Mad 203 (Pr 14) [AIR V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras.*

[3] 1952 Bom 16 (Prs 8, 9, 11) [AIR V 39 C 2] (DB). *State of Bombay* v. *Heman Santilal.* (Bombay Land Requisition Act (33 of 1948) is not *ultra vires* on the ground that it authorises requisitioning for a purpose which is not public.)
1946 Bom 216 (247) [AIR V 33 C 59] : I L R (1946) Bom 517, *Tan Bug Taim* v. *Collector of Bombay.*

[4] 1952 Punj 70 (Pr 11) [AIR V 39 C 21] : I L R (1951) Punj 438 (DB), *Shyam Krishen* v. *State of Punjab.*

[5] 1951 Bom 86 (Prs 7, 8) [AIR V 38 C 19]: ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. and W. Co.*

even though there is no transfer of title to the State.[6] Thus, the removal from office of the head of a Mutt, it has been held, would constitute a deprivation of property but not an acquisition of property.[7]

Similarly, the Bombay High Court has held that the Administration of Evacuee Property Ordinance of 1949 did not involve a transfer of title to the State and hence there was no compulsory acquisition of property under the Act. The only effect of vesting the property in the Custodian was to give the Custodian certain powers for the purpose of managing and administering the property. The title of the evacuee remained, as it were, in statutory suspense until it was determined by Parliament as to how that title was to be dealt with or disposed of.[8]

(d) Substantial interference with property

A substantial interference with private property, which destroys or lessens its use and value or by which the owner's right to use or enjoy it is abridged or destroyed in any substantial degree, is, according to the trend of American decisions, a "taking" of property.[9]

Thus, in *Pensylvania Coal Company* v. *Mahon*,[10] Justice Holmes, drawing a distinction between regulation and taking of property, said that "if regulation restricting use of private property goes too far, it will be recognised as a taking for which compensation must be made under the constitutional provision requiring compensation to be made for private property taken for public use." A State law, under which the right to obtain injunction in employer-employee disputes was taken away, in effect operated to make remediless injury to the employer's business by striking employees and others through concerted action in picketing, displaying banners, advertising the strikes, denouncing the employer as unfair to labour, appealing to customers to withdraw their patronage and circulating handbills containing abusive and libellous charges against employers and employees and patrons and intimations of injury to future business. It was held that such a law deprived the owner of the business and premises of his property without due process of law, contrary to the 14th Amendment and hence was void.[11] It was observed in the case that, while no one has a vested right in any particular rule of common law, the legislative power of a State can only be exercised in subordination to fundamental principles of right and justice, (which the guarantee of the due process of law in the Constitution, 14th Amendment, was intended to preserve) and a purely arbitrary and capricious exercise of that power, whereby a wrongful and highly injurious invasion of property right was practically sanctioned, and the owner was stripped off all real remedy, was wholly at variance to those principles.[12]

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[6] **Important Note.** — After the Commentary was sent to the Press it has been reported in the newspapers (*vide* 'The Hindu' of Madras dated 18th and 19th December, 1953) that the Supreme Court has in two decisions dissented from Das, J.'s view and held that both clauses (1) and (2) of this article relate to the *same* subject and that in no case can a person be deprived of his property except for a public purpose and on condition of payment of compensation. The judgments have not been reported yet in any law journal, nor have copies of judgments been received. Hence, it is impossible to make a correct appraisal of the above decisions at this stage. But it may be stated that the commentary, which has been written on the hypothesis that clauses (1) and (2) are *distinct* provisions, will require revision in the light of the above Supreme Court decisions.

[7] 1952 Mad 613 (634) [AIR V 39] (DB), *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.*

[8] 1951 Bom 440 (448) [AIR V 38 C 100] : ILR (1952) Bom 378 (DB), *Abdul Majid* v. *P. R. Nayak.* (It would not be true to say that the property of the evacuee is destroyed or extinguished. The title is in existence but its exercise has been suspended by reason of the Ordinance. This is not clearly a case where a property is destroyed by the State and both the property and the title disappear.)

[9] 1952 Mad 203 (Pr 14) [AIR V 39 C 98] (DB), *Rajah af Bobbili* v. *State of Madras.*

[10] (1922) 260 U S 393 (415, 416) : 67 Law Ed 322.

The following rulings also may be regarded as falling in the same category:

(i) The taking of property without due process of law would include the forbidding of mining of coal under private dwellings, etc., in spite of the right to mine coal having been granted to a person.[13]

(ii) Flying over a person's property at low altitudes, so as to render the property uninhabitable, amounts to taking of property for which compensation must be paid.[14]

(iii) When there is apprehension of firing from Government batteries over one's land depriving the owner of the profitable use of the land, it would be "taking" for which compensation should be paid.[15]

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[11] (1921) 257 U S 312 (340) : 66 Law Ed 254, *Truax* v. *Carrigan.*

[12] (1921) 257 U S 312 (329) : 66 Law Ed 254, *Truax* v. *Carrigan.*

[13] (1922) 260 U S 393 (415) : 67 Law Ed 322, *Pensylvania Coal Co.* v. *Mahon.*

[14] (1946) 328 U S 256 (261) : 90 Law Ed 1206, *United States* v. *Causby.* (The doctrine of the common law that the ownership of land extends to the periphery of the universe has no place in the modern world. The air is a public highway. But that general principle does not control the present case. When the flights over the respondent's property rendered the property uninhabitable, there would be a taking of the property. If by reason of the frequency and altitude of the flights, respondents could not use their land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken complete possession of the land — Inconveniences normally caused to owners of land by the flight of aeroplanes over it are not a taking for which compensation must be made, under the 5th Amendment, unless the flights are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.)

[15] (1913) 231 U S 530 (538) : 58 Law Ed 351, *Peabody* v. *United States.*

(iv) The destruction of all uses of property by flooding would constitute "taking".[16]

It will be seen that in the above cases there is no transfer of title or ownership to the State and as such there can be no "acquisition" of property.

Where the title of the owner is in its very nature subject to the property being used for a public purpose, such user does not amount to a "taking" of the property.[17]

(e) 'Acquisition' and 'taking' of property— Distinction

Thus, the word "acquisition" is also *not* synonymous with the word "take" under the American Constitution. Taking of property under the American Constitution does not necessarily require the transfer of title or ownership to the State from the previous owner, while acquisition of property by the State necessarily implies such a transfer of title. Every case of acquisition of property would be a case of taking of property but not *vice versa*. In other words, every case of taking of property will not necessarily be a case of acquisition of property. Hence, in the kind of cases referred to above in which it has been held that there would be taking of property so as to make compensation due to the owner of the property under the American Constitution, there would be no acquisition under our Constitution or under S. 299 (2) of the Government of India Act, 1935.[18]

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[16] (1916) 243 U S 316 (327):61 Law Ed 746, *United States* v. *Cress*. (Construction of dam on river, raising level of the river and causing flood over certain land, depreciating the value of the land—Owner is entitled to compensation.)

(1909) 54 Law Ed 787 (789) : 217 U S 333, *United States* v. *Welch*.

(1902) 47 Law Ed 539 (548) : 188 U S 445, *United States* v. *Lynah*.

(1896) 166 U S 269 (275, 276) : 41 Law Ed 996, *Gibson* v. *United States*. (Damage as an incidental consequence of lawful exercise of a governmental power is not 'taking'—Riparian ownership is subject to obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard.)

(1871) 20 Law Ed 557 (561) : 13 Wall 166, *Pumpelly* v. *G. B. & M. Canal Co.* (It is not necessary that property should be absolutely taken in the narrowest sense of the word to bring the case within the protection of this constitutional provision. But there may be such serious interruption to the common and necessary use of property as will be equivalent to taking. The backing of water so as to overflow the lands of an individual or any other superinduced addition of water, earth, sand or other material or artificial structure placed on land, if done under statutes authorising it for public benefit, is such a taking as demands compensation.)

[But see (1905) 199 U S 473 (481) : 50 Law Ed 274, *Manigoult* v. *Springs*. (Flooding of lands — In this case it was held that it was only an exercise of Police Powers of the State.)]

[See however (1904) 192 U S 217 (224, 225) : 48 Law Ed 414, *Bedford* v. *United States*. (It was held in this case that the above principle did not apply — The revetment along the banks of the river did not change the course of the river.)]

[17] (1913) 57 Law Ed 1063 (1075) : 229 U S 53 (62), *United States* v. *Chandler Dunbar W. P. Co.* (The title of the owner of fast land upon the shore of a navigable river to the bed of the river is, at best, a qualified one. . . It is subordinate to the public right of navigation and however helpful in protecting the owner against the acts of third parties is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers.)

(f) "Deprivation" and "taking" — Distinction— American decisions, applicability of

From the above it might seem that the word "deprivation" may be treated as being equivalent in meaning to the word "taking" under the American Constitution. As already pointed out, compensation is payable under the American Constitution for taking private property for public use. In other words, compensation is payable under the American Constitution, according to the decisions referred to above, even when there is no compulsory acquisition of property by the State in the sense of a transfer of title to the State.

Although "deprivation" and "taking" may thus be regarded as being more or less equivalent to each other, and, although the American decisions, in which it has been held that when there is a substantial interference with private property so as to destroy or lessen the value of property to the owner there is a taking of property, may be treated as supporting the proposition that in such cases there would also be deprivation of property for the purpose of the Indian Constitution, yet, as pointed out in NOTE 5, the fundamental distinction between the Indian Constitution and the American Constitution cannot be overlooked. This fundamental distinction consists in the fact that in the American Constitution there are no separate provisions for deprivation of property and for the imposition of restrictions on the right of property as there are under the Indian Constitution in ARTS. 21 and 19 respectively. Under the American Constitution, the 5th Amendment provides that no person shall be *deprived* of his property without due process of law and there is a similar provision in the 14th Amendment; in the 5th Amendment there is also the provision that private property shall not be taken for public use without payment of just compensation. Thus, the provisions in the American Constitution relating to the right of property only speak of deprivation of property or taking of property and do not deal specifically with the question of regulation or the restriction of the right of property. Hence, every case of abridgment of the right of property has necessarily to be brought within the ambit of the provisions which speak in terms of deprivation of property or taking of property. In every such case, whether it is deprivation of the totality of property or whether it is only a regulation of the right of property, the American Constitution empowers the Court to go into the matter of the reasonableness of the action of the State or of the law, under the due process clause, which is equated under the American law to the principles of natural justice

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[18] 1952 Mad 203 (Pr 14) [A I R V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras.* (Every instance of taking as understood by American decisions to mean substantial interference with private property, which destroys or lessens its use and value or by which the owner's right to use or enjoy it is abridged or destroyed in any substantial degree, would not amount to acquisition within the meaning of that term in S. 299 of Government of India Act or Art. 31 (2) of the Constitution of India.)

(see *Gopalan's case*).[19] But under our Constitution the reasonableness of a law affecting the right of property is open to examination by the Court only when the law amounts to regulation or restriction of the right (ART. 19 (5)) and not when it results in the total deprivation of property of a person. (ART. 31 (1).) Hence, in widening the meaning of the word "deprivation", the risk is that the citizen's Fundamental Right of property is likely to be cut down by depriving him of his right to go to a Court of law to examine the reasonableness of the law under which his rights are being affected. Hence, in applying the American precedents, the above consideration has to be borne in mind and an unduly wide construction should not be given to the meaning of the word "deprived" in ART. 31 (1).

The result will be that in many of the cases in which according to the American decisions there would be taking of property or deprivation of property, under our Constitution there would be neither acquisition of property, because there is no transfer of title to the State, nor deprivation of property, because the action of the State only amounts to regulation and not total deprivation, when alone ART. 31 will apply.

The undermentioned cases[20] are instances in which there is no acquisition of property or even deprivation of property for the purpose of this article.

See also NOTES 12 and 25.

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[19] 1950 S C 27 (58) (Pr 72) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan* v. *State of Madras.*

[20] 1944 F C 62 (65, 66) [A I R V 31] (FC), *Kunwarlal Singh* v. *C. P. & Berar.* (Enhancing land revenue is not 'acquisition'.)

1953 Mad 260 (261) [AIR V 40 C 98] (DB), *Gopalan* v. *State of Madras.* (Madras Estates Land (Reduction of Rent) Second Amendment Act (35 of 1951), S. 4—Provision is not confiscatory and unconstitutional: AIR 1952 S C 252 (SC), Distinguished.)

1952 Cal 61 (Pr 12) [AIR V 39 C 19-20], *Indra Narayan* v. *State of West Bengal.* (It is extremely doubtful whether the West Bengal Foodgrains (Disposal and Acquisition) Order, 1947, is a piece of legislation empowering possession or acquisition of a piece of property. The Order merely requires a person to sell a certain quantity of foodgrains to the State. But apart from this, Art. 31 (5) (a) saves the existing law. The Order in question was promulgated in 1947 more than 18 months before the Constitution, the time limit referred to in Art. 31 (6) of the Constitution.)

1951 Mad 974 (Prs 7, 8, 9, 10, 13) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras.* (The provisions of the Industrial Disputes Act and the award made in pursuance of the reference under the Act, re-instating a dismissed employee and granting additional bonus to the workers, are not inconsistent with the Fundamental Rights conferred by Part III of the Constitution. They do not contravene the Fundamental Rights declared by Arts. 14, 19 and 31 of the Constitution of India—The Act as such does not deprive any person of property within the meaning of Art. 31—It is true that every dispute which would amount to an industrial dispute according to the definition in the Act is likely to affect the pecuniary rights of the parties ; but it is not right on that account to speak of the Act or the award that may be passed under the Act as depriving any person of property. An adjustment of relations between two parties should not be considered in that light.)

12. **"Taken possession of."**—The words of cl. (2) are wide enough to include both the acquisition and the requisitioning of property, inasmuch as the words "take possession" are comprehensive enough to include requisitioning.[1]

It has been seen in NOTE 11 that while the acquisition of property involves the transfer of title or ownership from the previous owner to the State, the taking possession of property does not involve any such transfer of title or ownership, but only that the right of possession or enjoyment is transferred to the State.[2] 'Taking possession' means taking possession from a person who is entitled to such possession.[3] The law which authorises the requisitioning of property must clearly mention the public purpose for which the requisitioning is authorised

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1944 Nag 201 (213) [A I R V 31], *Kunwarlal Singh* v. *Provincial Government C. P. & Berar.* (Under S. 88, C. P. Land Revenue Act, the zamindars in Bhandara District are bound to pay whatever their estates are assessed to. All this is a liability vis-a-vis the Provincial Government and not a right. If the Provincial Government chooses not to enforce the whole of the liability against the zamindars, that is a concession in the gift of the Government and not a right which the zamindars can claim. Hence, the enforcing of an enhanced measure of the zamindar's liability against them cannot be called the acquisition of a right.)

[*See also* 1952 Orissa 42 (49) (Pr 19) [A I R V 39 C 10] (DB), *Lokanath Misra* v. *State of Orissa.* (Undertaking in S. 299 (2) of the Government of India Act, 1935, has the same meaning as business. Under Orissa Act 36 of 1947, no movable or immovable properties of private permit-holders have been acquired, but only their business of plying buses for hire has been extinguished by cancelling their permits, and transferred to a company by granting it monopoly rights. Even if it be held that the action of the Government indirectly amounts to the acquisition of the intangible property of the business of the permit holders for a public purpose, the whole Act cannot be held to be void, as S. 6 of the Act makes express provision for the payment of compensation to those holders of permits issued prior to 1st October, 1946 ; S. 6 is therefore sufficient compliance with the requirements of S. 299 (2) of the Government of India Act, 1935, in respect of permits granted prior to 1st October, 1946. The Act cannot be held to be invalid merely because it may be inoperative against permits granted after 1st October, 1946, especially when compensation has been provided for permits granted prior to that date : AIR 1946 Cal 140, Ref.)]

Articles 31, 31A, 31B — Note 12

[1] 1952 Vind Pra 78 (Pr 3) [AIR V 39], *Dr. Bhagwant* v. *Deputy Commr., Rewa District.*

[2] 1953 Mad 252 (256) (Pr 11) [A I R V 40 C 95], *C. Nataraja Mudaliar* v. *The Madras State.*

1953 Raj 78 (81) (Pr 12) [AIR V 40 C 26] : ILR (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (Taking possession of property negatives the idea of acquiring title.)

[3] 1952 S C 339 (342) [A I R V 39] : 1952 S C R 744 : I L R (1953) Mys 142 (SC), *D. K. Nabhirajiah* v. *State of Mysore.* (Mysore House Rent and Accommodation Control Order (1948), Cl. 3 (2), (4) and (6)—Allotment order made before Constitution came into force — Dispossession of landlord after coming into force of Constitution—Arts. 19 (1) (f) and 31 (2) did not apply as the dispossession was a mere consequence of the order of allotment which had already been passed before the coming into force of the Constitution — Moreover, owing to the allotment order by the Controller, the landlord had lost his right to possession and there was no "taking possession" within Art. 31 (2) merely because the actual dispossession took place after coming into force of Constitution.)

and also provide for compensation being paid.[4] Requisitioning of property is made by the superior authority of the State and does not make the State a tenant of the landlord.[5] Clause (2) cannot be evaded by taking substantially all the rights but leaving some insignificant ingredients.[6]

(a) 'Taking possession' not synonymous with "requisitioning"

Is "taking possession" synonymous with the "requisitioning" of property? In S. 299 (2) of the Government of India Act, 1935, the word used was only "acquisition" and it was held that acquisition did not include requisitioning of property. In the Government of India Act, the items in the legislative lists also only provided for the compulsory acquisition of property and not for requisitioning of property. Under this Constitution, cl. (2) provides not only for the acquisition of property but also for its being taken possession of and the entries in the legislative lists provide both for the compulsory acquisition and the requisitioning of property. Notwithstanding the legislative history of these provisions, it has been held by the Bombay High Court that taking possession is not synonymous with the requisitioning of property but is a term which is wider in its connotation.[7]

(b) Government assuming management of property on behalf of owner—Effect

The question has arisen, whether property is taken possession of by the Government compulsorily, when the Government assumes control and management of the property compulsorily. In this connection, the question has been whether taking possession of a property as the statutory agent of the owner of the property can be regarded as taking possession of the property within the meaning of cl. (2). In *Charanjit Lal* v. *The Union of India*,[8] Das, J., expressed the opinion that even in such cases there would be taking possession of property. In that case, the assets of the Sholapur Mills were taken over by the Government and it was contended on behalf of the Government that there was no taking possession of the property, so as to require the payment of compensation, inasmuch as the mills and all the other assets in the possession and custody of the new directors who, though appointed by the Government, were servants or agents of the *company*, were, in the eye of the law, in the possession and custody of the *company* and had not really been taken possession of by the State. In rejecting this contention, Das, J., observed as follows:

> "This argument, however, overlooks the fact that in order that the possession of the servant or agent may be juridically regarded as the possession of the master or the principal, the servant or agent must be obedient to and amenable to the directions of the master or

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[4] 1952 Vind Pra 78 (79) (Pr 3) [A I R V 39], *Dr. Bhagwant* v. *Deputy Commr., Rewa District*.

[5] 1952 Punj 116 (Pr 17) [A I R V 39 C 36] : I L R (1952) Punj 300, *Union of India* v. *Ram Pershad*.

[6] 1951 Bom 86 (Prs 7, 8) [AIR V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas Shriniwas* v. *Sholapur S. & W. Co.*

[7] 1951 Bom 86 (91) [A I R V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.*

[8] 1951 S C 41 (Pr 79) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC).

Articles 31, 31A, 31B
Note 12

principal. If the master or principal has no hand in the appointment of the servant or agent or has no control over him, or has no power to dismiss or discharge him as in this case, the possession of such servant or agent can hardly in law be regarded as a possession of the company. (See ELEMENTS OF LAW by Markby, Edn. 6, Para. 371, p. 192.) In this view of the matter, there is great force in the argument that the property of the company has been taken possession of by the State through directors who have been appointed by the State in exercise of the powers conferred by the Ordinance and the Act and who are under the direction and control of the State and this has been done without payment of any compensation. The appropriate legislative authority was no doubt induced to enact this law because, as the preamble of the Ordinance stated, on account of mismanagement and neglect a situation had arisen in the affairs of the company which had prejudicially affected the production of an essential commodity and had caused serious unemployment amongst a certain section of the community but, as stated by Holmes, J., in *Pensylvania Coal Company* v. *Mahon*:[9] 'A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' Here, therefore, it may well be argued that the property of the company having been taken possession of by the State in exercise of powers conferred by law which does not provide for payment of any compensation, a Fundamental Right of the company has, in the eye of the law, been infringed."

His Lordship, however, held that inasmuch as the *company* did not agitate the matter, the question was not properly before the Court and it was not open to a *shareholder* of the company to raise the question as in the eye of the law the company and the shareholder were two distinct entities.

It will be seen that in the circumstances of the case, Das, J.'s opinion was in the nature of *obiter dicta.*

In *Abdul Majid Haji Mohammed* v. *P. R. Naik*,[10] Chagla, C. J., of the Bombay High Court also expressed the view that taking possession in cl. (2) did not connote the taking of a beneficial interest and that even when the State did not take any beneficial interest, it could be held that there was taking possession of property.

But the general trend of decisions is that there is no taking possession of property when merely its management is taken up by the Government through its agents for the proper protection of the property itself.[11] The view proceeds on the basis that unless a beneficial interest is taken by the State, as in the case of compulsory acquisition of property, there can be no taking possession of the property also.[12] [See also NOTE 14].[13]

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[9] (1922) 260 U S 393 (416) : 67 Law Ed 322.

[10] 1951 Bom 440 (Pr 14) [AIR V 38 C 100] : I L R (1952) Bom 378 (DB). (Distinguishing AIR 1951 Bom 86.)

[11] 1953 Orissa 121 (138) (Pr 31) [A I R V 40 C 52] : I L R (1952) Cut 529 (DB), *Brundaban Chandra* v. *State of Orissa*. (Taking up management by Court of Wards does not amount to deprivation or requisitioning of property so as to give rise to a claim for compensation.)

Where the Government assumes certain powers over certain property, the question arises whether that amounts to taking possession of property. In such cases, it has to be seen whether the powers are assumed by the Government by virtue of taking possession or by virtue of some other right. Thus, in *Charanjit Lal* v. *Union of India*,[14] it was held that the powers of the Government were not assumed by virtue of the Government *taking possession* of the rights of the share-holders.

1953 Raj 78 (81) (Pr 12) [AIR V 40 C 26] : I L R (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (Taking possession of a public utility concern for purpose of management and not for beneficial enjoyment is not covered by cl. (2).)

1953 Raj 22 (Pr 17) [A I R V 40 C 8] : I L R (1951) 1 Raj 888 (DB), *Manoharsinghji* v. *The State of Rajasthan.* (Taking over management of jagir is not taking possession of a property.)

1952 Punj 9 (Pr 108) [AIR V 39 C 2] : ILR (1952) Punj 11 (DB), *Jupiter General Insurance Co.* v. *Rajagopalan.* (Taking over management of Insurance Company under S. 52A of the Insurance Act.)

1951 Bom 86 (Prs 1, 12, 13) [AIR V 38 C 19]:I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.* (The Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance (1950), is not *ultra vires* Art. 31 of the Constitution. The judicial possession of the company has not been in the slightest degree affected or interfered with. The right of the share-holders to control and manage the company is not property and even if property the Ordinance merely places reasonable restrictions in the public interest under Art. 19 (5) of the Constitution.)

1951 Mad 930 (Pr 14) [A I R V 38 C 329] (DB), *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras.* (Administration of Evacuee Property Ordinance (1949).)

1951 Sau 73 (Pr 3) [AIR V 38 C 36] (DB), *Masumali* v. *Custodian, E. P. Rajkot.* (Administration of Evacuee Property Act (1950), S. 10 — Custodian assuming possession of oil mill on one of the co-owners being declared an evacuee—No infringement of Fundamental Right.)

[*See also* 1952 Mad 203 (208) (Prs 12, 14) [A I R V 39 C 98], *Rajah of Bobbili* v. *State of Madras.* (Madras Estates Land (Reduction of Rent) Act (30 of 1947) — Power of Government to collect rent of estates on behalf of landlord—Government having no beneficial interest except for collection charges—No acquisition of property.)]

[12] 1953 Raj 78 (81) (Pr 12) [A I R V 40 C 26] : I L R (1951) 1 Raj 144 (DB), *Surajmal* v. *Rajasthan State.* (Article 31 (2) has no application where the taking over of possession by the State is not for beneficial enjoyment.)

[13] **Important Note:**—After the Commentary was sent to the Press it has been reported in the newspapers, (vide "The Hindu" dated 19th December 1953) that the Supreme Court has reversed the decision of the Bombay High Court in *Dwarkadas* v. *Sholapur Spinning & Weaving Co.*, AIR 1951 Bom 86 and held that the Sholapur Spinning & Weaving Company (Emergency Provisions) Ordinance (1950) and the Act subsequently passed on its basis are *ultra vires* under ART. 31.

[14] 1951 S C 41 (54) (Prs 50, 53, 55) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC).

Taking possession of the business or the properties of a company does not amount to taking possession of any property of the shareholders, because the shareholders of a company and the company are not identical in the eye of the law.[15]

(c) Taking possession and placing restrictions—Distinction

While taking possession of property must be distinguished from acquisition of property, taking possession must also be distinguished from the placing of restrictions on the right of property.[16] The placing of restrictions will be covered by Art. 19 while the taking of possession will come under this article. Taking possession would involve taking up complete control and enjoyment of the property.

13. Requisitioning of property. — See Note 12.

14. Taking over of management of properties.—The taking over of the management of an Insurance Company under S. 52A of the Insurance Act, 1938, does not amount to a compulsory acquisition or taking possession of the company or of its properties.[1] Similarly, in other cases of the Government taking over the management of the concerns or properties under statutory powers, there is no compulsory acquisition or taking possession of properties.[2] On the same principle, an Act under which the right to collect the rents of estates is taken by the Government is not one for acquisition or possession of property.[3] (See also Note 12.)

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[15] 1951 S C 41 (Pr 51) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjitlal* v. *Union of India.*

[16] *See* 1951 S C 41 (Pr 53) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjitlal* v. *Union of India.*

1951 Bom 86 (93) [AIR V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.*

Articles 31, 31A, 31B — Note 14

[1] 1952 Punj 9 (Pr 31) [AIR V 39 C 2] : ILR (1952) Punj 11, *Jupiter General Insurance Co.* v. *Rajagopalan.*

[2] 1950 Pat 392 (Prs 6, 24) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.* (The Bihar State Management of Estates and Tenures Act only deprives the proprietor of his right to manage his property or rather the greater part of his property. The proprietor still remains the owner of the property. This does not amount to acquisition of property.)

1951 Bom 86 (93) [AIR V 38 C 19] : ILR (1951) Bom 473, *Dwarkadas* v. *Sholapur S. & W. Co.* (Taking over management of Textile Mills.)

[But see 1952 Sau 59 (62, 65) (Prs 8, 10, 15) [AIR V 39] (SB), *Jayantilal* v. *State of Saurashtra.*]

Important Note: — The view expressed here may require reconsideration in view of the decision of the Supreme Court reported in the newspapers (*vide* 'the Hindu' D/- 19th December 1953) in which the Supreme Court is stated to have reversed the decision of the Bombay High Court in AIR 1951 Bom 86 and to have held that the Sholapur Mills Ordinance and Act are *ultra vires* under Art. 31. In absence of a full report, we are unable to do anything further than merely indicate this at this stage.

[3] 1953 Raj 22 (Pr 17) [AIR V 40 C 8] : ILR (1951) 1 Raj 888 (DB), *Manohar Singh* v. *State of Rajasthan.* (Mere right to collect revenue is not property and mere taking over management of jagir is not taking of possession of property.)

15. Taking over of business concerns. — See NOTE 14.

16. Regulating the relations between landlord and tenant. —An Act, which merely regulates the relations between the landlords and tenants and in the process diminishes the rights which the landlords have hitherto exercised in connection with their lands, is not one under which the lands are compulsorily acquired for the Government and therefore does not entitle the landlord to any compensation. Nor is the Act open to question on the ground of its not providing for compensation.[1] Thus, an Act providing for the reduction of rents payable by tenants to landlords and the collection of the reduced rents by the Government is not an Act for the compulsory acquisition of property and is not subject to this clause.[2] In such case, there is no transfer of title to the Government nor any transfer of possession to Government.

17. Accommodation control.—A power of allotment of houses and accommodation under Rent Control Acts does not amount to the compulsory acquisition or requisitioning of property.[1]

18. Rent reduction and rent control. — See NOTE 16.

19. "Public purposes."—As to whether cl. (2) "provides" that a law for compulsory acquisition or taking possession of property must be for a public purpose, see NOTE 10.

As seen in NOTES 9 and 10, both under sub-section (2) of S. 299 of the Government of India Act, 1935, and cl. (2) of this article and under the general principles of the law of Eminent Domain, private property can be compulsorily acquired or taken possession of by the Government only for a *public* purpose. Hence, an Act which authorises the acquisition or requisitioning of property, if in the opinion of the Government such acquisition or requisitioning is necessary or expedient,

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1952 Mad 203 (210) (Pr 18) [AIR V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras.* (The rent is collected on behalf of the landlord and Government has no beneficial interest except for collection charges.)

Articles 31, 31A, 31B — Note 16

[1] 1943 F C 29 (33) [A I R V 30] (FC), *Jagannath Baksh* v. *United Provinces.* (U. P. Tenancy Act does not fall within S. 299 (2), Government of India Act.)
1946 P C 127 (130) [AIR V 33 C 40] : 73 Ind App 123 : ILR (1946) Kar P C 129 (P C), *Jagannath Baksh* v. *United Provinces.* (U. P. Tenancy Act 1939 is not *ultra vires* the U. P. Legislature — The prohibition contained in S. 299, Government of India Act, can have no application to it as there is no question of confiscatory legislation.)
1943 All 345 (348) [AIR V 30] (DB), *Mohammad Zia* v. *United Provinces.* (AIR 1943 F C 29, Foll.)

[2] 1952 Mad 203 (Prs 17, 18, 19, 30 and 42) [A I R V 39, C 98] (DB), *Rajah of Bobbili* v. *State of Madras.* (The Madras Estates Land (Reduction of Rent) Act (30 of 1947) does not contravene S. 299 (2) of the Government of India Act, 1935, or Art. 31 (2)—Since there is no 'acquisition' it cannot be said that the Legislature has adopted a device to escape from the provisions of Art. 31 (2) by calling the Act by a different name and therefore there is no attempt by the Legislature to do indirectly what it cannot do directly : AIR 1939 P C 53, Ref. to.)

Articles 31, 31A, 31B — Note 17

[1] 1952 All 703 (704) (Pr 4) [AIR V 39] (FB), *Raman Das* v. *State of Uttar Pradesh*

will be void[1] as contravening the provisions of cl. (2). The reason is that in such a case the words are wide enough to enable the Government to compulsorily acquire or requisition property for purposes other than public, because there is no limitation implicit in the expression "necessary" or "expedient" that the purpose for which property is taken must be public. Similarly, an Act which authorises requisitioning of property for "any" purpose will be void under cl. (2).[2]

(a) "Public purpose." — Meaning — American law compared

It is, therefore, necessary to consider the meaning of the expression "public purposes" used in cl. (2) of this article. Under the 5th Amendment to the American Constitution the words used are "public use". The Amendment provides that private property shall not be taken for "public use" without just compensation. Clause (2) of Art. 31 uses the expression "public purposes". It will be seen that the expression "public purposes" in cl. (2) is wider than the expression "public use" in the 5th Amendment. But even the expression "public use" under the American Constitution has been given a wide connotation in the more recent decisions. The expression "public use" according to the older view in America denoted "use by the public", while the newer view in America is that the expression means "useful to the public". Thus, the expression as now understood under the American Constitution is synonymous with the expression "public purpose" which is the phrase used in cl. (2).

Prof. Willis in his book on the Constitutional Law of the United States observes as follows :

> "In order to have an exercise of the power of Eminent Domain private property must be taken for a public use. What is a public use? On this question there have been two view-points. One may be called the older view-point and the other the newer view-point. According to the older view-point, in order to have a public use, there must be a use by the public . . . . . According to the newer view-point, there

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Articles 31, 31A, 31B — Note 19

[1] 1953 Him Pra 5 (6) (Pr 5) (AIR V 40], *Jagat Ram* v. *State of Him. Pra.* (Punjab Requisitioning of Immovable Property (Amendment and Validation) Act (2 of 1951), Ss. 3, 6—East Punjab Requisitioning of Immovable Property (Temporary Powers) Act is not *ultra vires* of the Legislature on the ground of its not limiting requisitioning for public purposes only as under S. 3 of the Punjab Requisitioning of Immovable Property (Amendment and Validation) Act, 1951, the words "for a public purpose" were inserted, and were deemed always to have been inserted in sub-section (1) of S. 2 of the Requisitioning Act. Furthermore, under S. 6 of the same Act every requisition made before its commencement is, unless the contrary be proved, to be presumed to have been made for a public purpose under the Requisitioning Act as so amended.)

1952 Punj 70 (Prs 10, 11) [AIR V 39 C 21] : I L R (1951) Punj 438 (DB), *Shyam Krishen* v. *State of Punjab.* (Punjab Requisitioning of Immovable Property (Temporary Powers) Act (17 of 1947) and the East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948) are void as they stand: AIR 1951 Bom 86, Rel. on.)

[2] 1951 Bom 121 (Prs 4, 5) [A I R V 38 C 23] : I L R (1951) Bom 656 (DB), *Heman* v. *State of Bombay.* (Bombay Land Requisition Act (33 of 1948) authorises requisitioning for any purpose and not merely for public purpose. Hence it contravenes Art. 31 (2).)

> is a public use if the thing taken is useful to the public. This makes public use for Eminent Domain practically synonymous with public purpose for taxation and somewhat like social interest for Police Power . . . . ."[3]

Thus, the notion as to what is a public use is rapidly changing in America. In Cooley's CONSTITUTIONAL LIMITATIONS,[4] VOL. II, pages 1139-40, the following passage occurs :

> "No satisfactory definition of the term 'public use' has ever been achieved by the Courts. Two different theories are presented by the judicial attempts to describe the subjects to which the expression would apply. One theory of 'public use' limits the application to 'employment'—'occupation'. The more liberal and more flexible meaning makes it synonymous with 'public advantage', 'public benefit'. A little investigation will show that any definition attempted would exclude some subjects that property should be included in, and include some subjects that must be excluded from the operation of the words 'public use'. As might be expected, the more limited application of the principle appears in the earlier cases and the more liberal application has been rendered necessary by complex conditions due to recent developments of civilisation and the increasing density of population. In the very nature of the case, modern conditions and the increasing inter-dependence of the different human factors in the progressive complexity of a community, make it necessary for the Government to touch upon and limit individual activities at more points than formerly."

The position is summed up as follows in CORPUS JURIS, VOL. 20, ART. 30 at pages 552 and 553 under the caption "What is a public use ?" :

> "No general definition, of what degree of public good will meet the constitutional requirements for a 'public use', can be framed, as it is in every case a question of public policy. The meaning of the term is flexible and is not confined to what may constitute a public use at any given time but in general it may be said to cover a use affecting the public generally, or any number thereof, as distinguished from particular individuals. Some Courts have gone so far in the direction of a liberal construction as to hold that public use is synonymous with 'public benefit', 'public utility' or 'public advantage' and to authorise the exercise of the power of Eminent Domain to promote such public benefit, etc., especially where the interests involved are of considerable magnitude and it is sought to use the power in order that the natural resources and advantages of a locality may receive the fullest development in view of the general welfare."[5]

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[3] Willis on Constitutional Law of the United States, 1936 Edn., pp. 817—818.

[4] Quoted by Das J. in AIR 1951 Pat 91 (Pr 86) (FB).

[5] 1952 S C 252 (289) [AIR V 39]: 1952 S C R 889, 1020 and 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*. (Passage quoted by Das J.)

(b) Meaning of "public purpose" under the Constitution

As regards the phrase "public purpose", which is the phrase used in cl. (2) of this article, it must include a purpose that is an object or aim in which the general interest of the community, as opposed to the particular interests of the individuals, is directly and vitally concerned.[6] Thus, the test to see whether a purpose is a public purpose is whether it serves the general interests of the community. This test clearly applies although a general definition of public purpose is difficult to be framed. It follows that whatever furthers the general interests of the community as opposed to the particular interests of the individual, must be regarded as a public purpose.[7]

(c) Changing conception of public needs

With the onward march of civilisation, our notions as to the scope of the general interests of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interest of the community. The emphasis is unmistakably shifting from the individual to the community. This modern trend in the social and political philosophy is well reflected and given expression to in our Constitution.[8]

Thus, the expression "public purpose" is not capable of precise definition and has not a rigid meaning. It can only be defined by a process of judicial inclusions and exclusions. In other words, the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinct from the private interest of an individual.[9]

From the above it will be clear that the Courts are not bound to adhere to the meaning attributed to the phrase "public purpose" previously under different social, economic and political conditions. Nor

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6. 1914 P C 20 (21) [AIR V 1] (PC), *Hamabai Framjee Petit* v. *Secy. of State.* (Opinion of Batchelor J. in the Bombay High Court quoted with approval.)
1948 Sind 16 (Prs 4, 5) [AIR V 35 C 5] : I L R (1947) Kar 89, *Karachi Municipality* v. *Sind Province.*

7. 1952 S C 252 (290) (Pr 106) [AIR V 39]: 1952 S C R 889, 1020 and 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

8. 1952 S C 252 (290) (Pr 106) [AIR V 39]: 1952 S C R 889, 1020 and 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (The above is taken from the judgment of Das J.)

9. 1952 S C 252 (311) (Pr 208) [AIR V 39]: 1952 S C R 889, 1020 and 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Per Mahajan J.)
[*See also* 1950 Pat 392 (Pr 31) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.* (The relevant authority or the Court should determine in each case whether the taking is for public purpose.)
(1919) 253 U S 233 (240) : 64 Law Ed 878, *Green* v. *Frazier.* (What is a public purpose has given rise to no little judicial consideration. Courts as a rule have attempted no judicial definition of a public as distinguished from private purpose but have left each case to be determined by its own peculiar circumstances.)
(1896) 164 U S 112 (160) : 41 Law Ed 369, *Fallbrook Irrigation District* v. *Bradley.* (What is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter.)]

is it correct to contend that the expression "public purpose" in cl. (2) of this article must necessarily receive the same meaning that it was given previous to the framing of the Constitution.[10] In other words, the phrase "public purpose" must be construed according to the spirit of the times.[11]

(d) Directive Principles of State Policy

The Directive Principles of State Policy enunciated in Part IV of the Constitution can be taken into consideration in determining whether a particular purpose is a public purpose. The purpose which is in accordance with such Directive Principles of State Policy may be presumed to be a "public purpose".[12]

(e) Party programme

At the same time, "public purpose" must be distinguished from the party programme of the party in power.[13]

(f) "Public policy"

In this connection, the observations in Cooley's CONSTITUTIONAL LIMITATIONS, Vol. II, p. 744, may be referred to. The observations are as follows:

> "The purpose must be public and must have reference to the needs or convenience of the public and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights."[14]

(g) Elements of "public purpose"

The expression "public purpose" involves a double conception. It involves both a negative and a positive element. The negative element consists in the fact that no private interest can be created in the property acquired compulsorily. In other words, the property of *A* cannot be acquired to be given to *B* for his own private purpose, and the

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[10] 1952 S C 252 (Prs 209, 210) [A I R V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

[11] 1952 S C 252 (Pr 52) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*
1953 Madh B 97 (Pr 45) [AIR V 40 C 46] (FB), *Maloji Rao* v. *State of Madhya Bharat.*

[12] 1952 S C 252 (274) (Pr 52) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Preamble to Constitution and Art. 39 referred to — Concentration of big blocks of land in hands of individuals is contrary to principle on which Constitution is based.)
1951 All 674 (Prs 37, 38, 42, 43, 47) [AIR V 38 C 182]: ILR (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Government.* (The acquisition of property sought to be effected by the U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) having for its object the implementation of one or more of the Directive Principles of State Policy, is for a public purpose within the meaning of the Constitution—It is not for the Court to weigh in the balance relative merits of schemes designed to achieve a particular end—The Legislature in its wisdom has chosen one method and unless it can be shown that the judgment of the Legislature is absurd or manifestly unreasonable that judgment must be respected: 327 U S 546 : 90 Law Ed 546, *United States Ex Rel T. V. A.* v. *Welch*, Rel. on.)
[*See also* 1951 Pat 91 (Pr 40) [AIR V 38 C 15]: ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (By enacting Art. 31 (4) at a time when the Bihar Land Reforms Act was pending, the Constituent Assembly has shown that it regards nationalisation of land as a public purpose.)]

[13] 1950 Pat 392 (Prs 32, 76) [A I R V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

[14] 1952 S C 252 (274) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Quoted in this case at p. 274.)

Articles 31, 31A, 31B
Note 19

positive element consists in the fact that the property taken must be for a public benefit.[15]

Thus, compulsory acquisition or requisitioning of property for the benefit of one or more private individuals is *ultra vires.*[16]

But at the same time, not only the present demands of the public but those which may be fairly and reasonably anticipated in regard to a matter in future may also be taken into consideration in determining whether a purpose is a public one.[17]

The phrase "public purpose" does not connote that property when taken must in some way or other be made available to the public at large.[18] In other words, availability of the property for use by the public as such is not necessary to constitute public purpose.[19]

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[15] 1952 S C 252 (Pr 210) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

[16] 1952 Bom 476 (Pr 10) [AIR V 39] (DB), *Bhanjee* v. *State of Bombay.* (Bombay Land Requisition Act (33 of 1948), S. 6 — Benefiting particular individuals is not public purpose.)

1952 Cal 554 (Pr 11) [AIR V 39], *W.B.S.K. Co-op. Cr. Society* v. *Mrs. Banerjee.* (West Bengal Land Development and Planning Act (21 of 1948) — S. 8 is void.)

1952 Pat 166 (Pr 26) [A I R V 39 C 55 (12)] : ILR 30 Pat 1085, *Bankey Singh* v. *Jhingan Singh.* (Article 19 (1) (f) read with cl. (5) thereof and Art. 31, cls. (1), (2) and (3) make it clear that no property can be acquired or taken possession of, nor any restraint, reasonable or otherwise, imposed on the proprietary right of any person in the interest of any individual or individuals—In other words the State cannot deprive a person of his proprietary right or impose a restraint (reasonable or not) on his right of enjoyment to benefit an individual or individuals—It follows, therefore, as a necessary corollary, that if by any legislative enactment property of *A* is transferred to *B*, such enactment cannot be said to be valid and constitutional and must be ignored as if it did not exist, because the Constitution does not empower the Legislature to make such a law.)

(1896) 164 U S 403 (417) : 41 Law Ed 489, *Missauri Pacific R. Co.* v. *Nebraska Ex-Rel. Board of Transportation.* (The taking by a State of private property of one person or corporation without the owner's consent for the private use of another is not due process of law.)

(1850) 53 America Decisions 325 (328) : 3 New York (3 Comstock) 511, *Embury* v. *Conner.* (Taking private property for private use is not authorised by the right of Eminent Domain.)

[17] (1923) 262 U S 700 (707): 67 Law Ed 1186, *Rindge Co.* v. *Los Angeles County.*

(1914) 233 U S 211 (222): 58 Law Ed 924, *Union Lime Co.* v. *Chicago & N.W.R. Co.* (Extension of railroad spur track is public purpose although such extension may be for the present benefit of a single industry which is to bear the initial cost, where, subject to subsequent equitable division of initial costs, the track is at the service of the public and constitutes an integral part of the railroad system.)

[18] 1914 P C 20 (21) [A I R V 1] (PC), *Hamabai Framjee Petit* v. *Secretary of State.*

1952 Mad 756 (761) (Pr 16) [AIR V 39]: ILR (1952) Mad 982 (DB), *P. Thambiran Padayachi* v. *State of Madras.*

1952 Trav Co 522 (529, 530) (Pr 19) : I L R (1952) Trav Co 488 (DB), *Mohammed Noohu* v. *State of Travancore.* (The property need not be transferred for the use of the public — Acquisition of land for housing scheme framed by co-operative society is for public purpose.)

[*See also* (1923) 262 U S 700 (707) : 67 Law Ed 1186, *Rindge Co.* v. *Los Angeles County.* (It is not essential that the entire community or even a considerable portion should directly enjoy or participate in any improvement in order to constitute a public use.)]

'Public purpose' is whatever results in advantage to the public.[20] Even where the acquisition is not made directly and immediately for making the property available for public use and only certain individuals are benefited, the acquisition will be for a public purpose where the individuals are benefited not as individuals but in furtherance of a scheme of public utility.[21] Schemes for construction of houses for clearing slum areas, relieving congestion or housing poor people would be for a public purpose, as they tend to promote social welfare and prosperity.[22] So also, the acquisition of land for constructing irrigation channel would be for a public purpose although the immediate benefit would be for an individual alone.[23] The settlement of refugees from Pakistan is a public purpose for which land may be acquired compulsorily.[24]

(h) Benefit to section of public

It is not necessary that the public benefit aimed at or intended to be secured must apply to the whole community, but it must be for a considerable number.[25] In other words, even if only a section of the public[26] is benefited, still the purpose may be held to be a public one. (See in this connection the meaning of the expression "general public" occurring in cls. (5) and (6) of ART. 19 discussed in NOTE 21 on that article.) Thus, providing house-sites for Panchamas is a public purpose.[27] Similarly, the fact that primarily the people of a particular religion would benefit is not necessarily a proof that the property is not required for public purpose, where otherwise it is clear that it is so required, as for example, where a Dharamsala is built by a municipality for the benefit of the pilgrims near a temple providing proper sanitary facilities, etc.[28]

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[19] 1951 Bom 86 (94) [AIR V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.* (Taking control of textile mills held to be for public purpose.)

[20] 1952 Mad 756 (761) [AIR V 39] : I L R (1952) Mad 982 (DB), *P. Thambiran Padayachi* v. *State of Madras.*

[21] 1952 Mad 756 (761) [AIR V 39] : I L R (1952) Mad 982 (DB), *P. Thambiran Padayachi* v. *State of Madras.*

[22] 1952 Mad 756 (761) [AIR V 39] : I L R (1952) Mad 982 (DB), *P. Thambiran Padayachi* v. *State of Madras.* (Acquisition for purpose of building scheme promoted by co-operative society was held to be valid : (1896) 164 U S 112 : 41 Law Ed 369, *Fallbrook Irrigation District* v. *Bradley*; 270 N Y P 333 : 105 A L R 905, *New York City Housing Authority* v. *Muller*; A I R 1914 P C 20; AIR 1925 Mad 837; AIR 1930 Mad 798, Rel. on.)

1952 Trav Co 522 (529, 530) (Pr 19) [AIR V 39] : I L R (1952) Trav Co 488 (DB), *Mohammed Noohu* v. *State of Travancore.* (Acquisition of land for housing scheme framed by a co-operative society for providing accommodation for poor people (fisher folk) living in insanitary surroundings is for public purpose.)

[23] 1953 Mad 537 (540) [AIR V 40 C 202] : I L R (1953) Mad 551 (DB), *Belegal Gundachar* v. *State of Madras.* (Acquisition for extension of irrigation is for public purpose—AIR 1952 Mad 756, Foll.)

[24] 1952 Cal 857 (858) (Pr 4) [AIR V 39], *Hurdeodas* v. *West Bengal State.* (An acquisition of property under the W. B. Land Development and Planning Act for the settlement of refugees who have migrated into the Province of West Bengal is an acquisition for a public purpose, although the property acquired happens to belong to a refugee.)

1952 Cal 679 (681) (Pr 4) [A I R V 39], *Aswinikumar* v. *State of West Bengal.* (Do.—AIR 1950 S C 222 and AIR 1951 Cal 97, Foll.)

[25] Willis on Constitutional Law of the United States, 1936 Edn., p. 818.

[26] 1952 Trav Co 522 (529, 530) (Pr 19) [A I R V 39] : I L R (1952) Trav Co 488 (DB), *Mahommed Noohu* v. *State of Travancore.*

1931 Mad 361 (362) [AIR V 18], *Ramaswami* v. *Secy. of State.*

(i) Purposes of Union or State

The purposes of a State or the Union are obviously public purposes.[29] In this connection, reference may be made to Entry 33 of LIST 1, Entry 36 of LIST 2 and Entry 42 of LIST 3 of SCH. VII, which expressly refer to such purposes.

(j) Raising funds for Treasury

Raising funds for the Treasury is not a public purpose and private property cannot be compulsorily acquired for such a purpose.[30] Mahajan, J., observed as follows in this connection in the *State of Bihar* v. *Kameshawar Singh*[31]:

> "It is a well accepted proposition of law that property of individuals cannot be appropriated by the State under the power of compulsory acquisition for the mere purpose of adding to the revenues of the State. 'The principle of compulsory acquisition of property' says Cooley in Vol. II, p. 113, CONSTITUTIONAL LIMITATIONS, 'is founded on the superior claims of the whole community over an individual citizen but is applicable only in those cases

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27. 1931 Mad 361 (362) [A I R V 18], *Ramaswami* v. *Secy. of State.* (AIR 1925 Mad 837; AIR 1930 Mad 798 and AIR 1930 Mad 248, Rel. on.)

1930 Mad 798 (799) [AIR V 17], *Secy. of State* v. *Gopala Aiyar.*

[*See also* 1952 Mad 756 (761) (Pr 16) [A I R V 39] : I L R (1952) Mad 982 (DB), *P. Thambiran Padayachi* v. *State of Madras.* (Schemes for construction of houses, for clearing slum areas, relieving congestion, and housing poor people are for a public purpose.)]

28. 1922 P C 333 (334, 335) [AIR V 9] (P C), *A. C. Banerjee* v. *Corporation of Calcutta.* (Where the Municipality wanted to acquire land for Dharmashala near Kali's temple as well as for widening the road : *Held* that what Municipality had to consider was not the religious beliefs and purposes of those assembling in large numbers but what was the situation of the city in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation and the prevention of danger and disease. Any enlightened Municipality would carefully attend to these questions and endeavour to avoid the evils referred to—This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made.)

29. 1952 Madh B 57 (Pr 82) [AIR V 39 C 25] : ILR (1952) Madh B 178 (FB), *Ram Dubey* v. *Government of Madhya Bharat.*

1951 Pat 91 (Prs 37, 40, 89) [AIR V 38 C 15] : I L R 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar*. (Taking into consideration Entry 33 of the Union List, 36 of the State List and 42 of the Concurrent List, the intention of the Constitution appears to be to give the term "public purpose" a wide and comprehensive meaning.)

30. 1952 S C 252 (Pr 54) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

31. 1952 S C 252 (275) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C).

(1943) 319 U S 266 (284) : 87 Law Ed 1390 *United States Ex. Rel. T. V. A.* v. *Powelson.*

where private property is wanted for public use, or demanded by the public welfare and that no instance is known in which it has been taken for the mere purpose of raising a revenue by sale or otherwise and the exercise of such a power is utterly destructive of individual right. Taking money under the right of Eminent Domain, when it must be compensated in money afterwards, is nothing more or less than a forced loan. Money or that which in ordinary use passes as such and which the Government may reach by taxation, and 'also rights in action which can only be available when made to produce money', cannot be taken under this power'."

(k) Choses in action

There is, however, a difference of opinion on the question whether choses in action can be compulsorily acquired as "property." This question is discussed in NOTE 25.

(l) Abolition of Estates

We have so far discussed the general principles as to what will constitute a public purpose. We shall now consider some instances relative to the question. The most prominent and recent instance has been the case of the batch of Zamindari Abolition Acts, the validity of which has been considered by the Supreme Court in *State of Bihar* v. *Kameshwar Singh.*[32] The general object and purpose of these Acts were summarised by Patanjali Sastri, C. J., as follows :

> "The common aim of these statutes generally speaking is to abolish zamindaris and other proprietary estates and tenures in the three States aforesaid (Bihar, Madhya Pradesh and Uttar Pradesh) so as to eliminate the intermediaries by means of compulsory acquisition of their rights and interests and to bring the raiyats and other occupants of lands in those areas into direct relation with the Government."

All these Acts have been held to be for public purpose. As stated already, the aim set forth in the Directive Principles of the State Policy in Part IV of the Constitution may be taken as a guide for determining what will constitute a public purpose. And if a purpose comes within the ambit of those principles, it may be safely regarded as a public purpose. The above-mentioned Zamindari Abolition Acts eminently satisfy the test from this point of view. Other Zamindari Abolition Acts in addition to those in question in the case before the Supreme Court have also been held to be for public purposes on the ground that the zamindari abolition is a public purpose.[33] The nationalisation of land is similarly a public purpose.[34] But the provisions contained in S. 4 (b) of the Bihar Land Reforms Act, 1950, relating to the acquisition of arrears of rent of zamindaris, and S. 23 (1) (f), providing that in computing the compensation payable to the land-holders whose estates were compulsorily acquired under the Bihar Land Reforms Act, the costs of repairs of village irrigation works should be deducted, were held not to be for public purpose.[35]

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[32] 1952 S C 252 (274, 290, 291) (Prs 52, 105, 106, 107) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : I L R 31 Pat 565 (S C).

[33] For example see 1952 Madh B 57 (Pr 82) [A I R V 39 C 25] : I L R (1952) Madh B 178 (FB), *Ram Dubey* v. *Government of Madhya Bharat.* (Madhya Bharat Zamindari Abolition Act is for public purpose.)

[34] 1951 Pat 91 (Pr 40) [AIR V 38 C 15] : I L R 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

(m) Other instances

Providing house-sites for Harijans[36] is a public purpose as already mentioned. Similarly, the acquisition of land for settlement of refugees is also an acquisition for a public purpose.[37]

The provision of quarters for Government officials is a public purpose,[38] as providing suitable quarters for public officials will promote public benefit by helping the Government to maintain the efficiency of its servants. So also, the requisitioning of a house for the residence of a Minister is for a public purpose, as it is in the public interest that Ministers of a State should have suitable accommodation, as they cannot be expected to give of their best if they have to live in discomfort and squalor.[39] Similarly, providing accommodation for a public office whether of the Central or a State or of a Local Authority is a public purpose.[40]

The controlling of the letting out of accommodation and the prevention of eviction of tenants and rack-renting are public purposes when the assumption of powers by the Government in such matters is necessitated by a shortage of accommodation.[41]

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35. 1952 S C 252 (275) (Pr 53) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

36. 1952 Mad 252 (Pr 2) [AIR V 39 C 105 (2)] (DB), *Satyavathi* v. *State of Madras.* (Provision for house-sites for the houseless section of the community (Adi-Andhras).)

1930 Mad 798 (799, 800) [AIR V 17], *Secy. of State* v. *Gopala Aiyar.* (House sites for Panchamas and other coolies of Tanjore District—If the effect of the Government order is to enable it to acquire a particular house-site for a particular individual, it is only a matter of detail, which does not affect the general question of the purpose being a public one : A I R 1914 P C 20, Foll.)

37. 1951 Cal 97 (Pr 15) [AIR V 38 C 28], *Md. Safi* v. *State of West Bengal.* (The acquisition of land for settlement of refugees as provided in the West Bengal Land Development and Planning Act (21 of 1948) — There can be no doubt that the public or the inhabitants of the State of West Bengal are benefited by accommodating the refugees and confining their activities in a suitable locality: AIR 1922 PC 333 (PC) and AIR 1951 Cal 346, Rel. on.)

38. 1914 PC 20 (21, 22) [AIR V 1] (PC), *Hamabai Framjee Petit* v. *Secy. of State.* (The resumption of lands for erecting building for the use of Government officials is for public purpose as it will redound to public benefit by helping the Government to maintain the efficiency of its servants.)

1953 Cal 223 (225) (Pr 7) [AIR V 40 C 77], *Abdul Hamid* v. *State of West Bengal.* (Requisition for employee of State Government, whether refugee or otherwise, is for public purpose.)

1953 Mad 252 (256) [AIR V 40 C 95], *C. Nataraja Mudaliar* v. *Madras State.*

1951 Nag 33 (Pr 14) [AIR V 38 C 11] : ILR (1951) Nag 791 (DB), *Manohar Ramkrishna* v. *G. G. Desai.*

39. 1952 Cal 65 (Pr 7) [AIR V 39 C 21] (DB), *Sudhindra Nath* v. *Sailendra Nath.*

40. 1951 Nag 33 (Pr 14) [AIR V 38 C 11] : ILR (1951) Nag 791 (DB), *Manohar Ramkrishna* v. *G. G. Desai.*

41. 1952 All 703 (705) (Pr 6) [A I R V 39] (FB), *Raman Das* v. *State of Uttar Pradesh.*

Section 52A of the Insurance Act, 1938, and the connected provisions under which the management of Insurance Companies can be assumed by the Government through an Administrator, are designed for the achievement of a public purpose in that the legislation seeks thereby to protect the interests of the policy-holders and thus indirectly of the public in general.[42]

The undermentioned cases[43] provide further instances of public purpose. The taking of property for a highway is obviously for a public purpose.[44] So also irrigation of arid lands is a public purpose.[45] Land taken in a city for public parks and squares by authority of law where advantageous to the public for recreation, health, or business is taken for a public use.[46]

(n) Construction of Act to see if it is for public purpose

There is no presumption that an Act for compulsory acquisition of private property is for a public purpose.[47] When the Act itself says or clearly indicates that it is for a public purpose, that would *prima facie* show that it is for a public purpose.[48] The preamble of an Act may be looked at for this purpose.[49]

[*See* 1952 Bom 476 (Pr 5) [A I R V 39] (DB), *Bhanjee* v. *State of Bombay.* (Distributing available accommodation by applying process of requisitioning must be on an equitable basis; otherwise it will not be for public purpose.)]

42. 1952 Punj 9 (15) (Pr 30) [AIR V 39 C 2] : ILR (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*

43. 1953 Raj 173 (176) (Pr 10) [A I R V 40 C 61] (DB), *Lalsingh* v. *State of Rajasthan.* (Taking possession of surface land for working mines is for "public purpose".)

1951 Mad 930 (Pr 15) [AIR V 38 C 329](DB), *M. B. Namazi* v. *Deyuty Custodian of Evacuee Property, Madras.* (Administration of evacuee property.)

1948 Sind 16 (Prs 4, 5) (AIR V 35 C 5] : ILR (1947) Kar 89, *Karachi Municipality* v. *Sind Province.* (Salt manufacture — Increased production of salt, a vital commodity for life of the community.)

(1896) 40 Law Ed 576 (581) : 160 U S 668 (682), *United States* v. *Gettysburg Electric R. Co.* (The preservation of the battlefield of Gettysburg with the leading tactical positions properly marked with tablets, is a public purpose.)

44. (1922) 262 U S 700(706):67 Law Ed 1186, *Rindge Co.* v. *Los Angeles County.*

45. (1896) 164 U S 112 (160) : 41 Law Ed 369, *Fallbrook Irrigation District* v. *Bradley.*

46. (1893) 37 Law Ed 170(184) : 147 U S 282 (297), *Shoemaker* v. *United States.*

47. 1950 Pat 392 (Pr 32) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

48. 1950 Pat 392 (Pr 32) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

49. 1952 All 703 (705) (Pr 6) [A I R V 39] (FB), *Raman Das* v. *State of Uttar Pradesh.*

1952 Sau 114 (Prs 14, 17) [A I R V 39] (SB), *Kalikakumarsinhji* v. *Saurashtra State.* (The object of the Saurashtra Land Reforms Act, 1951, as the preamble says, is the improvement of land revenue administration and the ultimate doing away with the Girasdari system and making the tenants the occupants of the land held by them. Payment of compensation to the Girasdars for the extinguishment of their rights is contemplated for that purpose. The preamble makes it clear that the Act is for a public purpose and this inference is reinforced by the various provisions of the Act : AIR 1952 S C 252 (SC), Foll.)

In *Rex* v. *Basudeva*,[50] a decision of the late Federal Court of India, Patanjali Sastri, J., observed as follows :

> "Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of *vires* where the Legislature concerned has powers to legislate on certain specified matters only. The Court must still see in such cases whether the subject-matter of the impugned legislation is really within those powers."

The above observations of the learned Judge show that, although the preamble is not conclusive, it may be taken into consideration by the Court in determining whether an Act is for a public purpose. But it is not necessary that the Act authorising compulsory acquisition of property must itself state in so many words that it is for a public purpose.[51]

As observed by Mahajan J., in *State of Bihar* v. *Kameshwar Singh*[52]: "It is unnecessary to state in express terms in the statute itself the precise purpose for which property is being taken, provided from the whole tenor and intendment of the Act it could be gathered that the property was being acquired either for the purpose of the State or for purposes of the public and that the intention was to benefit the community at large."[53]

In that case, while considering whether the Bihar Land Reforms Act (30 of 1950) was for a public purpose, his Lordship observed as follows :

> "It may be conceded that the present statute does not disclose the Legislature's mind as to what it would ultimately do after the estates are vested in the State Government. Perhaps the State Government has not yet made up its mind how and for what

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[50] 1950 F C 67(69) [AIR V 37 C 6] : 1949 F C R 657 : 51 Cri L Jour 1011 (FC).

[51] 1952 S C 252 (Pr 52) [A I R V 39] : 1952 S C R 889, 1020, 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.

1952 Punj 70 (Prs 10, 11) [AIR V 39 C 21]:ILR (1951) Punj 438, *Shyam Krishen* v. *State of Punjab*.

[52] 1952 S C 252 (Pr 52) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC).

[53] 1953 Madh B 97 (Prs 3, 99) [A I R V 40 C 46] (FB), *Malojirao* v. *State of Madhya Bharat*. (Although the purpose of the M. B. Act 28 of 1951 is not specified, there is no doubt that it is inspired and dominated by a public purpose. It is obvious that the object of the Act is to extinguish the interests of the intermediary and to bring the actual cultivators into direct relations with the State Government and thereby to avoid concentration of wealth and means of production to the common detriment as laid down in Art. 39 (b) and (c) of the Constitution. It cannot be denied, therefore, that there is a public purpose for the acquisition of jagir lands—From the whole tenor and intendment of the Act, it can fairly be inferred that the amelioration of the peasantry living in jagir areas and the emancipation of this class of sub-human serfs from the medieval and archaic bondage which is non-conducive to the general interests of the community is the main purpose behind the impugned Act.)

purposes the lands and tenures acquired will be utilised. The statute provides in S. 34 for the establishment of a Land Commission whose function it will be to advise the Government as to its agrarian policy. Be that as it may, it seems to me that in spite of the criticism levelled against the Act by the learned counsel, it cannot be said that the Act would fall because it fails to postulate a public purpose. The Act is intituled the Bihar Land Reforms Act, 1950. The preamble of the Constitution says that India has been constituted into a SOVEREIGN DEMOCRATIC REPUBLIC to secure to all its citizens justice, social, economic and political. Article 39 of the Directive Principles of State Policy states as follows :

> 'The State shall in particular direct its policy towards securing, that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.'

"Now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act, therefore, is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible. In other words, shortly put, the purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community as advised. The Legislature is the best judge of what is good for the community by whose suffrage it comes into existence and it is not possible for this Court to say that there was no public purpose behind the acquisition contemplated by the impugned statute. The purpose of the statute certainly is in accordance with the letter and spirit of the Constitution of India."

The above passage shows not only that in considering what is a public purpose the objects of State Policy as enunciated in Part IV of the Constitution can be taken into consideration, as already stated in the former part of this note, but also that the object, tenor and intendment of the Act are to be gathered by a consideration of the Act as a whole, and the mere fact that there is no specific statement in the Act as to what its purpose is or that it is for a public purpose, will not make it other than one for a public purpose.

It has also to be remembered that in considering whether an enactment authorising the compulsory acquisition of property is for a public purpose, it is entirely a wrong approach to pick out an item out of the whole scheme of land reforms contemplated by the Act and say that it is not supported by public purpose. The scheme as a whole has to be taken into consideration for determining if the Act is for a public purpose.[54]

But whether as a result of an express statement in the Act itself or in the preamble to the Act or by consideration of the Act as a whole, it must be clear from the *Act itself* that it is meant for a public purpose.[55]

(o) Exercise of power to condemn

Where authority is conferred by law to take property for a particular public purpose, the authority must be used *bona fide* for that purpose and for none other.[56]

But the common law rule, that the statutory powers to condemn should be given a restricted interpretation, is inapplicable where the statute itself expressly provides that it shall be liberally construed to carry out the purposes of the Legislature.[57]

Although it is an essential condition for the validity of a law authorising the compulsory acquisition of private property by the State that it must be for a public purpose, yet the actual task of condemnation may be delegated by the Legislature to the executive, or a corporation, or other authority.[58] In peculiar circumstances even a private individual may be entitled under the law to condemn property.[59] Where an Act, under which the compulsory acquisition or requisitioning of property is authorised, so requires, the order of acquisition or requisitioning should state what is the public purpose for which the property is being acquired or requisitioned.[60]

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[54] 1952 S C 252 (Pr 107) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

[55] *See* 1952 Punj 70 (Prs 10, 11) [AIR V 39 C 21] : I L R (1951) Punj 438 (DB), *Shyam Krishen* v. *State of Punjab.* ("If in opinion of Provincial Government it is necessary or expedient" to requisition — The words do not necessarily imply the necessity of public purpose.)]

[56] (1906) 1 Ch 464 (476), *J. L. Denman & Co. Ltd.* v. *Westminister Corporation.* (Authority to take land for widening streets.)

[*See also* (1930) 100 L J K B 306 (310) : (1930) 2 K B 98 (145), *Minister of Health* v. *Rex.* (Housing Act, 1925—Improvement scheme promulgated by local authority—If the scheme conflicted with the Act it would have to give way —This is so notwithstanding the provision that on confirmation by Minister of Health it should have the same effect as if it was part of the Act—Opinion of Lord Herschell in *Institute of Patent Agents* v. *Lockwood,* (1894) 63 L J P C 74 : 1894 A C 347, Rel. on.—Rule made under Act but conflicting with Act will give way before Act though it is to be treated as part of the Act.)]

[57] (1945) 327 U S 546 (551) : 90 Law Ed 843, *United States Ex. Rel T. V. A.* v. *Welch.*

[58] (1872) 15 Am Rep. 13 (18), *Eastern Railroad Co.* v. *Boston and Maine Railroad.*

[59] (1905) 49 Law Ed 1085 (1087, 1088) : 198 U S 361 (367, 368), *Clark* v. *Nash.* (Peculiar local circumstances of Utah justify as authorising condemnation for public use a statute under which an individual landowner may condemn a right of way across his neighbour's land for the enlargement of an irrigation ditch therein in order to enable him to obtain water from a stream, in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.)

[60] 1952 Bom 16 (Pr 27) [A I R V 39 C 2], *State of Bombay* v. *Heman Santilal.*

(p) Question of "public purpose," whether justiciable

The next question to be dealt with is about the power of the Court to examine whether an Act authorising the compulsory acquisition of private property is for a public purpose. In other words, the question is how far the existence of a public purpose for an Act authorising the compulsory acquisition of private property by the State is a justiciable matter. Inasmuch as the Constitution requires that such an Act must be for a public purpose and the validity of such an Act depends upon its being for a public purpose, and the Courts are entitled to see whether the Act is valid or not, the Courts are necessarily entitled to see whether the Act is for a public purpose. This means that the Courts can pronounce their opinion on the question whether a purpose for which a certain Act for compulsory acquisition of property professes to be passed is a public purpose and also whether there is any relevance and connection between the purpose for which an Act professes to have been passed and the acquisition of any property which it may direct or authorise.[61] In other words, the Courts are entitled to scrutinise the purpose of an Act for compulsory acquisition or requisitioning of property and to see whether such purpose is a public purpose.[62] So also the question whether the acquisition or requisitioning in any case is for a public purpose is a justiciable one.[63]

At the same time, the opinion of the Legislature that a certain purpose is a public purpose ought to be given due weight by the Court and a purpose which has been considered by the Legislature to be a public purpose may *prima facie* be accepted as such by Court, although the opinion of the Legislature will not be conclusive.[64]

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61. 1952 S C 252 (Pr 128) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

62. 1952 Cal 554 (556) (Pr 13) [A I R V 39] (DB), *W. B. S. K. Co-op. Cr. Society* v. *Mrs. Banerjee.*

1950 Pat 392 (Prs 32, 76) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.* (Legislature not absolute judge of public purpose.)

(1923) 262 U S 700 (705) : 67 Law Ed 1186, *Rindge Co.* v. *Los Angeles County.*

(1893) 37 Law Ed 170 (184) : 147 U S 282 (298), *Shoemaker* v. *United States.*

63. 1953 Cal 223 (225) (Pr 6) [A I R V 40 C 77], *Abdul Hamid* v. *State of West Bengal.* (AIR 1951 Cal 111, Foll.)

('53) 91 Cal L Jour 347 (352), *Radharaman Das* v. *State of West Bengal.* (A I R 1951 Bom 404, Foll.)

Note :—('53) 57 Cal W N 719, *Srinivas* v. *State of West Bengal,* which overrules A I R 1953 Cal 223 and ('53) 57 Cal W N 342, does not affect the above point, as the point on which the two cases are overruled is one arising purely with reference to West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947.

64. 1950 Pat 392 (Pr 32) [AIR V 37 C 108] : I L R 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

(1945) 327 U S 546 (551) : 90 Law Ed 843, *United States Ex Rel T. V. A.* v. *Welch.*

(1930) 281 U S 439 (446) : 74 Law Ed 950, *Cincinnati* v. *Vester.* (In deciding such question, the Court should have appropriate regard to diversity of local conditions and consider with great respect legislative declaration and, in particular, judgments of State Courts as to uses considered to be public in the light of local exigencies.)

Similarly, where an Act authorises acquisition of property for a public purpose but does not specify what such purpose is and in the exercise of its powers under the Act the Government acquires certain property as being required for a public purpose, the Court ought to attach due weight to the opinion of the Government.[65]

In *Hamabai Framjee Petit* v. *Secretary of State for India*,[66] Lord Dunedin, delivering the judgment of the Judicial Committee of the Privy Council, observed as follows:

> "That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. *Prima facie* the Government are good judges of that. They are not absolute judges. They cannot say: "*Sic volo sic jubeo.*" But at least a Court would not easily hold them to be wrong."

But although the question whether a purpose for which property is compulsorily acquired or taken possession of by the Government is a public purpose is justiciable, this only means that the Court can see whether the purpose is one for which the property *can* be compulsorily acquired or taken possession of by the Government. Whether it is *necessary* to accomplish the public purpose by the compulsory acquisition of a particular property or of any property is not a matter for the *Court* but is a matter which is within the exclusive jurisdiction of the Legislature or the Executive acting under powers vested in it by law.[67]

In *Province of Bombay* v. *Khushaldas Advani*,[68] Fazl Ali, J., observed as follows:

> "It is well settled that where an Act or Regulation commits to an executive authority the decision of what is necessary or expedient and that authority makes a decision, it is not competent to the Courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith . . . . . In other

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(1925) 70 Law Ed 162 (165):269 U S 55, *Old Dominion Land Co.* v. *United States of America*. (Where the Legislature has declared the purpose to be a public purpose by implication, if not by express words, its decision is entitled to deference unless it is shown to involve an impossibility—Cited in AIR 1951 Pat 91.)

(1896) 164 U S 112 (160) : 41 Law Ed 369, *Falibrook Irrigation District* v. *Bradley*.

[65] 1914 P C 20 (21) [AIR V 1] (PC), *Hamabai Framjee Petit* v. *Secy. of State*.

[66] 1914 P C 20 (21) [AIR V 1] (PC).

[67] (1923) 67 Law Ed 1186 (1193): 262 U S 700 (709), *Rindge Co.* v. *Los Angeles County*.

(1913) 57 Law Ed 1063 (1076) : 229 U S 53, *United States* v. *Chandler Dunbar Water Power Company*.

(1906) 50 Law Ed 581 (583) : 200 U S 527 (531), *Strickley* v. *High Land Gold Mine Co.*

(1872) 15 Am Rep 13 (18), *Eastern Railroad Co.* v. *Boston and Maine Railroad*.

[68] 1950 S C 222 (229) (Pr 23) [AIR V 37 C 18] : 1950 S C R 621 (SC). (It was however held that a writ of *certiorari* could not issue in the case as the order of the State Government requisitioning the premises was an administrative order—A suit would have lain for contesting the validity of the order.)

words, if there is a public purpose the mere fact that to the Court or to any other person, the requisition of the premises does not appear necessary or expedient in the public interest, will not make the requisition bad. But the same cannot be said with regard to the decision of the Provincial Government as to the existence of a public purpose, which is the foundation of its power and is a condition precedent to its exercise. If the executive authority requisitions land under S. 3 (Bombay Land Requisition Ordinance, 5 of 1947) without there being any public purpose in existence, its action is a nullity and the position in law is as if the authority did not act under S. 3 at all. Such being the legal position, a person whose right is said to have been affected can always go to a proper Court and claim a declaration that in law his right cannot be affected."

In *Eastern Railroad Company* v. *Boston Maine Railroad*,[69] Colt, J., of the Massachusetts Supreme Court observed as follows :

> "The purposes of Government would be so far defeated, if any single owner, corporation or individual could in this respect control its action. It belongs exclusively to the Legislature to determine whether the public benefit to be secured is sufficient to warrant the taking; and this is not a judicial question. The necessity may be left to the adjudication of designated officers or tribunals; but when not so delegated, it may be declared by the Legislature itself. The right itself may be delegated to corporate bodies public or private; and when the enjoyment of two public rights would to some extent interfere, it is, in the language of Chief Justice Shaw, 'for the Legislature to determine which shall yield and to what extent, and whether wholly or in part only, to the other; and such question will ordinarily be determined by the Legislature according to their conviction of the greater preponderance of public necessity and convenience'."

Similarly, the extent to which property must be compulsorily acquired or taken possession of for a public purpose is also a matter within the exclusive jurisdiction of the Legislature.[70] Further, as the quotation from *Eastern Railroad Company* v. *Boston Maine Railroad* above given shows, when there is a conflict between two public purposes, it is for the Legislature to prescribe which public purpose is to be preferred in the matter of compulsory acquisition of property.[71]

(q) Provision excluding jurisdiction of Court —Validity

It has been seen that when the Legislature declares a certain purpose to be a public purpose, or the Executive acting under statutory powers declares a certain purpose to be a public purpose, the Court can see whether the alleged public purpose is really a public purpose. The question arises whether an Act of the Legislature can provide that the decision of the Executive that certain property is required for a public purpose or that certain purpose is a public purpose shall be final and conclusive and shall not be liable to be questioned before a Court of law. This question arises because such a provision is very often found in legislative enactments relating to the compulsory acquisition of property.

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[69] (1872) 15 Am Rep 13 (18).

[70] (1895) 40 Law Ed 576 (582) : 160 U S 668 (685), *United States* v. *Gettysburg Electric R. Co.*
(1893) 37 Law Ed 170 (184) : 147 U S 282 (298), *Shoemaker* v. *United States.*

[71] (1896) 40 Law Ed 576 (582) : 160 U S 668 (685), *United States* v. *Gettysburg Electric R. Co.* (Congress has power to take land devoted to one public use for another and different public use upon making just compensation.)
(1872) 15 Am Rep 13 (18), *Eastern Railroad Co.* v. *Boston and Maine Railroad.*

For instance, in S. 6 (3) of the Land Acquisition Act, 1894, it is provided as follows: —"The said declaration shall be conclusive evidence that the land is needed for a public purpose . . . ." The words "said declaration" refer to the declaration which the State Government is authorised to make under S. 6 (1) of the same Act, if it is satisfied that any particular land is needed for a public purpose. It is settled law that so far as the provisions of S. 6 (3) of the Land Acquisition Act are concerned, the declaration by the Government that a certain land is required for a public purpose shall be conclusive and binding on Courts and cannot be questioned in a Court of law.[72] Similar provisions are also contained in other enactments and it has been held that the opinion of the Government that property is required for a public purpose cannot be called in question before a Court of law in such cases.[73]

In *Province of Bombay* v. *Khushaldas Advani*,[74] the Supreme Court held that no writ of *certiorari* could be issued against the order of the State Government under the Bombay Land Requisition Ordinance

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[72] 1926 Mad 1099 (1100) [AIR V 13] (DB), *Ponnaia* v. *Secy. of State.*
1925 Mad 837 (840) [AIR V 12], *Veeraraghavachariar* v. *Secy. of State.*
1923 All 523 (524) [AIR V 10] (DB), *Secretary of State* v. *Akbar Ali.*
1921 Cal 159 (160) [AIR V 8], *Manick Chand Mahata* v. *Corporation of Calcutta.*
('03) ILR 30 Cal 36 (77), *Ezra* v. *The Secretary of State.*

[73] ('50) 54 Cal W N 855 (873, 874) (SB), *Patri Shaw* v. *R. N. Roy.* (The Legislature has selected the Government to come to a decision and no Court can investigate the adequacy of its reasons. If the Government acts in good faith it is not the concern of the Court to ascertain what facts there may have been which actuated the Government in what it did. An order of requisition of a property made by the Provincial Government under S. 25 (1) of the West Bengal Security Act is an executive order and the Court has no power at all to enquire into the reasonableness, the policy, the sense or any other aspect of the matter provided the Government has acted honestly and in good faith.)
1951 Cal 97 (Pr 14) [AIR V 38 C 28], *Md. Safi* v. *State of West Bengal.* (The decision of the Government as to the "public purpose" is conclusive and cannot be questioned in a Court of law. The use of the words : 'If it is satisfied' in S. 4 of West Bengal Land Development and Planning Act (21 of 1948) makes the decision unchallengeable : A I R 1951 Cal 294; 54 Cal W N 855 (SB) and AIR 1950 S C 222 (SC), Rel. on.)
[*See also* (1937) 3 All E R 305 (307):157 L T 67, *Re. Greenwich Housing Order.* (Housing Act, 1930, S. 1 (3), gave local authority absolute right to secure clearance of area in either of two ways, whether by clearance order or compulsory purchase orders.)
(1925) 269 U S 55 (66, 67) : 70 Law Ed 162, *Old Dominion Land Co..* v. *United States.*
(1919) 121 L T 1 (2) : 88 L J P C 52, *Wijeyesekera* v. *Festing.* (Ceylon Acquisition of Land Ordinance — Decision of Governor in Council — Finality — It connot be contended that the land is not needed for public purpose.)]

[74] 1950 S C 222 (Prs 10, 11) [AIR V 37 C 18] : 1950 S C R 621 (S C).

(5 of 1947) requisitioning certain property on the ground that the purpose for which the property was requisitioned was not a public purpose. Kania, C. J., observed as follows :

> "The decision of the Provincial Government as to the public purpose contains no judicial element in it. Just as the Government has to see that its order of requisition is not made in respect of land which is used for a public religious worship or is not in respect of land used for a purpose specified by the Provincial Government in the official gazette as mentioned in the proviso to S. 3, or that the premises are vacant on the date when the notification was issued (as mentioned in S. 4 of the Ordinance), the Government has to decide whether a particular object for which it is suggested that the land should be requisitioned was a public purpose . . . . There appears nothing in the Ordinance to show that in arriving at its decision on this point the Provincial Government has to act judicially. Sections 10 and 12 which were relied upon to show that the decision was quasi-judicial, in my opinion, do not support the plea. The enquiries mentioned in those sections are only permissive and the Government is not obliged to make them. Moreover, they do not relate to the purpose for which the land may be required. They are in respect of the condition of the land and such other matters affecting land. Every decision of the Government followed by the exercise of certain power given to it by any law is not necessarily judicial or quasi-judicial . . . . . . The decision of the Provincial Government about public purpose is, therefore, an administrative act. If the Government erroneously decides that fact, it is open to question in a Court of law in a regular suit just as its action on its decision on the facts mentioned in the proviso to S. 3 and in S. 4 is open to question in a similar way . . . . . As in my opinion the decision of the Provincial Government about public purpose is not a judicial or quasi-judicial decision, there is no scope for an application for a writ of *certiorari*."

It will be seen that in the above decisions the *validity* of a provision excluding the jurisdiction of the Court was not considered.

The provisions of sub-section (2) of S. 299 of the Government of India Act, 1935, were exactly similar to those of cl. (2) of this article and the validity of such a legislative provision making the decision of the Executive as to the existence of public purpose conclusive and binding on a Court of law, could have been questioned under S. 299 of the Government of India Act in the same way as it can be questioned under cl. (2) of this article. But there is no decision on the point under S. 299 of the Government of India Act.

The question has been specifically raised in a decision of the Calcutta High Court in *West Bengal Settlement Kanungoe Co-operative Credit Society Ltd.* v. *Mrs. Bella Bannerjee,*[75] and it has been held that such a provision excluding the jurisdiction of the Court and making the decision of the executive as to the existence of a public purpose binding and conclusive on a Court of law is *ultra vires* under cl. (2) of this article. The question in that case was about the validity of S. 8 of West Bengal Land Development and Planning Act (21 of 1948). Under that section the declaration of Government as to the nature of the purpose for which the acquisition was made was conclusive. The opening portion of the section was in the following terms : "A declaration under S. 6 shall be conclusive evidence that the land in respect of which the declaration is made is needed for a public purpose." It was held that the section was *ultra vires*. Harries, C. J., in delivering the judgment of the Court observed as follows on this point :

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[75] 1952 Cal 554 (556) [AIR V 39] (DB).

> "The Advocate-General contended that the purposes for which compulsory acquisition of property was allowed by a statute were not justiciable but it seems to me clear from cl. (2) of ART. 31 and the three items in the three lists of the 7th Schedule to which I have referred (Entry 33 LIST 1, Entry 36 LIST 2 and Entry 42 LIST 3) that it is open to Courts to scrutinise Acts empowering Government to acquire property compulsorily and to consider whether or not such Acts go beyond the powers given to the various Legislatures by the Constitution. No Act can be passed which permits compulsory acquisition of a citizen's property for purposes other than public and it appears to me that the Courts must see that no Act allows acquisition beyond that permitted by the Constitution.
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> "There can, I think, be no doubt that the effect of the opening words of S. 8 of this Act is to oust the jurisdiction of the Court when the question arises as to whether an acquisition was made for a public purpose or not. The declaration made by the Government would be put forward as conclusive and therefore a Court could not enter into the matter. The learned Advocate-General pointed out that making the declaration conclusive could have little or no effect, because a dishonest declaration could be ignored by any Court. A power exercised *mala fide* is no exercise of that power and it has constantly been held by their Lordships of the Privy Council and by Courts in India that an abuse of power is no exercise of the power in question. No difficulty could, therefore, arise over a *mala fide* declaration.
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> "A declaration, however, made by the Government may not be *mala fide* though it may be erroneous. It is practically impossible to define the phrase "public purpose", though it is frequently a matter of no difficulty to decide whether a particular purpose is public or not. There may, however, be borderline cases and the views of Government and of a Court of justice might not coincide. Government might honestly believe that a particular purpose was public and make a declaration accordingly. On the other hand, a Court might hold that such a purpose was not public. But in such a case, the hands of the Court would be tied because of the provision in S. 8 that the declaration as to the purpose made by the Government was conclusive. If that provision bound the Court it could not enter into the question at all and hold that upon the true facts that the

acquisition in question was not for a public purpose and therefore not within the Act at all."

It was, therefore, held that the section which deprived the Court of its jurisdiction which clause (2) of this article clearly conferred upon the Court, was *ultra vires.*

On the same reasoning, S. 6 (3) of the Land Acquisition Act, 1894, might also be called in question as being *ultra vires* under S. 299 (2) of the Government of India Act and under cl. (2) of this article read with ART. 13 of the Constitution. But in the case of this provision in the Land Acquisition Act, its validity is saved by S. 299 (4) of the Government of India Act, 1935, and by the provisions of cl. (5) of this article. Under S. 299 (4) of the Government of India Act, 1935, the validity of the provisions of any Act in force at the date of the passing of the Government of India Act, 1935, is expressly saved and so the Land Acquisition Act of 1894 is saved by this provision. Under cl. 5 (a) of this article, the provisions of any "existing law" are expressly exempted from the operation of cl. (2). Hence, even after the coming into force of the Constitution the provisions of S. 6 (3) of the Land Acquisition Act are valid and a declaration by the Government of the existence of a public purpose for a compulsory acquisition under that Act will be conclusive and binding on the Court.[76]

It may be pointed out incidentally that the Constitution does not contain a provision similar to that in the Land Acquisition Act, 1894, making a declaration or a notification by the Government that property is required for a public purpose conclusive on the question.[77]

In considering whether a provision of law making the opinion of the Government that property is required for a public purpose conclusive and binding on the Courts is *ultra vires*, it is useful to observe that cl. (2) requires that property must be acquired or taken possession of only for a public purpose and not for a purpose which the Executive Government *thinks* is a public purpose. In other words, the purpose for which property is acquired or taken possession of compulsorily by the Government must be actually a public purpose and must be found to be a public purpose by the Court and it is not enough if it is merely a purpose believed to be a public purpose, however *bona fide*, by the Government.

It may, however, be mentioned that in *Gopalan* v. *State of Madras*,[78] the Supreme Court held in connection with preventive detention law that the satisfaction of the detaining authority about the necessity for the detention of a person for preventive purposes was not a matter which could be scrutinised by the Court with a view to see whether it was reasonable or not. But the reasoning of the Supreme

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[76] 1953 All 182 (Prs 8, 9) [AIR V 40 C 80] (DB), *Brij Nath* v. *U. P. Government.* [*See also* ('53) 57 C W N 719 (725) (DB), *Sriniwas* v. *State of West Bengal.* (Overruling AIR 1953 Cal 323 and 57 C W N 342.)]

[77] 1952 S C 252 (294) (Pr 128) [A I R V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

[78] 1950 S C 27 (42, 43, 77) (Prs 27, 123) [AIR V 37 C 6] : 1950 S C R 88 ; 51 Cri L Jour 1383 (S C).

Court in *Gopalan's case*[79] does not apply to the compulsory acquisition of property. In the case of the detention of a person under preventive detention law, the Constitution does not impose any conditions similar to the condition of the existence of a public purpose for the acquisition of property compulsorily by the State. All that Art. 21 says is that deprivation of liberty of a person must be in accordance with procedure established by law and the question of *when* the detention under preventive detention law may be ordered is not made a matter of constitutional provision at all. Hence, the reasoning in *Gopalan's case*[80] cannot apply to the question of compulsory acquisition of property by the State in regard to the existence or otherwise of a public purpose for such acquisition.

(a) Effect of cl. (2)

20. **"Compensation."** — As seen in Notes 9 and 10, the payment of compensation is an inescapable obligation attached to the compulsory acquisition of property by the State. Clause (2) of this article expressly provides that a law authorising the compulsory acquisition or taking possession of property by a State for public purposes shall provide for compensation for the property taken possession of or acquired and either fix the amount of compensation or specify the principles on which and the manner in which the compensation is to be determined and given. Any law which authorises the compulsory acquisition or taking possession of property by the State but fails to provide for the payment of compensation, will be void under cl. (2) read with Art. 13.

Clause (2) only requires that just compensation must be paid to persons whose properties are compulsorily acquired or requisitioned and that the law under which the acquisition or requisitioning takes place should provide for such compensation. The Constitution does not describe the manner or time of payment of compensation but leaves them to the Legislature.[1] The fact that the compensation is not required to be paid in advance does not make the law *ultra vires* so long as it provides for payment of just compensation.[2]

The clause requires that the law must either fix the amount of compensation or specify the principles on which and the manner in which compensation is to be determined and given. Thus, it is not necessary that the law under which the acquisition or requisitioning is made, must itself fix the amount of compensation. It is sufficient if the law specifies the principles and the manner in which the compensation is to be paid.[3] A provision that such compensation as may be determined by the Deputy Commissioner or, if his award is not acceptable, by the Civil Court would be sufficient compliance with clause (2).[4] Similarly, a provision that compensation should be paid means that it must be paid in one lump sum and so is not bad for not indicating the manner in which the compensation should be paid.[5]

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[79] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

[80] 1950 S C 27 [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (S C), *Gopalan* v. *State of Madras.*

Articles 31, 31A, 31B — Note 20

[1] 1952 Cal 870 (872) [AIR V 39], *Naba Kumar* v. *West Bengal State.*

[2] 1952 Cal 870 (872) [AIR V 39], *Naba Kumar* v. *West Bengal State.*

[3] 1953 Pat 121 (124) (Prs 4, 5) [AIR V 40 C 36]: ILR 32 Pat 87 (DB), *Rebati Ranjan* v. *State of Bihar.* (Bihar Land Reforms Act (30 of 1950), S. 32 (2)—Reading

The clause requires that provision for compensation must be made by the "law", under which property is acquired or requisitioned. The "law" in a given case must be an Act read with the order promulgated under it. Hence, provision for compensation in an order promulgated under an Act must be treated as a provision in the "law" and will be sufficient for the purpose of clause (2).[6]

(b) Compensation and damages — Distinction

Compensation for acquisition or requisitioning is different from damages for loss caused during temporary occupation.[7]

(c) English law

In England there is no written Constitution and there is no *constitutional* requirement that compensation must be paid for property compulsorily acquired by the State or that a law for compulsory acquisition must contain a provision for compensation. But the accepted principle in England is that no law for compulsory acquisition will be construed as authorising such acquisition without payment of compensation unless the intention to the contrary is expressed in unambiguous terms.[8] In *London and North-Western Railway*

S. 32 (2) along with S. 24 (3) it is manifest that in the case of a perpetual premium payable to trustees of a religious or charitable endowment the compensation officer is bound to make payment in cash. In those sections the statute has specified the principle and the manner in which compensation is to be determined and given with respect to properties of a religious or charitable endowment and there is no violation of the guarantee of Art. 31 (2) of the Constitution.)

1953 Raj 173 (177) (Pr 19) [AIR V 40 C 61] (DB), *Lalsingh* v. *State of Rajasthan.* (Marwar Land Revenue Act (40 of 1949), S. 231 (4)—Sub-section complies with the requirements of Art. 31 (2) in the matter of granting compensation upon acquisition—Sub-s. (4) also lays down the manner in which compensation is to be given —S. 231 is *intra vires.*)

[4] 1953 Raj 173 (177) (Pr 19) [AIR V 40 C 61] (DB), *Lalsingh* v. *State of Rajasthan.*

[5] 1953 Raj 173 (177) (Pr 19) [AIR V 40 C 61] (DB), *Lalsingh* v. *State of Rajasthan.*

[6] 1953 Cal 548 (557) (Pr 40) [AIR V 40 C 205], *Atulya Kumar* v. *Director of Procurement and Supply.* (It cannot be said that the Essential Supplies (Temporary Powers) Act (1946) read with West Bengal Foodgrains (Intensive Procurement) Order (1952) does not fix compensation.)

[7] 1952 Cal 679 (683) (Pr 8) [AIR V 39], *Aswini Kumar* v. *State of West Bengal.*

[8] 1928 P C 287 (290) [AIR V 15] (PC), *Inglewood Pulp Co.* v. *New Brunswick Electric etc.*

(1927) 1927 App Cas 343 (359) : 136 L T 709, *Colonial Sugar Refining Co.* v. *Melbourne Harbour Trust Commissioners.* (A statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms—Lord Warrington of Clyffe.)

(1920) 1920 App Cas 508 (542) : 122 L T 691, *Attorney General* v. *De Keyser's Royal Hotel.* (*Lord Atkinson* — The recognised rule for the construction of statutes is that unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation—Quoting Bowen L. J. in (1893) 1 Ch 16 (28), *London and North Western Railway Co.* v. *Evans.*)

Company v. *Evans*,[9] Bowen, L. J., observed as follows:

> "The Legislature cannot fairly be supposed to intend in the absence of clear words showing such intention that one man's property shall be confiscated for the benefit of others or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can of course override or disregard this ordinary principle, if it sees fit to do so, but it is not likely that it will be found disregarding it, without plain expressions of such a purpose."

(d) War conditions, no exception

Even in time of war, the more recent view in England is that property cannot be taken even for purposes of defence without payment of compensation and that compensation is claimable by the owner of the property not as of grace but as a matter of right.[10] In America also, the view taken is that the existence of a war does not by itself suspend the provision as to compensation for private property acquired for public use.[11]

(e) Legislative urisdiction

Under cl. (2), a law providing for the compulsory acquisition or taking possession of private property for public purposes must provide for compensation and either fix the amount of compensation itself or specify the principles on which and the manner in which the compensation is to be determined and given. Under Entry 42 of LIST 3, SCH. VII of the Constitution, the principles on which compensation is to be determined and the form and the manner in which such compensation is to be given are matters within the legislative jurisdiction of both the Parliament and the State Legislatures. Entry 36 in LIST 2, which provides for legislative power of State Legislatures to legislate about acquisition or requisitioning of property, is subject to the provisions of Entry 42 of LIST 3. The result of all these provisions is that when there is a parliamentary enactment relating to the principles on which compensation should be determined, such enactment will apply when acquisition is made under a State statute.

The power which the Legislature has under Entry 42 in LIST 3 to legislate for laying down principles according to which compensation should be determined for property compulsorily acquired or

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(1919) 1919 App Cas 744 (752) : 121 L T 361, *Central Control Board* v. *Cannon Brewery Company Ltd.*

(1903) 1903 App Cas 355 (363, 364) : 88 L T 779, *Commissioner of Public Works (Cafe Colony)* v. *Logan*. (*Western County Railway Co.* v. *Windsor Annapalis Railway Co.*, (1882) App Cas 178, Foll.)

[9] (1893) 1 Ch 16 (28) : 67 L T 630.

[10] (1920) 1920 App Cas 508 (542, 576) : 122 L T 691, *Attorney General* v. *Keyser's Royal Hotel*. (Crown is not entitled as of right either by virtue of its prerogative or under any statute to take possession of land or buildings of a subject for administrative purposes in connection with the defence of the realm without paying compensation for their use and occupation.)

(1919) 1919 App Cas 744 (752) : 121 L T 361, *Central Control Board* v. *Cannon Brewery Company Ltd.*

[But see (1915) 3 K B 649 (653), *In re A Petition of Right*. (Not good law.)]

[11] (1922) 67 Law Ed 1014 (1047) : 262 U S 341 (343), *United States* v. *New River Collieries Co.*

requisitioned, would not enable a Legislature to lay down principles that would lead to the non-payment of compensation.[12]

(f) American law compared

Under the 5th Amendment to the American Constitution, the provision is to the effect that private property shall not be taken for public use without just compensation. As already pointed out in NOTE 10, this provision is not precisely similar to the provision in cl. (2) of this article in that it does not require, like cl. (2), that the law authorising the compulsory acquisition of property must itself provide for the compensation to be paid but only makes it a matter of obligation against the State that when private property is taken for public use, the State must pay compensation.

Under the 5th Amendment of the American Constitution, compensation is payable even though the "taking" of the property does not amount to acquisition or requisitioning of it.[13]

(g) Compensation need not be paid in advance

The obligation of the State under the 5th Amendment to pay compensation does not mean that compensation should be actually *paid in advance* of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupation is disturbed.[14] Nor is it necessary that the value of the property and the compensation to be paid must be actually determined and fixed before property is acquired.[15] The same is the position under the Indian Constitution also.[16]

(h) Who is entitled to compensation

The provision for compensation upon compulsory acquisition or taking possession of land must provide such compensation not only to the owner of the property but also to the tenant who may be in occupation of the property and whose possession is disturbed.[17]

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[12] 1952 S C 252 (Pr 122) [AIR V 39]: 1952 S C R 889, 1020 & 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (*Atiqua Begum's case,* A I R 1941 F C 16 (FC), held not applicable.)

[13] *See* 1952 Mad 203 (Pr 14) [A I R V 39 C 98] (DB), *Rajah of Bobbili* v. *State of Madras.*

[14] (1895) 40 Law Ed 188 (196) : 159 U S 380 (400), *Sweet* v. *Rechel.* (Compensation need not be made or tendered to the owner before the rights of the public become complete— Enough if the statute makes adequate and certain provision for such compensation.)

(1890) 135 U S 641 (659):34 Law Ed 295, *Cherokee Nation* v. *Southern Kansas R.Co.*

[15] (1945) 326 U S 203 (205) : 90 Law Ed 3, *Bailey* v. *Anderson.*

[16] 1952 Cal 870 (872) [AIR V 39], *Naba Kumar* v. *State of West Bengal.* (West Bengal Land Development and Planning Act (21 of 1948) not bad for not requiring compensation to be paid in advance.)

[17] 1952 Punj 70 (Pr 6a) [A I R V 39 C 21] : I L.R (1951) Punj 438 (DB), *Shyam Krishen* v. *State of Punjab.* (Section 5 of Punjab Requisitioning of Immovable Property (Temporary Powers) Act does not exclude the right of the tenant to such compensation and so it is not *ultra vires.*)

1951 Nag 33 (Prs 20, 21) [AIR V 38 C 11] : I L R (1951) Nag 791 (DB), *Manohar Ramkrishna* v. *G. G. Desai.* (Article 31 (2) of the Constitution clearly contemplates payment of compensation to the person who has a present right to occupy the requisitioned premises—The C. P. & Berar Accommodation (Requisition) Act (63 of 1948) does not provide for payment of any compensation to the tenant on requisition of premises in the possession of a tenant — It only provides

(i) Compensation must be just and fair— Justiciability of question

As regards the meaning of the word "compensation", the word has the same meaning as in S. 299 of the Government of India Act, 1935.[18] Hence, compensation must be just and fair.[19] Section 299 of the Government of India Act being a parliamentary enactment drafted by parliamentary draftsmen, must be taken as using the word "compensation" in a sense which was well settled under the English law, namely, just and fair compensation. The principle in such cases is that if the Legislature uses a term which has a well settled meaning, such meaning must, in the absence of an indication to the contrary, be given to that word.[20]

The position that the word "compensation" in cl. (2) means just and fair compensation, leads to the result that the fairness and justice of compensation awarded are justiciable matters.[21]

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for payment of compensation to owner and to none else — The Act is therefore void in so far as it provides for requisitioning of property from tenants.)
See also Note 10.

[18] 1951 All 674 (Pr 51) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Government.*

[19] 1952 S C 252 (Pr 100) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

1951 Pat 91 (Pr 50) [A I R V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (Although under the Constitution compensation need not necessarily be in money, nevertheless, whatever compensation is made, it should be something which could fairly be said to be equivalent in value to the property taken over by the State—Per *Reuben J.* :—Compensation represents the money value of the property acquired—It is usual to give the owner something more than the value of the property by way of a solatium for the compulsory nature of the acquisition. The use of the word "compensation" is to be taken in the accepted sense as representing the money value of the property. The giving of compensation for property compulsorily acquired was considered to be of sufficient importance to be guaranteed by a provision in the part of the Constitution dealing with Fundamental Rights. It does not appear likely that the Constituent Assembly would by that very provision empower the Legislature to give as compensation such amount as it thinks proper without any reference to the real value of the property acquired.)

1953 Cal 548 (557) (Pr 39) [A I R V 40 C 205], *Atulya Kumar* v. *Director of Procurement & Supply.* (AIR 1951 Cal 111 ; A I R 1951 All 674 ; (1893) 37 Law Ed 463: 148 U S 312, *Monongahela Navigation Co.* v. *United States*, Rel. on.)

1951 Cal 111 (Prs 33, 34, 37) [AIR V 38 C 30b) (DB), *W. B. S. K. Co-op. Society* v. *Bella.* (Compensation assessed in accordance with the latter portion of proviso (b) of S. 8, West Bengal Land Development and Planning Act, is not determined according to a principle and in a manner which would result in a just or reasonable equivalent being paid for the land—The principles on which and the manner in which compensation is to be determined as laid down in the latter portion of proviso (b) to S. 8 are no better than if it had been stated that whatever the market value of the land might be it could be acquired at the rate of 'X' rupees per bigha or per acre—The provisions as to compensation in S. 8 clearly offend against the provisions of cl. (2) of Art. 31 and are therefore void.)

[20] 1951 All 674 (Pr 50) [A I R V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.*

[21] 1952 Raj 74 (Pr 14) [A I R V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr., Civil Supplies.*

(1893) 37 Law Ed 463 (468) : 148 U S 310, *Monongohela Navigation Co.* v. *United States.* (The Legislature may determine what private property is needed for

In *Raja Suryapalsingh* v. *Uttar Pradesh Government*,[22] the Allahabad High Court observed as follows :

> "The absence of the qualifying adjective 'just', 'fair', 'adequate' is, to our minds, not of consequence; nor can we see any ground on principle or authority for attributing to the word 'compensation' the meaning suggested by the State, namely, such amount as the Legislature itself considers reasonable. If it had been the intention to make so radical a change in the meaning of the word 'compensation' — a change which wholly destroys the basis upon which it was obviously understood that compensation would be determined— it is reasonable to expect that fact to have been clearly stated in the Constitution. If the amount of compensation was left entirely to the discretion of the Legislature and was not to be justiciable, Art. 31 (2), which is a restraint on legislative power, would cease to be of use to protect the Fundamental Right to property. Nor does the conferment of power to determine the principles on which compensation shall be given enable the Legislature to depart from the basic rule. That provision is intended to enable the Legislature to lay down rules for the assessment of compensation in cases where its determination may be difficult, or where different persons may take divergent views as to what is the equivalent in value of the property acquired."

In the 5th Amendment of the American Constitution it is expressly provided that the compensation must be just.[23] The compensation must be just not only to the individual whose property is taken but to the public which has to pay for it.[24] From the above, it is clear that compensation does not mean such amount as the Legislature itself considers reasonable.[25]

If a provision in any Act providing for the compulsory acquisition of property, with regard to the payment of compensation, contravenes the provisions of Art. 14, because it is discriminatory, then it also contravenes Art. 31 (2).[26]

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public purposes but when the taking has been ordered, then the question of compensation is judicial.)

[22] 1951 All 674 (Pr 51) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB).

[23] (1896) 41 Law Ed 979 (986) : 166 U S 226 (241, 242), *Chicago B. & Q. R. Co.* v. *Chicago*. (It may be merely *nominal* and yet just and fair.)
(1893) 37 Law Ed 463 (467, 468) : 148 U S 310, *Monongahela Navigation Co.* v. *United States*.
[*See* (1943) 317 U S 369 (373) : 87 Law Ed 336, *United States* v. *Miller*. (Just compensation within 5th Amendment means full and perfect equivalent in money of the property taken whereby the owner is put in as good a position pecuniarily as he would have occupied if his property had not been taken.)]

[24] (1890) 133 U S 553 (562) : 33 Law Ed 740, *Searl* v. *School District No. 2 in the County of Lake*.

[25] 1951 All 674 (Pr 50) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government*.

[26] 1951 All 674 (Prs 52, 53) [A I R V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government*. (As either inadequate compensation or discriminatory payments to different owners have the same result, namely,

The passage quoted from *Suryapal Singh's case*[27] above shows that the power to lay down the principles according to which the compensation payable is to be determined, does not enable the Legislature to avoid the duty of seeing that the compensation is just and fair. The provision is intended to enable the Legislature to lay down rules for difficult cases where the determination of compensation may be difficult or different persons may take divergent views as to what is equivalent of the value of the property acquired.[28]

(j) Market-value

There are certain well-recognised principles according to which compensation for property compulsorily acquired should be determined and which are regarded as being just and fair. To begin with, the market-value of the property is the normal measure of compensation.[29] The value of the property is to be determined as on the date of the acquisition.[30] The market-value of the property which is the normal measure of compensation may reflect the use to which the land could be readily converted as well as its existing use.[31] The use to which the land may be readily converted is not merely the use to which the land can be put as a separate tract but its use when combined with other parcels. But in order to consider such special adaptability, there must be a reasonable probability of the lands in question being combined with the other tracts for that purpose in the reasonably near future.[32] Facts like extra-fertility of agricultural land or the advantage of a situation of a site in towns are factors to be taken into consideration, as they directly tend to increase the value of the lands in the hands of the owner.[33] The special adaptability of the land for the construction of a work of public utility may be taken into account when there is a market, though limited, for such adaptability. But when the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration

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failure to provide for compensation in law, it will be a contravention of cl. (2) of Art. 31.)

[27] 1951 All 674 [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.*

[28] 1951 All 674 (Pr 50) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.* (A good illustration of this is to be found in *In re Lucas and the Chasterfield Gas and Water Board,* (1909) 1 K B 16, in which the question was as to the value of a piece of land which was peculiarly suited for purposes for which the respondents wanted it, namely, the construction of a reservoir.)

1951 Pat 91 (Prs 51, 60) [A I R V 38 C 15] : 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

[29] (1946) 328 U S 256 (261) : 90 Law Ed 1206, *United States* v. *Causby.*

(1923) 67 Law Ed 1014 (1017) : 262 U S 341 (344), *United States* v. *New River Collieries Co.*

[30] (1943) 317 U S 369 (374) : 87 Law Ed 336, *United States* v. *Miller.*

[31] (1946) 328 U S 256 (261) : 90 Law Ed 1206, *United States* v. *Causby.*

[32] (1943) 319 U S 266 (275) : 87 Law Ed 1390, *United States Ex Rel. T. V. A.* v. *Powelson.*

[33] (1909) 1 K B 16 (30) : 99 L T 767, *Lucas and Chesterfield Gas and Water Board, In re.*

in fixing the price.[34] In other words, although the market-value is to be fixed with due consideration of all its uses, its special value to the condemner as distinct from others, who may or may not possess power to condemn, must be excluded as an element of market value.[35]

The owner of property is not entitled to any increment in value due to action taken by public authority in previously condemning adjacent land where, from the beginning, the public project included the taking of his property as well as that of his neighbours, or the possibility or probability of such taking.[36]

"Just compensation" does not guarantee a return of the investment.[37] Where there is a market price for the property taken, cost of production and reasonable profit are immaterial.[38]

Where an estate is compulsorily acquired, buildings appurtenant to the estate need not be treated separately from the estate for the purpose of computing the compensation.[39]

(k) Possibility of increase of value of land acquired for development

It is a fundamental principle with regard to compensation for property compulsorily acquired by the State that it is the owner's loss and not the taker's gain which is the measure of the value of the property taken.[40] In other words, the owner is to receive no more than indemnity for his loss. The award cannot be enhanced by any gain to the taker.[41] It follows from the above that when the property is acquired for purposes of development, after it is so acquired by the Government, the possible increase in the value of the property after the development need not be taken into consideration in calculating the compensation.[42] *In re, Arbitration between Lucas and Chesterfield*

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[34] (1909) 1 K B 16 (30, 31) : 99 L T 767, *Lucas and Chesterfield Gas and Water Board, In re.*

[*See also* (1943) 319 U S 266 (273, 276) : 87 Law Ed 1390, *United States Ex Rel T. V. A.* v. *Powelson.* (Acquisition of riparian lands — Value for purposes of water power development in conjunction with lands of other owners need not be taken into account although the owner contemplates such development and is invested by State law with power of eminent domain by which lands necessary to the project might be acquired.)]

[35] (1943) 317 U S 369 (375) : 87 Law Ed 336, *United States* v. *Miller.*

[36] (1943) 317 U S 369 (377) : 87 Law Ed 336 (345), *United States* v. *Miller.* (*Shoemaker* v. *U. S.*, 147 U S 282 : 37 Law Ed 170, Rel. on.)

[37] (1943) 319 U S 266 (285) : 87 Law Ed 1390, *United States Ex Rel T. V. A.* v. *Powelson.*

[38] (1923) 67 Law Ed 1014 (1017) : 262 U S 341 (344), *United States* v. *New River Collieries Co.*

[39] 1953 S C 375 (383) [AIR V 40 C 85] (SC), *Gajapati Narayan* v. *State of Orissa.* (AIR 1953 Orissa 185, Affirmed on appeal—Case regarding Orissa Estates Abolition Act (1 of 1952), S. 5.)

[40] (1946) 328 U S 256 (261) : 90 Law Ed 1206, *United States* v. *Causby.*
(1943) 317 U S 369 (375) : 87 Law Ed 336, *United States* v. *Miller.*
(1917) 1917 App Cas 187 (194) : 116 L T 258, *Fraser* v. *Fraser Ville (City of).*

[41] (1943) 317 U S 369 (375) : 87 Law Ed 336, *United States* v. *Miller.*

[42] (1917) 1917 App Cas 187 (194) : 116 L T 258, *Fraser* v. *Fraser Ville (City of).* (The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.)

Gas and Waterboard,[43] Fletcher-Moulton, L. J., observed as follows:

> "The principles upon which compensation is assessed when land is taken under compulsory powers, are well settled. The owner receives for the lands he gives up their equivalent, that is that which they were worth to him in money. His property is, therefore, not diminished in amount but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognised as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market-value of his lands as they stood before the scheme was authorised by which they are put to public uses. Subject to that, he is entitled to be paid the full price for his lands and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him."

(l) Burden of proof

The burden of establishing the value of lands sought to be condemned is on the owner.[44]

(m) Matters to be considered and excluded from consideration in determining compensation

The Land Acquisition Act, 1894, S. 23, enumerates the matters to be considered in determining compensation under the Act. The section runs as follows:

> "23. (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—
>
> *first*, the market-value of the land at the date of the publication of the notification under S. 4, sub-section (1);
>
> *secondly*, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;
>
> *thirdly*, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;
>
> *fourthly*, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;
>
> *fifthly*, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and
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> *sixthly*, the damage, if any, *bona fide* resulting from diminution of the profits of the land between the time of the

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[43] (1909) 1 K B 16 (29, 30) : 99 L T 767.

[44] (1943) 319 U S 266 (273): 87 Law Ed 1390, *United States Ex Rel T. V. A.* v. *Powelson.*

publication of the declaration under S. 6 and the time of the Collector's taking possession of the land.

(2) In addition to the market-value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition.".

Section 24 of the same Act enumerates the matters that should not be taken into consideration in determining the amount of compensation payable under the Act. The section runs as follows:

"24. But the Court shall not take into consideration—

first, the degree of urgency which has led to the acquisition;

secondly, any disinclination of the person interested to part with the land acquired;

thirdly, any damage sustained by him which, if caused by a private person, would not render such person liable to a suit;

fourthly, any damage which is likely to be caused to the land acquired, after the date of the publication of the declaration under section 6, by or in consequence of the use to which it will be put;

fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired;

sixthly, any increase to the value of the other land of the person interested likely to accrue from the use in which the land acquired will be put; or,

seventhly, any outlay or improvements on, or disposal of, the land acquired, commenced, made or effected without the sanction of the Collector after the date of the publication of the notification under section 4, sub-section (1)."

The above provisions may be taken for guidance even in cases not coming under the Act. The A. I. R. MANUAL and the case-law given in the said MANUAL, Vol. 5, (1947 Edn.), under the above sections of the Land Acquisition Act may be usefully consulted.

(n) Deductions

When arrears of rent were authorised to be acquired under the Bihar Land Reforms Act, 1950, 50 per cent. of the value of the rents was considered to be fair compensation by the Supreme Court.[45] In the same case it was held that the deduction of the cost of repairs to village tanks, etc., from the compensation payable to zamindars was a reasonable deduction.[46] See also the undermentioned cases.[47]

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45. 1952 S C 252 (Pr 19) [A I R V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*. (The arrears are not money or money's worth in zamindar's hands.)

46. 1952 S C 252 (Pr 20) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*. (Deduction of amount for costs of works of benefit to raiyats are justified as zamindars are under legal obligation to maintain and repair irrigation tanks : *Madras Ry. Co.* v. *Zamindar of Carvatenagarum*, 1 Ind App 364 (PC), cited and quoted.)

47. 1952 Madh B 57 (Prs 40, 42) [A I R V 39 C 25] : I L R (1952) Madh B 178 (FB), *Ram Duley* v. *Govt of Madhya Bharat*. (The Madhya Bharat Zamindari

(o) Compensation need not be in cash

Under cl. (2) of this article, the compensation need not be in cash.[48] In this connection, the difference in the wording of sub-s. (2) of S. 299 of the Government of India Act, 1935, and cl. (2) of this article may be noticed. In the Government of India Act the words used were "for the *payment* of compensation". In cl. (2) of this article the words are "for compensation". The difference in the wording indicates that compensation may now be otherwise than in cash. For instance, compensation may be given in the form of bonds or possibly in the form of other land, the reason being that when a large number of individuals are being expropriated under a scheme of land reform, it may be impossible to compensate them in money and that when large numbers of cultivators are to be expropriated in order that land may be taken for such a public purpose as the construction of a dam, it may be in their own interest to receive land elsewhere rather than money.[49]

21. Exceptions to clause (2). — The provisions of cl. (2), requiring that a law authorising the compulsory acquisition or taking possession of property by the State shall only be for public purposes and shall provide for compensation, are subject to several exceptions.

Abolition Act cannot be held to be confiscatory as not providing for compensation being given to Chakdars and Blockdars and as not providing for compensation for forest lands, pastures, stray trees and similar other items pertaining to Zamindari ; AIR 1951 All 674 (FB), Rel. on.)

1952 Cal 100 (Prs 24, 26, 28) [AIR V 39 C 36], *Govinda Chandra* v. *Dinesh Chandra.* (Clause 3 (2) of the Bengal Foodgrains (Disposal and Acquisition) Order (1947) complies with Art. 31 (2) of the Constitution and hence the Order is not void. The question of adequacy of compensation must depend on various factors. The economic conditions prevailing in the country and the food situation of the country require that ceiling prices fixed by the Government should be treated or accepted as the measure of just compensation. Just compensation cannot mean that the Government must compensate the owner of the paddy for potential profits lost because of economic distress in the country and consequent price control : (1950) U S 121 : 94 L. Ed. 707, Rel. on.)

1952 Raj 79 (Pr 10) [AIR V 39] : I L R (1951) 1 Raj 692 (DB), *Firm Udairaj* v. *Commr., Civil Supplies.* (Rajasthan Foodgrains Control Order, 1949, Clause 25 is void as fair compensation is not fixed : AIR 1952 Raj 74, Foll.)

1952 Raj 74 (Pr 17) [A I R V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr., Civil Supplies.* (Clause 25 of the Rajasthan Foodgrains Control Order is void as it offends Art. 31 (2) of the Constitution inasmuch as fair compensation has not been fixed in the law for acquiring the foodgrains. The Government procurement rates are bound to be much below the ceiling price and so the provision is void under Art. 19 (1) (g) — It is also void under Art. 31 (2).)

[48] 1951 All 674 (Pr 52) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Govt.*

1952 Raj 74 (Pr 14) [A I R V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr., Civil Supplies.*

[*See also* 1950 Pat 392 (398) [AIR V 37 C 108]: ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.* (Conceded by counsel that compensation might be in form of 'bonds'.)]

[49] 1951 Pat 91 (Pr 4) [AIR V 38 C 15]: ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

These exceptions are contained in cls. (4), (5) and (6) of this article and in Arts. 31A and 31B. In determining the scope of these exceptions, necessarily the determination of the scope of the provisions of cl. (2) becomes important for the purpose of seeing what can be held to be provided by cl. (2) and when the provisions of cl. (2) can be regarded as being contravened. This question has been fully discussed in Notes 9 and 10 and also in Note 29.

As to whether compensation must be paid for property taken for war purposes, see Note 20.

22. Competency of Legislatures to enact laws about compulsory acquisitions of property.—As noted in Notes 9 and 10, the Constitution does not expressly empower the enactment of law for the compulsory acquisition of property. In accordance with the usual system in this respect, observed in the other Constitutions of the world (see, for instance, the 5th Amendment to the American Constitution), the power of compulsory acquisition, being an inherent attribute of sovereignty, is not made the subject of an express enactment in the Constitution. But the power is clearly implied in the constitutional limitations in cl. (2), as it is implied in the limitations imposed by the 5th and 14th Amendments of the American Constitution. The inclusion of compulsory acquisition of property as a legislative head in the legislative list pertaining to a particular Legislature only amounts to a *recognition* of such a power and does not, by itself, confer the power to legislate on the subject. No doubt the entries in the legislative lists read with Art. 246, do amount to the conferment of power on the respective Legislatures to enact laws relative to the subjects enumerated. But the proper perspective in which the provisions of Art. 246 should be taken shows that the article is concerned with the *distribution* of legislative powers, as the sub-title to the chapter, in which the article occurs, shows, and not to the *creation* of legislative power.

Legislative power to make laws about the compulsory acquisition of property has been conferred under this Constitution both on the State Legislatures and on the Parliament: see Sch. VII, List 1 Entry 33, List 2 Entry 36, List 3 Entry 42.

Clauses (3), (4) and (6) of this article and Proviso to Art. 31A impose restrictions on the power of a State Legislature and require that the assent of the President must be obtained for the laws as to compulsory acquisition passed by the State Legislatures.

In *State of Bihar* v. *Kameshwar Singh*,[1] the contention was raised that nationalization of land was a separate head of legislation and that the expression "acquisition of property" in Entry 36 of List 2 did not cover the subject. This contention was overruled and it was held that nationalization of property could be effected under the power of compulsory acquisition.

Articles 31, 31A, 31B — Note 22

[1] 1952 S C 252 (264) (Pr 14) [AIR V 39] : 1952-S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC).

As to whether the conditions as to 'public purpose' and 'compensation' can be implied from the entries in the legislative lists, see NOTE 10.

23. Entries in legislative lists as to compulsory acquisition — Conditions implicit.—As seen in NOTE 10, the question has arisen whether the two conditions, which are essential concomitants of a power of compulsory acquisition of private property by the State, namely, those as to the existence of a public purpose and as to payment of compensation, can be deduced as implied in the entries in the legislative lists under which the respective Legislatures are empowered to enact laws regarding compulsory acquisition of property, apart from the provisions of cl. (2) of this article. This question has been considered in NOTE 10. There it has been seen that the above two conditions are *provided for* in cl. (2) of this article, and that on the principle of *expressum facit cessare tacitum* (words expressed make what is silent to cease), they cannot be deemed as impliedly provided by the entries in the legislative lists also. In this connection, comparison may be made with S. 51, placitum (xxxi) of the Commonwealth of the Australian Constitution Act under which the conception that compensation should be made for compulsory acquisition of property is contained in the head of legislative business itself and is not separately and distinctly provided in the body of the Constitution, whereas the requirement as to just compensation is the subject of specific and express enactment in the body of the Constitution itself in the Indian Constitution in cl. (2) of this article.

24. Compulsory acquisition of property—Condition as to public purpose and compensation — If may be implied from the spirit of the Constitution. — See NOTE 10.

(a) "Property" —Meaning of

25. "Property." — The question arises what is the meaning of "property" for the purpose of this article. When can a person be said to be deprived of his "property" within the meaning of cl. (1)? When can "property" be said to be acquired or taken possession of within the meaning of cl. (2)? Under ART. 19 (1) (f), a citizen is guaranteed the right to acquire, hold and dispose of property. The word "property" must receive the same meaning for the purpose of this article as for that of ART. 19.[1]

As seen in NOTES 4 and 5, the scope of ART. 19 and that of this article are quite distinct and different. While ART. 19 deals with cases in which restrictions are placed upon a person's rights in regard to his property, this article deals with cases in which the whole property is taken away from him or he is totally dispossessed of his property. The concept of "property" is the same for the purpose of both the articles, and the difference between the articles lies only in regard to the manner in which they protect the rights of a person with reference to his

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Articles 31, 31A, 31B — Note 25

[1] 1951 S C 41 (Pr 77) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.*

property.. Hence, property for the purpose of this article must be held to include only property that can be acquired, held or disposed of within the meaning of ART. 19.[2] In other words, the interest must be a substantive interest. If it is not a substantive interest but only an incidental right attached to a substantive interest, it will not be property either for the purpose of ART. 19 or for the purpose of this article.[3]

(b) Different meanings

The word "property" is said to be the most equivocal of legal terms.[4] It is nowhere defined in the Constitution. Nor is it defined in the General Clauses Act which, by force of ART. 367, applies to the interpretation of this Constitution. In its narrowest sense, "property" includes nothing more than corporeal property, i. e., the concrete thing which is the subject of ownership.[5] In its most comprehensive sense it includes all legal rights of a person, except his personal rights, which constitute his status or personal condition.[6]

In *Jones* v. *Skinner*,[7] Lord Langdale, M. R., described the word "property" as being "the most comprehensive of all the terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have." It is in this comprehensive sense that the word "property" is used in the Transfer of Property Act.[8]

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2. 1951 Bom 86 (Pr 6) [AIR V 38 C 19] : ILR (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.* (It also follows as a corollary that if the property is capable of being acquired or taken possession of, it is also property, the loss of which can be compensated for. Directorship of a company though may be an 'asset' for purposes of Income-tax Act, is not property for the purpose of the Constitution.)

   [*See* 1951 S C 41 (Prs 60, 78) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*. (Articles 19 (1) (f) and 31 only regard that as "property" which can by itself be acquired, disposed of or taken possession of. The right to vote for the election of directors, the right to pass resolutions and the right to present a petition for winding up are personal rights flowing from the ownership of the share and cannot by themselves and apart from the share be acquired or disposed of or taken possession of as contemplated by those articles.)]

3. 1951 S C 41 (Pr 60) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjitlal* v. *Union of India*. (Right of share-holders in company to elect directors, to pass effective resolutions in concurrence with majority of share-holders, right to institute winding up proceedings are rights or privileges which are appurtenant to or flow from ownership of property but they themselves taken independently cannot be reckoned as property.)

   [*See also* 1952 Punj 9 (16) (Pr 36) [A I R V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Insurance Co.* v. *Raja Gopalan*. (Rights of directors and managing agents of company as regards management are not proprietary rights *in rem* and so are not 'property'.)]

4. Salmond's Jurisprudence, 9th Edn., p. 323.

5. 1939 All 415 (425) [A I R V 26] (FB), *Umrao Singh* v. *Kacheru Singh*. (Per *Allsop, J.* — "Property" may be used in the objective sense of the concrete thing which is the subject of ownership.)

6. See Salmond's Jurisprudence, 9th Edn., 1937, p. 579.

7. (1835) 42 R R 274 (276) : 5 L J Ch 87.

8. 1939 All 415 (425) [A I R V 26] (FB), *Umrao Singh* v. *Kacheru Singh*. (Per *Allsop J.*)

   ('07) I L R 29 All 385 (396) (FB), *Ram Shankar Lal* v. *Ganesh Prasad*. (Sub-mortgagee's interest.)

Prof. Willis in his CONSTITUTIONAL LAW[9] observes as follows:

> "In general it may be said that any and all property may be taken. Land, buildings, water, an easement as distinguished from general property, a contract, and a franchise may be taken."

Weaver in his book on CONSTITUTIONAL LAW[10] observes as follows:

> "Property is ownership. It consists of the free enjoyment of one's acquisitions without control or diminution save by the law of the land. It consists not merely of ownership and possession but in the unrestricted right of use and disposal. Anything which destroys any of these elements, to that extent destroys the property itself. The right of property is a natural right and neither the Federal Government nor the State Government can deprive its owner of it or its possession except by the due process of law.
>
> "Property includes not only real estate and personal property but also incorporeal rights such as patents, copyrights, leases, accounts and choses in action and every other thing of an exchangeable value which one may have."

Although the above passage relates to the American Constitution and the remark that "anything which destroys the unrestricted right of use and disposal of property will amount to the destruction of the property itself" has to be understood in the context of the American Constitution and for the reasons discussed in NOTES 5, 7, 10 and 11, are not applicable in their entirety to the Indian Constitution, yet, the passage shows that the word "property" has to be understood in a very wide and undefined sense and not in any restricted sense.

It is conceived that whatever is property for the purpose of the Transfer of Property Act will also be "property" for the purpose of this Constitution. Under the Transfer of Property Act, although the word "property" has not been defined, it will include an actionable claim,[11] an annuity,[12] a copyright in a literary composition[13] and all rights relating to physical objects,[14] such as equity of redemption,[15]

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9. Willis, Constitutional Law of the United States, 1936 Edn., p. 815.

10. Quoted in *Sri Lakshmindra Theertha Swamiar* v. *Commissioner, Hindu Religious Endowments*, AIR 1952 Mad 613 (633).

11. ('87) ILR 14 Cal 241 (244) (DB), *Rudra Prakash Misser* v. *Krishna Mohun.* (Portion of the property reserved by the donor though not in his possession.)

See Section 8, last but one paragraph, T. P. Act which runs: "where the property is a debt or other actionable claim," etc.

[*See also* ('99) 4 Cal W N 70 (75), *Sarah Gabriel* v. *R. D. Solomon.* (Property in the Official Trustees Act, 1864, includes actionable claim.)]

12. (1883) 31 W R (Eng) 956 (956) : 8 P D 159, *Jump* v. *Jump.* (Deed of separation containing weekly allowance.)

13. (1907) 23 T L R 45 (48) : (1907) 1 Ch 107, *Macmilan & Co.* v. *Dent.*

(1769) 98 E R 201 (257) : 4 Burr 2303, *Miller* v. *Taylor.*

14. ('97) I L R 20 Mad 35 (39) (DB), *M. Vijia Raghunatha* v. *Venkatachalam Chetti.* (Sub-mortgagee's rights.)

15. ('07) I L R 29 All 385 (401, 408, 414), *Ram Shankar Lal* v. *Ganesh Prasad.* (Dissenting from ILR 13 All 432 (FB).)

('97) I L R 20 Mad 35 (39) (DB), *Muthu Vijia Raghunatha* v. *Venkatachallam Chetti.* (Do.)

a charge[16] of vested remainder in immovable property.[17] Even a contingent interest not being a mere possibility is a well recognised form of property which is capable of being transferred.[18] The interest of a person in possession without title is also transferable property.[19]

The different meanings of the term "property" have been discussed by Salmond in his JURISPRUDENCE, 9th Edn. (1937), at pp. 578-579. He says that the term "property", meaning proprietary rights *in rem*, possesses a singular variety of different applications having different degrees of generality. In the widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is *his in law*. "This usage, however, is obsolete at the present day", says Salmond.

In a second and narrower sense, property includes not all of a person's rights but only his proprietary as opposed to his personal rights. The former constitute his estate or personal rights while the latter constitute his status or personal condition, in the sense that a man's land, chattels, shares and the debts due to him are his property; but not his life or liberty or reputation.

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16. 1924 Oudh 209 (215) [A I R V 11] (DB), *Mohan Singh* v. *Sewa Ram*. (Right to hold immovable property as a security for repayment of loan.)

[*See also* 1928 Pat 587 (588) [AIR V 15] (DB), *Murat Singh* v. *Pheku Singh*.
('10) 6 Nag L R 20 (25, 26), *Fida Ali* v. *Isfailji*. (Mortgage is not a mere right to sue but is a right in immovable property and hence is capable of transfer by assignment.)]

17. ('91) ILR 18 Cal 164 (176, 177) : 17 Ind App 201 (PC), *Umes Chander Sircar* v. *Zahur Fatima*.

1947 Bom 185 (187) [A I R V 34 C 58] : I L R (1947) Bom 636, *Ghulamhussein* v. *Fakirmahomed*. (Vested remainder in immovable property is present interest in property and can be sold or attached in execution of a decree: I L R 32 Bom 172, Rel. on.)

18. 1930 P C 17 (18) [AIR V 17] (PC), *Ma Yait* v. *Official Assignee*.

1921 P C 138 (144) [AIR V 8] (PC), *Fernando* v. *Gunatillaka*. (Case under Roman Dutch law in Ceylon.)

1937 Sind 181 (189) [A I R V 24] (DB), *Shamdas* v. *Savitribai*. (Endowment policy creates a contingent interest which may be assigned.)

1936 Cal 802 (803) [A I R V 23] (DB), *Sm. Matimala* v. *Surendra Nath Mudi*.

1924 All 625 (635) [A I R V 11] (DB), *Mt. Phulwanti Kunwar* v. *Janeshar Das*. (Contingent interest; in case widow does not adopt, the gift of such contingent interest is valid.)

[*See also* (1846) 3 Moo Ind App 435 (446) (PC), *Archibald Francis Arbuthnot* v. *John Bruce Norton*.]

[But see 1936 Sind 65 (66) [A I R V 23] (DB), *Pestonji Bhicaji* v. *Patrick H. Anderson*.]

19. 1927 All 669 (670) [A I R V 14] (DB), *Ganesh* v. *Dasso*. (Occupancy holding mortgaged though opposed to law—Mortgagee has possessory title.)

1924 Oudh 209 (216) [AIR V 11] (DB), *Mohan Singh* v. *Sewa Ram*.

('08) 11 Oudh Cas 337 (339, 340), *Wazir-un-nisa Begum* v. *Wazir Ali*. (Trespasser's possession is a valid title against any one except the rightful owner—It is transferable interest in property.)

('05) I L R 27 All 169 (171) (DB), *Pahlwan Singh* v. *Ram Bharose*. (Property gifted when in possession—Subsequent transfer invalid.)

('07) ILR 29 All 52 (60) (DB), *Shri Gopal* v. *Ayesha Begum*. (Per *Aikman J.*

('01) ILR 24 All 157 (159) (DB), *Gobind Prasad* v. *Mohan Lal*.

In a third application, the term "property" includes not even all proprietary rights but only those which are both proprietary and real. The law of property is the law of proprietary rights *in rem*, the law of proprietary rights *in personam* being distinguished from it as the law of obligations. According to this usage, a freehold or leasehold estate in land, or a patent or copyright, is property but a debt or the benefit of a contract is not. Finally, in the narrowest use of the term, it includes nothing more than corporeal property, that is to say, the right of ownership in a material object or that object itself identified with the right by way of metonymy.

(c) "Proprietary rights in rem"

Studying the above analysis of the conception of property by Salmond, it is clear that the narrowest usage of the term 'property' as meaning only corporeal property is not the sense in which the word "property" is used in the Constitution as it is not used under the Transfer of Property Act. In other words, the term "property" will include both corporeal and incorporeal rights.[20] Similarly, the usage which will include personal rights also does not seem to be applicable to the interpretation of the term "property" for the purpose of the Constitution. In other words, it would seem that the word "property" will have to be understood for the purpose of the Constitution in the same sense in which it is understood by Salmond in his book on JURISPRUDENCE in the chapter relating to the Law of Property, namely proprietary rights *in rem*, proprietary rights *in personam* being excluded.

In *Jupiter General Insurance Co. Ltd.* v. *Rajagopalan*,[21] Harnam Singh, J., adopted this meaning. He observed : "In my judgment the term 'property' used in ART. 31(2) means proprietary rights *in rem* and that being so, the benefit of a contract would not come within the meaning of the term 'property' as used in ART. 31 (2)." On this reasoning, it was held in that case that the rights of the directors of a company, and of the managing agents of a company as regards their rights of management, did not constitute property and hence when the management of an Insurance Company was taken over by Government under S. 52-A of the Insurance Act, it could not be said that there was any acquisition of property or dispossession of any person of his property.

The term "property" is wide enough to cover *any interest* including a temporary or precarious interest such as that of a mortgagee, lessee or tenant.[22]

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[20] 1952 Mad 613 (633) [AIR V 39] *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Property includes both tangible and intangible property.)

1951 Bom 86 (94) [A I R V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. & W. Co.* (But even the incorporeal property must be capable of being acquired and must have the indicia of Art. 19 (1) (f).)

[*See* ('49) 1949 Bur L R (SC) 170 (184), *Bo Thein Swe* v. *The Union of Burma.* (Electoral right is property—Right to patent or easement, etc., is property.)]

[21] 1952 Punj 9 (16) (Pr 36) [AIR V 39 C 2] : ILR (1952) Punj 11 (DB).

[22] 1952 Vind Pra 78 (79) (Pr 3) [AIR V 39], *Dr. Bhagwant* v. *Deputy Commr., Rewa District.*

(d) Totality of rights

As already stated, the word "property" is not restricted in its meaning to the concrete object itself. It includes the bundle of rights over a thing as well as the thing itself.[23] In view of what has already been stated above as regards the relative scopes of this article and ART. 19, the word "property" when it refers to a bundle of rights in respect of any interest means the totality of the rights and not any one or more of the individual rights which constitute the totality. Laws and State action affecting only individual rights and not the property as a whole will have to be judged under ART. 19 and not under this article. Hence, where the totality of the rights which constitute ownership is not affected, there is no deprivation of property.[24] Thus, the award of an Industrial Tribunal directing a company to pay additional bonus to the workers does not amount to a deprivation of property.[25]

(e) Portion of rights taken away—Effect

Although "property" means the whole bundle of rights pertaining to the property or interest acquired, and although unless the whole bundle of rights is taken away, there is no deprivation or acquisition of property, yet when a substantial part of the rights is taken away, it may be held that the whole property is taken away. The reason is that it is not open to the Government to deprive a person of his right to compensation for compulsory acquisition of property by taking from him the bulk of his rights and leaving only some insignificant rights with him. The test in each case will be whether what has been left is of an illusory character from the point of view of its value to the owner. If such is the case, it will be held that there has been a taking of the property and if there is also a transfer of title with regard to the rights in question, there would be also an "acquisition".[26]

In *Charanjit Lal* v. *Union of India*,[27] it was contended on behalf of the State that unless the entirety of the rights of a person were taken, it could not be said that he was dispossessed. The contention was based upon the argument that the word "property" in this article connoted the entirety of property, i. e., the totality of the rights which the ownership of the object connoted. The argument of the Attorney-General was that if a person was not deprived of the entirety of his rights, which he was entitled to exercise by reason of his being the owner of a certain property, and *some* rights, however insignificant they might be, still remained in him, there could not be any dispossession as contemplated by ART. 31. This contention was rejected. Das, J., as well as B. K. Mukherjea, J., who dealt with the contention and found it unacceptable, relied upon the observations of Rich, J., in *Minister*

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[23] 1951 S C 41 (61) (Pr 77) [AIR V 39 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

[24] 1951 Mad 974 (Pr 10) [A I R V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras*.

[25] 1951 Mad 974 (Pr 10) [AIR V 38 C 338] (DB), *Sree Meenakshi Mills* v. *State of Madras*.

[26] 1951 S C 41 (55, 61) (Prs 54, 77) [A I R V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

[27] 1951 S C 41 (54, 55) (Prs 49, 54) [A I R V 38 C 9] : 1950 S C R 869 : I L R 1951) Hyd 461 (SC).

of State for the Army v. *Dalziel.*[28] In that case the question was about S. 51, placitum (xxxi) of the Australian Constitution. In dealing with the provision, Rich, J., observed as follows :

> "Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the Legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating . . . . ."

The learned Judge then concluded as follows in *Minister of State for the Army* v. *Dalziel* :[29]

> "It would, in my opinion, be wholly inconsistent with the language of the placitum to hold that whilst preventing the Legislature from authorising the acquisition of a citizen's full title except upon just terms, it leaves it open to the Legislature to seize possession and enjoy the full fruits of possession indefinitely on any terms it chooses or upon no terms at all."

Das, J., after citing the above passages from the Australian case, proceeded as follows :

> "In my judgment the question whether the Ordinance or the Act has deprived the share-holder of his "property" must depend for its answer on whether it has taken away the substantial bulk of the rights constituting his property. In other words, if the rights taken away by the Ordinance or the Act are such as would render the rights left untouched illusory and practically valueless, then there can be no question that in effect and substance the "property" of the share-holder has been taken away by the Ordinance or the Act."

Applying the test, the learned Judge held that in the particular case before him, the person was not deprived of his property as the rights left with him unaffected were not illusory or unsubstantial. (See also NOTES 11 and 12.)

Where a person is entitled to different interests in the same property, it is not necessary that the State should acquire all the interests; the State can acquire any of them.[30]

(f) Movable property

Clause (2) of this article expressly refers to both movable and immovable property. Section 299 (2) of the Government of India, 1935, only applied to "land". "Land" was defined in sub-section (5) of that section as including immovable property of every kind and any rights in or over such property.[31] Thus, S. 299 of the Government of India

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28. (1943-44) 68 C L R 261.

29. (1943-44) 68 C L R 261 (286).

30. 1952 S C 252 (313) (Pr 218) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*
1952 All 88 (Pr 9) [AIR V 39 C 29] (DB), *Mt. Govindi* v. *State of U. P.*

31. *See* 1944 Nag 201 (212, 220) [A I R V 31], *Kunwarlal Singh* v. *Provincial Govt., C. P. & Berar.* (The right to collect *takoli* must be considered to be "a right in or over immovable property" within the meaning of S. 299 (2) (5), Act, 1935, did not apply to movable property, while cl. (2) of this article applies to movable property also. This means that even for the purpose of the compulsory acquisition or requisitioning of *movable* property, the two conditions as to existence of a public purpose and payment of compensation must be fulfilled.

(g) Money

As seen in NOTE 19, the enrichment of the State Treasury is not a public purpose and cannot be accomplished by compulsory acquisition of property. Money as such cannot be compulsorily taken by the State.

Prof. Willis[32] observes as follows in his CONSTITUTIONAL LAW OF THE UNITED STATES :

> "While, as stated above, any and all property is in general subject to the exercise of the power of Eminent Domain, there are certain rather unusual forms of private property which cannot thus be taken. These are corpses, money, choses in action, property used by the Government in its governmental capacity, property to be used for a mere substituted ownership, unless such substituted ownership is a more necessary use, and perhaps trust property dedicated to a State, mortgage liens and suits to quiet title."

Money in the hands of a citizen can be reached by the exercise of the power of taxation; it may be confiscated as a penalty under judicial order; and cases can even be conceived where the State seizes or confiscates money belonging to or in the hands of a citizen, under the exercise of its Police Power on the ground that such fund may be used for unlawful purposes to the detriment of the interest of the community. But taking money under the right of Eminent Domain, when it must be compensated by money afterwards, could be nothing more or less than a forced loan and it is difficult to say that it comes under the head of acquisition or requisitioning of property as described in Entry 36 of LIST 2. and that it is embraced within its ordinary connotation.[33]

(h) Choses in action

On the question whether choses in action can be compulsorily acquired under the power of Eminent Domain, there is a difference of opinion and this difference of opinion is reflected in the judgments of the Supreme Court in the case of the *State of Bihar* v. *Kameshwar Singh*.[34] According to Patanjali Sastri, C. J. and Das, J., choses in action can be compulsorily acquired. Thus, according to their Lordships,

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Government of India Act. But an omission on the part of Government, or even a promise to that effect, to refrain from collecting the full demand which it is entitled to make, does not create an interest in or over immovable property. *Note* :—'*Takoli*' has no exact meaning. Its significance varies according to connotation in which it is used. In the case of feudatories who are not British subjects it may possibly, and probably does, connote a 'tribute' leviable by the paramount power—But in the case of non-feudatories it is nothing more than a portion of the land revenue.)]

[32] Willis on Constitutional Law of the United States, 1936 Edn., p. 816.

[33] 1952 S C 252 (Pr 82) [AIR V 39] : 1952 S C R 889, 1020 & 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.

[34] 1952 S C 252 (280) (Prs 82, 83) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC).

arrears of rent due from tenants of zamindars can be compulsorily acquired by the State. But the other learned Judges in the case disagreed with this view. In the opinion of the majority of the Judges in this case, the provision in question which authorised the acquisition of arrears of rent was *ultra vires*. The judgments in the case on this point show that even in America there is a difference of opinion on the question among the writers on Constitutional Law. Thus, Prof. Willis and Cooley are of the opinion that choses in action cannot be acquired under the power of Eminent Domain. A contrary view has been taken in Nichols on EMINENT DOMAIN[35] citing *Cincinnati* v. *Louisville & N. R. Co.*[36]

(i) Water supply system

A water-supply system can be acquired under the power of Eminent Domain.[37]

(ii) Space above ground

A land-owner owns at least as much of the space above the ground as he can occupy or use in connection with the land, even though he does not occupy it in a physical sense by buildings and the like.[38] Hence, it has been held that when an owner of land is deprived of the use of his property in a safe manner on account of aeroplanes flying over his land at a very low altitude, he is deprived of his property. (See NOTE 11).

(j) Decree

A decree in favour of a party may be property.[39]

(k) Grants from State

The power to take property extends to property previously granted by the State itself.[40] In *Eastern Railroad Company* v. *Boston and Maine Railroad*,[41] Colt, J., of the Massachusetts Supreme Court observed as follows :

> "The power of the State to take private property for the public use reaches every description of property within its jurisdiction, even when acquired by grant from a State. It is an inherent element of sovereignty; and from the necessity of the case and the highest considerations of public welfare it must continue unimpaired in the State. It is impliedly reserved in every grant. It cannot be abridged so as to bind future legislation. The franchise of a corporation is not exempt. As an incorporeal hereditament, it may be taken, in whole or in part, and with the other property of the corporation devoted to other or similar public uses."

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[35] Nichols on Eminent Domain, Vol. 1, p. 99, para 2. (Cited in A I R 1952 S C 252 (para 99).)

[36] (1912) 56 Law Ed 481 : 223 U S 390. (Cited in AIR 1952 S C 252 (Para 99).)

[37] (1897) 41 Law Ed 1165 (1166) : 166 U S 685 (689), *Long Island Water Supply Co.* v. *Brooklyn.*

[38] (1946) 328 U S 256 (264) : 90 Law Ed 1206, *United States* v. *Causby.*

[39] 1951 Hyd 1 (Pr 22) [A I R V 38 C 1] (FB), *Mahbub Begum* v. *Hyderabad State.* (Act which takes away the rights under the decree without providing for compensation will be void under Art. 31.)

[40] (1872) 15 Am Rep 13 (18), *Eastern Railroad Co.* v. *Boston and Maine Railroad.*

[41] (1872) 15 Am Rep 13 (18).

Thus, Crown grants are not exempt from the power of Eminent Domain.[42] In *State of Bihar* v. *Kameshwar Singh*,[43] Mahajan, J., observed as follows :

> "The Crown cannot deprive a Legislature of its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists and no Court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence. If, therefore, it be found that the subject-matter of a Crown grant is within the competence of a Provincial Legislature, nothing can prevent that Legislature from legislating about it, unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally."

In *Jagannath Baksh Singh* v. *United Provinces*,[44] their Lordships of the Privy Council observed as follows :

> "It is, however, desirable to examine the particular grounds on which it is sought to induce the Court to arrive at this paradoxical conclusion. Some of these are said to be based on the general principle of law that the Crown cannot derogate from its own grant, others are said to depend on particular provisions of the Government of India Act. It has not been possible for the appellant to adduce any authority for the principle involved which their Lordships apprehend to be that Parliament, whether Imperial, Federal or Provincial, in the absence of express prohibition, is debarred from legislating so as to vary the effect of a Crown grant ...... Their Lordships completely concur in the opinion of the Federal Court that 'if once it be found that the subject-matter of a Crown grant is within the competence of a Provincial Legislature, nothing can prevent that Legislature from legislating about it, unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally'."

Thus, it is clear that the legislative powers of the Government are superior to any rights under Crown grants. (See also NOTE 27).

(l) Eminent Domain not subject to contract

The power of Eminent Domain is not also subject to any contractual right in favour of the owner conferred by the State.[45] In *Pennsylvania Hospital* v. *Philadelphia*,[46] White C. J., of the Supreme Court of America delivering the opinion of the Court observed as follows :

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[42] 1952 S C 252 (Pr 213) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.

[43] 1952 S C 252 (Pr 213) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC).

[44] 1946 P C 127 (Prs 16, 17) [A I R V 33 C 40] : I L R (1946) Kar P C 129 : 73 Ind App 123 : 1946 F C R 111 (PC).

[45] (1917) 245 U S 20 (23) : 62 Law Ed 124 (127), *Pennsylvania Hospital* v. *Philadelphia*. (Power of Eminent Domain is so inherently governmental and so essential to public welfare that it cannot be abridged by agreement.)
(1897) 41 Law Ed 1165 (1166, 1167) : 166 U S 685 (690), *Long Island Water Supply Co.* v. *Brooklyn*.

[46] (1917) 245 U S 20 (23) : 62 Law Ed 124 (127).

"There can be now, in view of the many decisions of this Court on the subject, no room for challenging the general proposition that the States cannot, by virtue of the contract clause, be held to have divested themselves by contract of the right to exert their governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties." (See also NOTE 27).

(m) Trust property

There is no prohibition against the acquisition of trust property as such.[47] The Religious Endowments Act (20 of 1863) only deals with the management of certain properties and does not come in the way of their acquisition.[48]

See also NOTES 14, 26 and 27.

26. **"Interest in, or in any company owning, any commercial or industrial undertaking."**—Clause (2) of this article expressly includes within the property that can be compulsorily acquired or taken possession of, any interest in any commercial or industrial undertaking or in any company owning such commercial or industrial undertaking.

(a) Commercial or industrial undertaking whether "property"

Section 299 (2) of the Government of India Act, 1935, was applicable to the compulsory acquisition of any land *or* any commercial or industrial undertaking or interest in such undertaking or in any company owning such undertaking. It was held by the Lahore High Court that a law which authorised the acquisition of *movable and immovable property* would not justify the acquisition of an undertaking like an electricity supply company. The reason given was that such an undertaking cannot be treated as nothing but a collection of items of movable and immovable property.[1] But this view was dissented from by the Calcutta High Court,[2] which held that under the very same provision which was in question in the Lahore case, namely, Rule 75A of the Defence of India Rules, an order requisitioning a building where

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47. 1952 S C 252 (Prs 70, 214) [AIR V 39]: 1952 S C R 889, 1020 & 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Charity created by private individual is not immune from sovereign's power of compulsory acquisition.)
[*See also* 1952 Mad 613 (633, 634) [AIR V 39], *Lakshmindra Theertha Swamiar* v. *Commr., H. R. E., Madras.* (Property—Meaning of—Trust property—The right of a hereditary dharmakarta to manage a temple is property—So also the right of a mathadhipati who has a beneficial interest and who is not merely a bare trustee is property, even assuming that a bare trust will not be property. So also shebaitship carries a beneficial interest. Position of dharmakarta, mathadhipatis, archakas, etc., explained with authorities—Art. 19 (1) (f) does not imply that 'property' must always be 'disposable' — Hence inalienable property is property.)]

48. 1952 S C 252 (Pr 215) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

Articles 31, 31A, 31B — Note 26

1. 1943 Lah 41 (45, 46) [AIR V 30] (FB), *Lahore E. S. Co.* v. *Punjab Province.*

2. 1946 Cal 140 (155, 156) [AIR V 33 C 37] : ILR (1945) 2 Cal 604, *H. C. Gupta* v. *Mackertich John.*

a hotel business was being carried on, was not *ultra vires*. It was held that the requisitioning of an undertaking was within the powers conferred by Rule 75A of the Defence of India Rules. The decision of the Calcutta High Court was tantamount to holding that a business undertaking also may be treated as property for the purpose of a law which authorises the acquisition or requisitioning of property, *movable or immovable*. This is now made clear by cl. (2) of this article which expressly reads "No property, movable or immovable, *including* any interest in, or in any company owning, any commercial or industrial undertaking," thereby showing that such interest is included within the meaning of property, movable and immovable.

In *Truax* v. *Corrigan*,[3] the Supreme Court of America has also held that a business is property and free access for employees, owner and customers to his place of business is incident to his right of property. In *Duplex Printing Press Co.* v. *Deering*,[4] the Supreme Court of America held that the business of manufacturing printing presses and disposal of them in commerce is a property right entitled to protection against unlawful injury or interference.

(b) "Undertaking"—Meaning of

Both S. 299 (2) of the Government of India Act, 1935, and cl. (2) of this article use the word "undertaking." "Undertaking" means business. A hotel business, for instance, is an undertaking.[5] The Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) is an instance of acquisition of a commercial or industrial undertaking and the Act is not in any manner inconsistent with the Fundamental Rights granted by Part III.[6]

(c) Undertaking owned by Company

Where a company is owning and running a commercial or industrial undertaking like a textile mill, the interest in the *undertaking* belongs to the company and not to the shareholders. The shareholders have an interest in the *company* which owns the interest in the undertaking. It is important to remember this distinction, because when the undertaking is taken possession of by the Government or acquired by the Government compulsorily, it is the property of the *company* that is acquired or taken possession of and not that of the *shareholders*. Hence, the shareholders as such have no right under the Constitution to move in the matter or apply for any constitutional remedy under the Constitution so long as the company has directors and the position taken up by the shareholders is that the action of the Government is *ultra vires*, so that the Directors' position is, according to the contentions of the shareholders, legally unaffected and the directors continue to be competent in the eye of the law to take the necessary constitutional action for vindicating the rights of the company.[7] But the shareholders have an *interest in the company* which owns the business in such cases. The interest consists in their ownership of the shares and in the rights which such ownership confers upon them. In so far as their rights *qua* the shares may be affected, the shareholders have a right to go to court for redress.[8]

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[3] (1921) 257 U S 312 (327) : 66 Law Ed 254. (*Duplex Printing Press Co.* v. *Deering*, 254 U S 443 (465) : 65 Law Ed 349 (356), Foll.)

[4] (1920) 65 Law Ed 349 (356) : 254 U S 443 (465).

[5] 1946 Cal 140 (155, 156) [AIR V 33 C 37] : ILR (1945) 2 Cal 604, *H. C. Gupta* v. *Mackertich John.*

[6] 1951 Mad 979 (Pr 16) [AIR V 38 C 339] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras.*

The above principles are illustrated in *Charanjit Lal* v. *Union of India*.[9] It was held in that case that the action of the Government in taking up the management of the Sholapur Mills affected the rights of the *company* but that inasmuch as the company was not moving in the matter, it was not open to an individual shareholder to agitate it before the Supreme Court. As regards the *rights of the shareholders*, the Supreme Court held that there was neither acquisition nor taking possession of those rights inasmuch as their rights as shareholders were not substantially affected by the action taken by the State and that, although some of their rights and privileges as shareholders were affected, the rights which were left to them were still valuable rights and it could not be said that they were only illusory in their nature so as to make the proceeding of the Government amount to a deprivation or taking possession of their property.

The above case also illustrates a proposition which has already been discussed in NOTE 25, namely, that matters which are merely appurtenant and incidental to a substantive interest cannot be treated as property and when such merely incidental rights are abolished or taken up, there is no deprivation of or acquisition of or dispossession from property. Thus, it was held that the rights and privileges of shareholders that were affected were merely incidental rights and the deprivation of the shareholders of those rights did not amount to depriving them of their property or taking possession of their property.

In *Dwarkadas* v. *The Sholapur Spinning and Weaving Co. Ltd.*,[10] which was a case before the High Court of Bombay arising out of the same matter, the High Court of Bombay also came to the conclusion that there was no acquisition or taking possession of property of the shareholders. It was also held in that case that taking up of the management of the company by the Government did not amount to expropriation of any *property* even of the *company*. As regards the rights of directors and managing agents of a company, the management of which is taken up by the Government, the right of management of directors and managing agents is not property. It is simply a contractual right and not proprietary right *in rem* as seen in NOTE 25. Hence, in such cases so far as directors and managing agents of the company are concerned, there is no acquisition or taking possession of their property.[11] The general principle involved in these cases is that a mere right of management as such is a *personal* right and is not property for the purpose of cl. (2).[12] (See NOTE 25.)

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[7] 1951 S C 41 (44, 53, 61) (Prs 7, 44, 76) [AIR V 38 C 9]: 1950 S C R 869: ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

[8] 1951 S C 41 (Pr 80) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India*.

[9] 1951 S C 41 (55) (Pr 53) [AIR V 38 C 9] : 1950 S C R 869 : I L R (1951) Hyd 461 (SC).

[10] 1951 Bom 86 (93) [A I R V 38 C 19] : ILR (1951) Bom 473 (DB).

Important Note. — After the Commentary was sent to the Press, it has been reported in the newspapers (*vide* "The Hindu" dated 19th December 1953) that the Supreme Court has reversed on appeal the decision of the Bombay High Court in *Dwarka Das* v. *Sholapur Spg. and Weg. Co. Ltd.*, AIR 1951 Bom. 86, and held that the Sholapur Mills Ordinance and Act under which possession was taken of the Mills and assets of the Company are *ultra vires*.

27. Property of Rulers of merged States.—It has been seen in NOTE 25 that Crown grants are not exempt from the principle of Eminent Domain and also that a State's power of Eminent Domain is not subject to any contractual obligation of the State in favour of the person whose property the Legislature empowers the Government to take compulsorily for a public purpose. In spite of this, it is possible to have an exception to the general principle when there is a specific constitutional provision for such exception. Thus, in ART. 362 of the Constitution it is provided that—

> "In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in cl. (1) of ART. 291 with respect to the personal rights, privileges, and dignities of the Ruler of an Indian State."

Hence, the power of compulsory acquisition of property cannot be enforced against a former Ruler of an Indian State if there is anything in the covenant of merger with regard to his State which precludes such acquisition. But where the covenant of merger only provides that certain properties were to be treated as the *private properties* of the Rulers, the covenant does not prohibit their compulsory acquisition by the State inasmuch as by such compulsory acquisition no breach is committed of the covenant to treat the properties as *private properties* of the owners.[1] It may also be questioned whether ART. 362 will apply at all to such a provision in the covenant of merger, because that article only relates to personal rights, privileges and dignities of the Ruler of an Indian State and not to the rights of property of such a Ruler.

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[11] 1951 S C 41 (Prs 36, 38) [AIR V 38 C 9] : 1950 S C R 869 : ILR (1951) Hyd 461 (SC), *Charanjit Lal* v. *Union of India.* (Taking up management of Insurance Company under S. 52A of the Insurance Act.)

1951 Bom 86 (93) [AIR V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. and W. Co.* (Government taking up management of Sholapur Textile Mills.)

[12] 1953 Raj 22 (Pr 17) [AIR V 40 C 8] : ILR (1951) 1 Raj 888, *Manoharsinghji* v. *The State of Rajasthan.* (Management of jagir.)

1952 Punj 9 (Pr 109) [AIR V 39 C 2] : ILR (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.* (Government taking up management of Insurance Company under S. 52A of Insurance Act.)

1951 Bom 86 (93) [AIR V 38 C 19] : I L R (1951) Bom 473 (DB), *Dwarkadas* v. *Sholapur S. and W. Co.* (Government taking up management of Sholapur Textile Mills.)

1951 Sau 73 (Pr 3) [AIR V 38 C 36] (DB), *Masumali* v. *Custodian, E. P., Rajkot.* (Administration of Evacuee Property Act (1950), S. 10—One of two joint owners of oil mill declared evacuee—Possession of whole mill taken by custodian—There was no acquisition of property but only taking over of management — Art. 31 did not apply.)

28. **"Clause (3)."**—As already seen in NOTE 22, although both the Parliament and the State Legislatures have power to enact laws relating to compulsory acquisition and requisitioning of property, the power of the *State* Legislatures is subject to the restriction that the assent of the President is necessary for the laws for compulsory acquisition or taking possession of property that may be made by such Legislatures. This restriction is imposed under cls. (3), (4) and (6) of this article and under proviso to ART. 31A.

Clause (3) provides that no such law as is referred to in cl. (2), made by the Legislature of a *State*, shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.[1] The question has been raised as to the meaning of the word "law" occurring in this clause. The issue raised has been whether, in view of the fact that the word used is "law" and not a "bill," there should not be a full-blown law before the President's assent is obtained for it. In other words, the issue has been whether the words of the clause do not require that the Governor must assent to the Bill passed by the House or Houses of Legislature as the case may be before reserving the Bill for the assent of the President. The view that it is only law in this sense that is contemplated by cl. (3) is also sought to be supported by the argument that "Legislature" includes not only the Houses of the Legislature but also the Governor of the State (see ART. 168). On this question it is definitely settled that the Governor's assent is not necessary before a Bill passed by the State Legislature is reserved by him for the assent of the President and the President's assent is obtained.[2] In the context in which the word "law" occurs in this clause it refers only to a Bill and not a full-fledged law. In this connection, reference may be made to ART. 200 which does not contemplate that in cases where a Bill is reserved for the assent of the President, the Governor should first record his assent to the Bill. Further, the contention that the word "law" in cl. (3) only means a full-fledged law would lead to the absurd result that the President's assent is required twice for the same bill, first to make it *law*

Articles 31, 31A, 31B — Note 27

[1] 1952 S C 252 (Pr 24) [AIR V 39]: 1952 S C R 889, 1020 and 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

Articles 31, 31A, 31B — Note 28

[1] 1954 Trav-Co 145 (Prs 10, 12) [A I R V 41 C 52] : I L R (1952) Trav-Co 519, *K. N. Pandarathil* v. *District Collector, Trivandrum.* (Clause (3) does not mean that if the law has been submitted to the President for his assent the same should have been received, but that otherwise such assent is not necessary.)

[2] 1952 S C 252 (Pr 17) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

and then once again, to enable it to have *effect* as law, because where a Bill is required to be reserved for the assent of the President, it does not become law till the President has given his assent.[3]

The clause only applies to *expropriatory* legislation.[4]

Where a State law dealing with acquisition and requisitioning of property, and also other matters, has not been referred to the President for his assent, the whole Act is not *ultra vires.*[5]

(a) General

29. Clause (4) — Scope of. — Clauses (4), (5) and (6) of this article and Arts. 31A and 31B enact certain exceptions to the provisions of cl. (2) of this article in relation to the compulsory acquisition or taking possession of property by the State. The scope of cls. (5) and (6) and Arts. 31A and 31B is considered in the respective notes relating to them. As regards cl. (4), this clause applies to Bills which were pending at the commencement of the Constitution in the Legislature of a State. It must be noted that the clause only applies to Bills pending in the *Legislature of a State* and not in the Parliament. A further condition is that after the Bill was passed by the Legislature it must have been reserved for the consideration of the President and must have received his assent. If these conditions are satisfied, then the clause provides that the law so enacted shall not be called in question in any Court on the ground that it contravenes the provisions of cl. (2) of this article. The clause provides that such law shall not be impeached on such ground, "notwithstanding anything in this Constitution."

Thus, in the case of the laws covered by this clause, they will be valid, although they do not comply with the requirement of cl. (2) or, to put it in the words of cl. (4), although the laws contravene the provisions of cl. (2).[1] So it becomes important to determine what is meant by the phrase "the provisions of cl. (2)" and what would amount to the contravention of such provisions. As regards the *first* question, it has been considered fully in Notes 9 and 10. As regards the *second* question, in the light of the discussion in Notes 9 and 10, it is clear that any law which authorises the compulsory acquisition or taking possession of property for a purpose other than a public purpose, or fails to provide for compensation for the property which it authorises to be taken, would contravene the provisions of cl. (2).

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[3] 1952 S C 252 (Pr 178) [AIR V 39] : 1952 S C R 889, 1020 & 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

[4] 1952 Trav.Co 455 (458) (Pr 14) [A I R V 39] : I L R (1951) Trav-Co 655 (DB), *A. Cheerappan* v. *G. P. T.* ((Travancore-Cochin) Paddy (Acquisition and Movement) Control Order (1950)— Nature of — Order cannot come under category of expropriatory legislation.)

[5] 1954 Trav-Co 145 (Pr 10) [AIR V 41 C 52] : I L R (1952) Trav-Co 519, *K. N. Pandarathil* v. *District Collector, Trivandrum.*

Articles 31, 31A, 31B — Note 29

[1] 1952 All 88 (Pr 7) [AIR V 39 C 29] (DB), *Govindi* v. *State of Uttar Pradesh.* (Contravention of clause (2) is cured by provision in clause (4): AIR 1951 All 674 (FB), Foll.)

(b) "Provisions of cl. (2)"—If can be spelt out otherwise

As seen in NOTE 10, the question has arisen whether the requirements as to the existence of a public purpose and the provision of compensation can be spelt out from any other source as, for instance, the entries in the legislative lists or the spirit of the Constitution, apart from and independently of the provisions of cl. (2). This question is material under cl. (4), because the clause only saves the laws referred to therein from being called in question on the ground that they contravene the *provisions of cl. (2)* and not on the ground that they contravene the provisions of any *other* law. On this question also, it has been seen that the above-mentioned requirements form *exclusively* a subject of provision under cl. (2) and cannot be spelt out otherwise.

(c) "Notwithstanding...... Constitution"

Even assuming that any other provision in the Constitution might be construed as importing the same requirement in a law providing for the compulsory acquisition of property, the phrase "notwithstanding anything in this Constitution" in this clause would exclude any reliance being placed upon such provision for supporting an objection to the validity of the law which is covered by cl. (2) of this article. The above is the interpretation of the words "notwithstanding anything in this Constitution" occurring in this clause contained in judicial decisions,[2] including the decision of the Supreme Court in the *State of Bihar* v. *Kameshwar Singh.*[2a]

But it is submitted with respect that the words "notwithstanding anything in this Constitution" have reference to the provisions of ART. 13 under which it is expressly enacted that any law made in contravention of the Fundamental Rights will be void. The effect of the words "notwithstanding anything in this Constitution" seems to be only that notwithstanding that a law providing for compulsory acquisition or requisitioning of property contravenes the Fundamental Rights granted under clause (2) of this article and notwithstanding the provisions of Article 13, such a law in the cases covered by cl. (4) shall not be called in question. Even attributing to the words "notwithstanding anything in this Constitution", the force ascribed to them by the above decisions, it is submitted with respect that, if construed by themselves, the words in the last part of cl. (4) permit the questioning of a law on the ground of its contravention of some other provision of the Constitution, which may import the same requirement as cl. (2). Such an effect of those words cannot be avoided by merely having recourse to the words "notwithstanding anything in this Constitution." The reason is, the position still remains the same, namely, that what is prohibited under this clause is the impeachment of a law on the ground that it contravenes the provisions of cl. (2). Hence, the same question occurs whether the words "notwithstanding anything in this Constitution" are taken to refer to the other provision in which the identical requirements mentioned in cl. (2) are supposed to be involved or not.

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[2] 1952 S C 252 (Pr 96) [A I R V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*
1952 Madh B 57 (Prs 77, 78) [A I R V 39 C 25] : I L R (1952) Madh B 178 (FB), *Ram Dubey* v. *Govt. of Madhya Bharat.* (It would appear from the words "notwithstanding anything in this Constitution" which occur in clause (4) that it is not permissible to object to an Act on the ground that the compensation fixed or to be determined is no compensation in law as being contrary to other provision of the Constitution. The protection given by clause (4) is not confined to one ground only, namely, the ground arising out of the provisions of Cl. (2) of Art. 31 : AIR 1951 All 674 (FB) and Misc. Petition 29 of 1951 (Nag), Rel. on ; AIR 1951 Pat 91 (SB), Dissented from.)

[2a] 1952 S C 252 (273) (Pr 49) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC).

(d) Objection in substance under cl. (2) barred

But, apart from the words "notwithstanding anything in this Constitution", when a certain provision is contained in two enactments, a contravention of one of such provisions *ipso facto* becomes a contravention of the other also and hence when the contravention of one of the provisions is condoned by the Constitution, *ipso facto* the condonation must be taken to apply in regard to the other provision also. It is submitted with respect that it is on this ground that an objection to the validity of a law on the ground of its contravention of some provision other than cl. (2) but embodying the same requirement as cl. (2) should be held as precluded by the words "shall not be called in question" on the ground that it contravenes the provisions of clause (2).

Looking at the matter from another point of view, when it is said that a certain Act contravenes the provision of cl. (2), it must be seen what are the provisions of cl. (2). If those provisions mean that there must be a public purpose and provision for compensation as necessary elements in a law authorising compulsory acquisition of property, then an Act providing for such acquisition will contravene these provisions if it does not contain the two elements regarded as necessary by them. Hence, what is meant by saying that a certain Act contravenes the provisions of cl. (2) is only that the Act lacks the two elements which are treated as essential by cl. (2). Hence, whenever an Act is questioned on the ground of its lacking in such elements it must be treated as being questioned on the ground that it contravenes the provisions of cl. (2).

Further, it is clear that the object of cl. (4) is to provide that a law relating to the compulsory acquisition of property should not be open to question on the ground that it does not limit the acquisition to acquisition for public purposes or does not provide for compensation. In other words, it is clearly the aim of the Constitution to make such a law valid in spite of such defects. Hence, whatever may be the provision under which the defect is supposed to arise, that defect must be deemed as condoned by the Constitution.[3]

(e) Entries in legislative lists —Objections based on

Moreover, the entries in the legislative lists, namely, Entry 33 of List 1 and Entry 36 of List 2 read with Entry 42 of List 3, do not provide that compensation must be paid and that the payment of compensation must be made part of every Act relating to compulsory acquisition of property.[4] The provision as to payment of compensation is, under the Constitution, contained as a positive enactment in the body of the Constitution itself and is not, as under S. 51, placitum (xxxi) of the Australian Constitution, embodied in a legislative head specifying the subject of legislation within the competence of the Legislature. As regards the question of public purpose also the language of the legislative entries does not expressly refer to the need for public purpose as a necessary ingredient of any enactment relating to compulsory acquisition. And, according to the views of the majority of the Judges in the Supreme Court decision of *State of Bihar* v. *Kameshwar Singh*,[5] the word "acquisition" which is used in the legislative entries does not, by itself, import the ingredient of public purpose. Hence, as held by Patanjali Sastri, C. J., in the above case, the plea that an Act relating to compulsory acquisition of property may be attacked on the ground that by failing to contain the ingredients as to public purpose and compensation, the Act falls outside the legislative powers of the Legislature as conferred by the entries in the legislative list, is barred, not only because such a plea virtually amounts only to calling in question the Act, on the ground of its contravening the provisions of cl. (2), but because also that the legislative entries, which are invoked to support the plea, do not in fact contain the provisions, expressly or by implication, which they are said to contain.

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[3] *See* 1951 All 674 (Pr 23) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Govt.* (If the Constitution says that a certain law shall not be challenged on a particular ground, the result is that the Act cannot be challenged on that ground and has to be treated as valid and enforceable.)

(f) Expressum facit cessare tacitum

In this connection also, it must be remembered that what has been made the subject of specific enactment in cl. (2) cannot, at the same time, be regarded as continuing to be a matter of common law or a matter that is left to be inferred from any other provision of law. *Expressum facit cessare tacitum* (what is expressed, makes what is silent to cease). In *Attorney-General* v. *De Keyser's Royal Hotel*,[6] it was pointed out that if the whole ground of something, which could be done by the prerogative, is covered by the Statute, it is the statute that rules.

(g) Objection as to compensation

On the question of compensation, cl. (2), not only requires that a law relating to compulsory acquisition of property or the taking possession of property should contain some provision as to compensation, but also that such compensation must be just and fair. (See NOTE 20). Hence, an objection to the validity of such a law, on the ground that its provisions relating to compensation are not just and fair, is also barred under cl. (4).[7]

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[4] 1952 S C 252 (271) (Prs 41, 42) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.
1951 Pat 91 (Pr 29) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar*. (As these entries stand, it would be open to the Legislature to legislate for acquisition without at the same time legislating about compensation.)

[5] 1952 S C 252 (271, 272) (Prs 41, 42, 43) [A I R V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC).

[6] (1920) 1920 App Cas 508 (526) : 122 L T 691.

[7] 1953 S C 375 (381) (Pr 18) [AIR V 40 C 85] (SC), *Gajapati Narayan* v. *State of Orissa*. (Orissa Estates Abolition Act (1 of 1952) is valid—AIR 1953 Orissa 185

Hence, the clause bars any objection regarding the adequacy of compensation or the correctness of the principles, prescribed by an Act, for determining the compensation, or the manner in which the Act directs the compensation to be given.[8] A view has been expressed that the protection under cl. (4) only applies to inadequacy of compensation and does not extend to cases in which there is a total absence of any provisions as to compensation.[9] It is submitted with respect that this view seems to be against the plain words of cl. (2), inasmuch as that clause expressly says that no property shall be taken unless the law under which it is taken "provides" for compensation and either fixes the amount of compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given. Thus, a law, which wholly fails to make any provision for compensation, contravenes the provisions of cl. (2) quite as much as a law which fails to make a provision for compensation *in the manner laid down in the clause.*[10]

(h) Objection on other grounds

Clause (4) only saves a law from being questioned on the ground that it contravenes the provisions of cl. (2). What is exactly meant by the contravention of the provisions of cl. (2) has already been discussed. Clause (4) does not preclude an objection on the ground that an Act contravenes any other provision of the Constitution, as for instance, ARTS. 14, 19, etc.[11] In this respect the clause is narrower in

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affirmed on appeal — Legislation cannot be attacked on ground that deductions from value are exorbitant, unjust, etc., unless the legislation is shown to be unrelated to facts—AIR 1952 S C 252, Explained and Distinguished.)

1952 S C 252 (Pr 100) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

1951 All 674 (Pr 50) [AIR V 38 C 182] : ILR (1952) 2 All 46 (FB), *Suryapalsingh* v. *U. P. Government.*

1951 Pat 91 (Prs 16, 62, 106, 108) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

[8] 1951 Pat 91 (Pr 62) [AIR V 38 C 15]:ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

[9] 1952 S C 252(Pr 8) [AIR V 39]:1952 S C R 889, 1020 and 1056:ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Per *B. K. Mukherjea, J.*—Article 31 (4) does not do away with obligation to pay compensation — It only lays down that the laws cannot be questioned on ground of inadequacy, etc.)

1951 Pat 91 (Pr 62) [AIR V 38 C 15]:ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (Per *Reuben, J.*—Article 31 (4) does not protect the Act if there is no provision for compensation.)

[10] *See* 1952 S C 252 (Pr 80) [AIR V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (*B. K. Mukherjea, J.* — "Clause (2) provides that no property shall be acquired or taken possession of unless the law directing its appropriation makes provision in manner laid down in Cl. (2)"—Submitted that though this is so, it does not mean that a law which makes no provision at all for compensation does not contravene cl. (2). Clause (2) means that (1) provision must be made for compensation and (2) that the provision must be made in the manner laid in cl. (2).)

[11] 1952 S C 252 (Pr 86) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

1951 Pat 91 (Pr 107) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (Clause (4) of Art. 31 seeks to cut down a Fundamental Right and must be construed strictly. The words "notwithstanding anything in this Con-its effect than ART. 31A, under which an objection on the ground of contravention of *any* Fundamental Right is barred and not only an objection on the ground of contravention of cl. (2). *A fortiori* cl. (4) does not bar an objection on the ground that the enactment falls outside the scope of the power of the Legislature under the relevant entries in the legislative lists. Similarly, the clause does not preclude an objection that in passing the law in question, the Legislature has, under the pretence of acting under its powers under the entries in the legislative lists relating to acquisition or requisitioning of property, has in fact done something which is in flat contradiction to them.[12]

(i) Strict construction

As the effect of the clause is to abridge Fundamental Rights by barring objections to laws taking away a person's property, the clause must be construed strictly.[13]

(j) Art. 31A compared

The point of difference between cl. (4) and ART. 31A has already been mentioned, namely, that while cl. (4) only saves a law from being questioned on the ground that it contravenes the provisions of cl. (2), ART. 31A is wider and saves a law from being questioned generally on the ground that it violates any Fundamental Right. While cl. (4) is, on this point, narrower in its effect than ART. 31-A, it is *wider* than ART. 31-A in another respect, namely, that while ART. 31A is confined in its application to "estates" and rights therein, cl. (4) is not confined to estates or to any other type of property, but is general in its terms.[14]

Another point of difference that may be noted is that the *non-obstante* clause, "notwithstanding anything in this Constitution," occurs only in cl. (4) and not in ART. 31A.[15] The effect of these words has already been discussed above.

A further point of difference is, that cl. (4) applies only to statutes which were pending as Bills in the Legislature at the commencement of the Constitution, while ART. 31A is not subject to any such restriction.[16]

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stitution" occurring in that clause cannot have the effect of enlarging the operative portion of the clause which, in clear terms, mentions one and one ground only, namely, the ground arising out of the contravention of the provisions of cl. (2) of Art. 31.)

[12] 1952 S C 252 (279) (Pr 80) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

[13] 1952 S C 252 (Pr 45) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

1951 Pat 91 (Pr 107) [AIR V 38 C 15] : I L R 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

[14] 1952 S C 252 (Pr 178) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

[15] 1952 S C 252 (Pr 11) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.* (Per *Patanjali Sastri, C. J.*—The "non-obstante" clause in Art. 31 (4) overrides all other provisions in the Constitution including the lists of the Seventh Schedule, whereas a law which falls within the purview of Art. 31A could only prevail over "the foregoing provisions of this Part".)

[16] 1952 S C 252 (Pr 11) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

(k) Pending — Meaning of

Clause (4) applies only to statutes which were *pending* as Bills before the Legislature before the commencement of the Constitution, i. e. 26th January 1950. A Bill may be pending even after the Legislative Assembly is prorogued. Section 73 of the Government of India Act, 1935, and ART. 196 (3) of the present Constitution, clearly provide that pending Bills shall not lapse by the prorogation of the Legislature.[17] After a Bill has been amended and passed by the Legislative Council of a State, it has necessarily to go again before the Legislative Assembly. A Bill which is in the process of transmission from one House to another, must be held to be a Bill pending in the Legislature of a State.[18] There is nothing in cl. (4) which requires that the Act as passed must be identical with the Bill that was pending at the commencement of the Constitution. In other words, changes introduced into the Bill, during its passage through the Legislature, do not affect the identity of the Bill and if the Bill was pending in either House of the Legislature of the State, at the commencement of the Constitution, it does not cease to be such pending Bill for the purpose of cl. (4), merely because changes are made in its provisions subsequently, before it is finally passed into law.[19]

(l) "Legislature" —Meaning of

The word "Legislature" in cl. (4) does not include the Governor but only means the Houses of Legislature of the State. Hence, the words "after it has been passed by such Legislature" in cl. (4) do not mean that the Bill must have also received the assent of the Governor before it is reserved for the consideration of the President.[20]

In this connection, it may be noted that the word "Legislature" does not bear the same meaning throughout the Constitution. Its meaning varies with the context. In some articles, the phrase means the Houses of Legislature and the Governor of the State, but in others, it only means the Houses of Legislature. Article 31 (4) is an instance of the latter kind. (See also NOTE 28.)

(m) "Law so assented to"

The words "the law so assented to" in the clause do not mean that even prior to the President's assent, there must be a full-fledged law. It is the President's assent that makes the measure a law and although ordinarily the word "law" means a valid and completed law,

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17. 1952 S C 252 (310) (Pr 205) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

18. 1951 All 674 (Pr 22) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.*

19. 1953 S C 375 (384) [A I R V 40 C 85] (SC), *Gajapati Narayan* v. *State of Orissa.* (Amendment of Bill before it is finally passed does not make cl. (4) inapplicable—Case regarding Orissa Estates Abolition Act (1 of 1952)—AIR 1953 Orissa 185 affirmed on appeal.)

1952 Madh B 57 (Prs 35, 36) [A I R V 39] : I L R (1952) Madh B 178 (FB), *Ram Dubey* v. *Govt. of Madhya Bharat.*

1951 Pat 91 (Pr 22) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

20. 1952 S C 252 (Pr 154) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

in the context of this clause, it means only a *Bill* and not a fully passed legislation.[21]

Nor do the above words, namely, "the law so assented to," imply a *valid* law being in existence prior to the President's assent. In other words, the words do not imply that prior to the President's assent, there must be a law which is unimpeachable under the provisions of the Constitution, including cl. (2) of this article. In fact, the clause contemplates a law which contravenes cl. (2) and which, but for the provisions of the clause and the assent of the President, would be void under ART. 13 of the Constitution. Hence, it is impossible that the clause should contemplate the existence of a *valid* law prior to the President's assent.

(n) President's assent — Questioning of

It is not open to the Courts to question the propriety of the President's action in giving his assent to a Bill under this clause.[22] No doubt, the reservation of Bills for the assent of a higher authority, is not a mere matter of procedure or empty formality. It is an essential and important part of a law-making machinery set up by the Constitution. When a Bill is reserved for the consideration of the President, it is the duty of the law officers to examine it with a view to ascertaining whether, in the first place, it is unconstitutional in whole or in part and, secondly, whether if assent is given to the Bill, the differences between the law obtaining in the State to which the Bill applies and the law obtaining in other Provinces will be merely differences in points of detail rather than in principle.[23] But, notwithstanding these considerations, it is not open, as already stated, to Courts to question the propriety of the President's assent to a Bill. Similar principles also apply to the question of certification of a Bill submitted to the President under cl. (6) of this article and NOTE 34, which relates to that clause, may be referred to.

(o) Clause (3) and cl. (4)—Correlation

Under cl. (3), the assent of the President is necessary for all *State* laws relating to the compulsory acquisition of property. Under cl. (4), the President's assent is required for the validity of a law which was pending as a Bill in a State Legislature at the commencement of the Constitution. The combined effect of these two clauses is not that in the case of Bills pending at the commencement of the Constitution the President's assent must be first obtained under cl. (3) and then again under cl. (4) so as to override the provisions of cl. (2).[24]

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[21] 1951 All 674 (Pr 24) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.*

1951 Pat 91 (Prs 34, 97) [AIR V 38 C 15] : ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.* (Per *Reuben, J.*— The word "law" in Art. 31 (4) seems to have been used as a compendious way of describing legislation which has passed through the Legislature of a State and has not yet received assent. The protection given by Art. 31 (4) assumes that the "law" is open to attack and therefore is not law in the strict sense. Per *Das, J.*—The word 'law' in Art. 31 does not appear to have been used exactly in the same sense in all the clauses; the context makes that quite clear. In cl. (1) of Art. 31, the expresion 'law' means a valid law.)

[22] 1951 Pat 91 (Pr 15) [A I R V 38 C 15] : I L R 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

[23] 1951 Pat 91 (Pr 14) [A I R V 38 C 15] : I L R 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar.*

Under cl. (4), the law assented to by the President becomes immune from attack on the ground mentioned in the clause. This protection will also extend to any notification under such law for exercising the powers conferred by the law.[25] When a law is valid, it necessarily means that the action taken under it is also valid.

30. "Provisions of cl. (2)" — Meaning of. — See NOTES 10 and 29.

(a) Introductory

31. Clause (5) — Scope of. — This is one of the provisions enacting exceptions to cl. (2). This clause exempts from the operation of cl. (2)—(a) all existing laws with certain exceptions and (b) any law which the State may hereafter make and which falls under the categories specified in the three sub-divisions of sub-cl. (b). Hence, such laws need not be aimed at securing any public purpose or provide for compensation, although they may relate to the compulsory acquisition or taking possession of private property by the State. The clause is applicable to all the laws of the description above-mentioned irrespective of the question whether the law is a Central one or a State one. One important instance of an existing law which is saved from the operation of cl. (2) by reason of this clause has already been noticed in NOTE 19. It has been seen in that note that S. 6 (3) of the Land Acquisition Act, 1894, is not open to be questioned on the ground that it makes the decision of the Executive about the existence of a public purpose for the acquisition of property conclusive and binding on a Court of law contrary to the clear intendment of cl. (2) of this article.

(b) "Existing law" (sub-cl. (a))

According to sub-cl. (a) of this clause, the provisions of any existing law other than a law to which the provisions of cl. (6) apply are exempted from the operation of cl. (2). The words "existing law" have been defined in ART. 366, cl. (10), as meaning "any law, Ordinance, order, bye-law, rule or regulation, passed or made before the commencement of this Constitution by any Legislature, authority, or person having power to make such a law, Ordinance, order, bye-law, rule or regulation." The words having been defined in the Constitution as having a certain meaning must be understood only in that sense, unless the context otherwise requires. There is another phrase of analogous import used in the Constitution, namely, "laws in force." This phrase has been defined in cl. (3) of ART. 13 as having a particular meaning. That definition is, however, only intended for the purpose of Art. 13. We have seen in the notes on Art. 13 that there is a difference between the meaning of an existing law and a law in force as defined in ART. 13. The word "law" has also been defined in cl. (iii) (a) of Art. 13. As pointed out in the notes on Art. 13, the meaning of "existing law" is also not identical with the meaning of

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[24] 1952 S C 252 (Pr 153) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.

[25] 1952 S C 252 (Pr 215) [A I R V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.

"law" as defined in ART. 13. Reference may be made to NOTE 2 on ART. 13 in this connection.

The test of an existing law as defined in ART. 366 (10) is that it must have been passed before the coming into force of the Constitution. Sometimes a law is passed and a provision is made therein that it shall come into force from some future date which may be fixed in the law itself or which may be fixed by the Government or other authority thereafter as may be indicated in the law. Similarly, any particular portion of the Act may come into force at some future date, fixed or to be fixed, and such postponement of the operation of the Act may apply to the whole of the country or to any particular areas in the country. By virtue of the special provisions of cl. 3 (b) of ART. 13, notwithstanding that an enactment may not be immediately operative either in the whole of the country or in any particular area and may be only intended to come into force at some future date fixed or to be fixed, the law shall be treated as a law in force for the purpose of Art. 13. There is no such explicit provision made with regard to "existing law" in the definition in ART. 366 (10) or elsewhere. Notwithstanding this, the test of an existing law being only that it must have been passed or made before the coming into force of the Constitution, the words "existing law" will include any law which has been passed before the coming into force of the Constitution in spite of the fact that it may not be operative immediately and may be intended to come into operation only from a future date either fixed or to be fixed thereafter by the appropriate authority. In other words, in this respect the meaning of "laws in force", and "existing law" is the same.[1]

On the above reasoning, where there is an existing law, as explained above, at the commencement of the Constitution, but that law being due to expire on some date after the coming into force of the Constitution, the life of the Act is extended by another enactment for a further period, the law will be treated as an existing law for the purpose of this clause, also with reference to the period for which its life is extended in this manner.[2]

Articles 31, 31A, 31B — Note 31

[1] 1952 Bom 16 (Pr 19) [AIR V 39 C 2], *State of Bombay* v. *Heman Santilal.*

[2] 1952 Bom 16 (Pr 19) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santilal.* (Act of 1948 to expire on 31-3-1950—Act 2 of 1950 extending it for further 2 years—What is saved under Art. 31 (5) (a) is not merely the original Act of 1948 but also its extended operation.)

1952 Cal 100 (Prs 20, 22) [AIR V 39 C 36], *Govinda Chandra* v. *Dinesh Chandra.* (The Essential Supplies (Temporary Powers) Act (24 of 1946) was existing law and was in force at the commencement of the Constitution. The Amendment Act 52 of 1950 merely extended the life or operation of this existing law. The character of the law remained unaltered. The Resolution had not the effect of transforming the existing law into a new law. Consequently the Bengal Food Grains (Disposal and Acquisition) Order (1947) is also an existing law and consideration whether it provides for compensation or principles and manner of compensation is unnecessary.)

(c) Orders passed under existing law

The words "existing law" as defined in ART. 366 (10) include *inter alia* an "order" made by an appropriate authority before the commencement of the Constitution. Although the Essential Supplies (Temporary Powers) Act is an Act of 1946, orders passed under the Act will not be deemed to be orders of 1946 but the dates on which the orders were passed will be treated as the dates of the order. Hence, if an order under the Essential Supplies (Temporary Powers) Act, 1946, is passed after the coming into force of the Constitution, i. e., 26th January, 1950, such an order will not be deemed to be an "existing law" for the purpose of cl. (5) of this article.

Similarly, if the order is passed on some date within 18 months before the coming into force of the Constitution, it will not be deemed to be an order of 1946 although it is passed under an Act of 1946.[3]

(d) Law passed within eighteen months before Constitution (cl. 6)

The materiality of the period of 18 months above referred to arises in this way. Under cl. 5 (a) it is *not every* existing law as already stated that is exempted from the provisions of cl. (2). There are certain exceptions. These exceptions refer to the laws to which cl. (6) apply. The laws to which cl. (6) apply are laws which have been passed within 18 months before the coming into force of the Constitution. Hence, a law passed within 18 months before the coming into force of the Constitution is not exempt from the provisions of cl. (2) by virtue of cl. (5) (a), although it may be an existing law. But in the case of all such laws coming under cl. (6), they will also be exempt from the provisions of cl. (2) if they are certified by the President. In the absence of a certificate from the President, they will not be exempt from the operation of cl. (2). Thus, there is a difference between an existing law passed more than 18 months before the Constitution and such laws passed within 18 months before the Constitution. Hence, where an order under the Essential Supplies (Temporary Powers) Act of 1946 is passed within 18 months before the coming into force of the Constitution and has not been certified by the President, it will not be exempt from the provisions of cl. (2). This is the materiality of the period of 18 months which has been referred to above with reference to an order under the Essential Supplies (Temporary Powers) Act.

(e) Temporary pre-Constitution Acts

It has been stated above that where a temporary Act is passed before the commencement of the Constitution, but the duration of the Act is extended by an enactment subsequent to the coming into force of the Constitution, the Act will be treated as an existing law even with reference to the subsequent period for which its life is extended. Where an Act is passed subsequent to the coming into force of the Constitution extending the life of a temporary Act passed previous to the Constitution, and such previous Act contains a provision to the effect that its life may be extended for a further period by the Provincial Government, it may be held that the extension of the period of duration of the Act is also a matter of pre-Constitution law and as such an "existing law" for the purpose of cl. (5) (a).[4]

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[3] 1952 Raj 74 (Pr 15) [AIR V 39] : I L R (1951) 1 Raj 674 : 1952 Cri L Jour 732 (DB), *Nathmal* v. *Commr. Civil Supplies.* (The provision as to compensation in Cl. 25 of the Rajasthan Food Grains Control Order, 1949, is not saved by Art. 31 (5) as the order came into force long after 26-7-1948, i. e., within 18 months before the Constitution came into force.)

(f) Notification under existing law

Where an "existing law" authorises the compulsory acquisition or taking possession of property by the State, the mere fact that a notification under such an Act for the acquisition of property is issued subsequent to the commencement of the Constitution does not make the notification a subsequent law and deprive it of the immunity under cl. (5) (a). The reason is that such a notification is not a "law" and if the Act under which the notification is issued is protected under cl. (5) (a), the protection necessarily extends to the notifications under the Act also.[5]

(g) Effects of cls. (5) (a) and (6) read together

The relation between cl. (5) and cl. (6) has already been explained. The effect of the two clauses read together, as already stated, is that under cl. (5) (a) all existing laws as defined in ART. 366 (10) and explained above, passed more than 18 months before the commencement of the Constitution, are *ipso facto* saved from being questioned on the ground of their contravention of cl. (2) of this article.[6]

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[4] 1952 Bom 16 (Pr 16) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santilal*.

[5] 1952 Trav-Co 14 (Pr 19) [AIR V 39 C 5] : 1950 Trav-Co L R 162, *Shaik Mansoor* v. *Tra-Co. Govt.* (The notifications issued by the Government under Ss. 11 and 14, (Travancore) Salt Act (3. of 1088 (ME)), acquiring an existing salt factory and establishing a factory by Government in its place, are not the laws which authorise the Government the taking possession of or acquiring a salt factory. The law invoked by Government in that behalf is the Salt Act. The notifications are only the orders issued by the executive Government in exercise of powers they claim as vested in them under the Act. If the Salt Act confers on Government the powers they claim even if it contains no provisions as contemplated by Art. 31 (2), they are saved by cl. 5 (a) of Art. 31 and Art. 13 of the Constitution cannot be invoked.)

[6] 1952 Bom 16 (Pr 16) [AIR V 39 C 2] (DB), *State of Bombay* v. *Heman Santilal*. (The Bombay Land Requisition Act (33 of 1948), as amended by the Bombay Land Requisition (Amendment) Act (2 of 1950), was an existing law within the meaning of Art. 31 (5) (a) and, therefore, even though it contravened the provision of Art. 31 (2), inasmuch as the power of requisitioning vested in Government was not restricted to public purposes, still it would not be void as the contravention is permissible under Art. 31 (5) (a).)

1952 Cal 65 (Prs 21, 23, 24) [AIR V 39 C 21] (DB), *Sudhindra Nath* v. *Sailendra Nath*. (The West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 is *intra vires* and constitutional as it complies with the provisions of Art. 31 (2) as to compensation. Moreover Art. 31 (6) applies to West Bengal Premises Requisition and Control (Temporary Provisions) Act (5 of 1947). Therefore the provisions of cl. (2) requiring compensation would not make the Act *ultra vires* even if no compensation was provided for as it had been passed more than eighteen months before the Constitution came into force.)

1952 Cal 61 (Pr 12) [AIR V 39 C 19-20], *Indra Narayan* v. *State of West Bengal*. (West Bengal Food Grains (Disposal and Acquisition) Order 1947 is saved.)

1952 Cal 16 (Pr 12) [A I R V 39 C 6], *Krishna* v. *Director of L. H. & D. E. Command*. (The Requisitioned Land (Continuance of Powers) Act (17 of 1946) does not contravene the provisions of Art. 31.)

1951 Bom 121 (Prs 4, 5) [A I R V 38 C 23] : I L R (1951) Bom 656 (DB), *Heman* v. *State of Bombay*. (Bombay Land Requisition Act (33 of 1948) contravenes Art. 31 (2) as it authorises requisitioning for purposes other than public—But it is saved under Art. 31 (5) (a).)

With regard to Acts passed within 18 months before the coming into force of the Constitution, they will be immune from being questioned on the ground of their contravention of cl. (2) only if they have been submitted to the President and have been certified by him.

In this connection, the wording of cl. (5) (a) requires a little attention. It refers to the provisions of any existing law other than a law to which the provisions of cl. (6) apply. What is the meaning of the words "a law to which the provisions of cl. (6) apply" ? It was contended in one case that unless the certificate of the President under cl. (6) was obtained for a law, it was not a law to which cl. (6) applied. The result of this argument was that even laws passed within 18 months before the commencement of the Constitution, but not certified by the President, would be exempt from the operation of cl. (2) under cl. (5) (a), because such laws would *not* be "laws to which the provisions of cl. (6) applied" and would not, therefore, be excluded from the provisions of cl. (5) (a) by virtue of the phrase "other than a law . . . . ." . Obviously, this argument was fallacious as it renders nugatory the condition as to the President's assent for laws passed within 18 months before the Act. The argument was rejected by the Court.[7] The words "a law to which the provisions of cl. (6) apply" only refer to a law enacted not more than 18 months before the commencement of the Constitution. It is not the certificate of the President that makes it "a law to which cl. (6) applies". If the certificate of the President is not obtained, then it means that such a law will not be entitled to the protection of cl. (6) and will be void if it contravened the provisions of cl. (2).

The protection under cl. (5) is not limited to the question of compensation but also extends to the question of public purpose, as cl. (2) requires both.[8] (See NOTES 10 and 29.)

(h) Sub-clause (b) of cl. (5)

Clause (5) (b) relates to future laws, that is laws to be made by the State after the coming into force of the Constitution. Even in regard to such laws, cl. (5) (b) creates certain exceptions to the provisions of cl. (2). These exceptions are enumerated in the three sub-divisions of cl. (5) (b).[9] The first sub-division refers to the power of the State to impose a tax or penalty. It has been seen that there is a distinction between the power of Eminent Domain and the power of taxation. (See NOTE 9.) Under ART. 265 no taxation shall be levied or collected except by authority of law. Thus taxation is treated as a separate and distinct matter falling under a distinct power of a State under the Constitution. It has also been seen that public purpose does not include the acquisition of public funds for the public treasury and that money as such cannot be made the subject-matter of compulsory acquisition of property. (See NOTES 19 and 25). In the context of all these, it is not clear what exactly is the scope of cl. (5) (b) (i) which exempts from the provisions of cl. (2) any law which the State may make for the purpose of imposing or levying any tax or penalty. What is not clear is how a power of enacting a law for the purpose of imposing a tax or penalty falls under the power of Eminent Domain with which cl. (2) deals.

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[7] 1951 Cal 111 (Pr 31) [A I R V 38 C 30B] (DB), *W. B. S. K. Co-op. Society* v. *Bella*.

[8] 1951 Bom 121 (123) [AIR V 38 C 23] : I L R (1951) Bom 656 (DB), *Heman* v. *State of Bombay*.

[9] **Important Note.**—After the Commentary was sent to the Press it has been reported in the newspapers (*vide* 'The Hindu' of Madras dated 18th and 19th December, 1953) that the Supreme Court has in two decisions dissented from Das, J.'s view and held that both cls. (1) and (2) of this article relate to the *same* subject and that in no case can a person be deprived of his property except for a public purpose and on condition of payment of compensation. The judgments have not been reported yet in any law journal, nor have copies of judgments been received. Hence, it is impossible to make a correct appraisal of the above decisions at this stage. But it may be stated that the commentary, which has been written on the hypothesis that

Clause (5) (b) (ii) exempts from the provisions of cl. (2) any law for the promotion of public health or the prevention of danger to life or property. It has been held that the expression "danger to property" covers danger to the interests of policy-holders in a Life Insurance Company. Hence, (it has been held) S. 52A of the Insurance Act under which Government can take control of an Insurance Company if it is being mismanaged, may be regarded as a provision of law covered by cl. (5) (b) (ii) and as such exempt from the requirements of cl. (2).[10]

32. Taxation. — Taxation is not deprivation of property and is not covered by this article. The article applicable is ART. 265. Under that article, no tax shall be levied or collected except by authority of law. It has been seen in NOTE 9 that there is a distinction between the power of taxation and that of Eminent Domain.

As pointed out in *Ramjilal* v. *Income-tax Officer, Mohindargarh*[1] by the Supreme Court, there was no provision corresponding to ART. 265 in the Government of India Act, 1935. If collection of taxes amounts to deprivation of property within the meaning of ART. 31 (1), then there was no point in making a separate provision again, as has been made, in ART. 265. It, therefore, follows that cl. (1) of ART. 31 must be regarded as concerned with deprivation of property otherwise than the imposition or collection of tax, otherwise ART. 265 becomes wholly redundant. In the United States of America, as already pointed out in NOTE 9, the power of taxation is regarded as distinct from the exercise of Police Power or Eminent Domain. The Indian Constitution evidently has also treated taxation as distinct from compulsory acquisition of property and has made independent provision giving protection against taxation save by authority of law. This provision,

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cls. (1) and (2) are *distinct* provisions, will require revision in the light of the above Supreme Court decisions.

[10] 1952 Punj 9 (Pr 110) [A I R V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*

Articles 31, 31A, 31B — Note 32

[1] 1951 S C 97 (Pr 12) [AIR V 38 C 11] : 1951 S C R 127 (SC).

namely, ART. 265, not being contained in Part III of the Constitution, the right conferred thereby is not a Fundamental Right which can be enforced by an application to the Supreme Court under ART. 32.[2] (See also NOTES 9, 19 and 31 and ART. 19, NOTE 85.)

33. Evacuee property. — Under cl. (5) (b) (iii), laws relating to compulsory acquisition of property or their being taken possession of compulsorily by the State are exempted from the requirements of cl. (2) of this article, if the laws pertain to *evacuee property.*

The clause reads as follows:

> "Nothing in cl. (2) shall affect the provisions of any law which the State may hereafter make in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property."

Clause (5) (b) (iii) applies only to laws that may be made by the State after the coming into force of the Constitution. With regard to such laws, the clause says that cl. (2) will not apply.

As regards existing evacuee property laws. i. e., evacuee property laws passed before the coming into force of the Constitution, the provisions of cl. (5) (a) and cl. (6) will apply. In other words, if such laws have been made more than 18 months before the Constitution, they will not be open to question on the ground of their contravention of cl. (2). But if such laws have been made within 18 months before the Constitution, they will be open to question if they are inconsistent with the provisions of cl. (2), unless they have been submitted to the President and have been certified by him.

Hence, evacuee property laws, passed within 18 months before the Constitution, and not certified by the President, will be void if they contravene the provisions of cl. (2). See also NOTE 14.

34. Clause (6)—Scope of. — This clause provides for another exception to the requirements of cl. (2). The clause applies to laws authorising the acquisition or taking possession of property compulsorily by the State in cases where such laws have been passed within 18 months before the Constitution. In such cases, according to the clause, the laws cannot be called in question if they have been submitted to the President and have been certified by him. In cases of laws passed more than 18 months before the Constitution, they are totally exempt from the provisions of cl. (2) irrespective of the certification by the President. (See Cl. 5.) In all such cases the certificate of the President is not contemplated at all. (See NOTE 31.)

Where a law complies with the requirements of cl. (2), there is no question of its having to be certified by the President and its validity cannot be attacked on the ground of the want of such certification.[1] This clause only bars an objection on the ground that a law contravenes the provisions of cl. (2) of this article or those of sub-section (2) of S. 299 of the Government of India Act. An objection to the validity of a law authorising the compulsory acquisition or taking possession of property is not barred, if it is based on any other ground.[2] But as regards the grounds mentioned in the clause, namely, grounds based on the contravention of cl. (2) of this article or S. 299 of the Government of India Act, 1935, the President's certificate cures any unconstitutionality in any law due to such contravention.[3]

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[2] 1951 S C 97 (Pr 12) [AIR V 38 C 11] : 1951 S C R 127 (SC), *Ramjilal* v. *I.-T. Officer, Mohindargarh.*

It has already been seen in NOTE 29, that it is not open to the Courts to consider the propriety of the President's assent to a Bill, although no doubt such assent has to be given according to well-considered principles. Similarly, the President's certificate to a law under this clause is also not open to question in a Court of law as not being proper. Such restrictions as there are on the exercise of the power of the President in giving his assent or certificate are not legal but moral.[4]

In NOTE 29, the question has been considered whether prior to the submission of a Bill for the assent of the President the Bill must have become a valid law. In other words, the question has been whether the word "law" in cl. (4) implies that what is submitted to the President is a *valid* law. Similarly, under this clause also the question has been raised whether the use of the word "law" imports that even before submission to the President for his certificate, there must be a

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Articles 31, 31A, 31B — Note 34

[1] 1952 Raj 137 (Pr 6) [AIR V 39]:ILR (1951) 1 Raj 853, *Jeewan Ram* v. *United States of Rajasthan.*

[2] 1950 Pat 392 (Prs 39, 81, 84) [AIR V 37 C 108]: ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.* (Per *Sinha and Das, JJ.*—Article 31 cannot be read as an exception to the Fundamental Rights as declared in Art. 19 (1) (f). But certainly the two articles have got to be read together in order to give full effect to the intention of the Constitutent Assembly. Terms of Art. 31 (6) are not wide enough to cover each and every contravention of the Constitution but only of Cl. (2) of Art. 31. Hence as the Bihar State Management of Estates and Tenures Act (21 of 1949) is inconsistent with Art. 19 (1) (f) it must be held to be invalid notwithstanding the certification by the President.)

1952 Mad 835 (Pr 3) [A I R V 39] : ILR (1953) Mad 543 (DB), *Veerappa* v. *State of Madras.*

1951 Mad 979 (Prs 14, 15) [AIR V 38 C 339](DB), *Narasaraopeta Electric Corporation* v. *State of Madras.* (It does not prevent a party from establishing that the Act is in fact beyond the competency of the Legislature or that even apart from S. 299 (2), the Legislature could acquire property only for a public purpose—*Note*: — The latter view, however, seems to be opposed to AIR 1952 S C 252 and should be deemed as not good law.)

[3] 1952 Mad 835 (Pr 2) [AIR V 39]: ILR (1953) Mad 543 (DB), *Veerappa* v. *State of Madras.*

1951 Mad 979 (Pr 14) [A I R V 38 C 339] (DB), *Narasaraopeta Electric Corporation* v. *State of Madras.*

[*See also* 1952 Raj 137 (Pr 6) [A I R V 39] : ILR (1951) 1 Raj 853, *Jeewan Ram* v. *United States of Rajasthan.*]

[4] 1950 Pat 392 (Pr 5) [AIR V 37 C 108]: ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar.*

valid law in existence. On this question there has been some difference of opinion. But it is submitted with respect, the better view has been expressed in *Veerappa Chettiar* v. *State of Madras*.[5] In that case, it was held that the words "any law of the State" mean any Act, Ordinance, or Order, enacted by the State without any reference to its validity.

The words of this clause are couched in a form so as to refer to the future. They are to the effect that any law to which the clause applies and which has been certified by the President "shall not be called in question" on the grounds mentioned. If a proceeding was pending in a Court of law at the commencement of the Constitution challenging the validity of any law as contravening the provisions of cl. (2) of ART. 31 or of sub-section (2) of S. 299 of the Government of India Act, will the provisions of this clause be a bar to the questioning of the law even in such a proceeding? In other words, will the clause have a retrospective effect so as to affect proceedings questioning an enactment instituted prior to the coming into force of the Constitution? It has been held that this clause will have such retrospective effect and will operate as a bar to the questioning of the validity of an Act on the grounds mentioned therein, even though the legal proceeding in which the validity of the Act is challenged was instituted before the coming into force of the Constitution and was pending at the commencement of the Constitution.[6]

For Acts and Ordinances certified by the President under this clause, see the undermentioned foot-note.[7]

(a) Introductory

35. Article 31A—Scope. — As seen in NOTE 3, ARTS. 31A and 31B were introduced into the Constitution under the Constitution (First Amendment) Act, 1951, for the purpose of validating certain

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[5] 1952 Mad 835 (Pr 2) [AIR V 39] : ILR (1953) Mad 543 (DB). (Opinion of Das J. in A I R 1950 Pat 392, approved and observations of Sinha J., dissent. from.)

[6] 1950 Pat 392 (Pr 37) [AIR V 37 C 108] : ILR 29 Pat 790 (SB), *Kameshwar Singh* v. *Province of Bihar*. (Distinguishing *Moon* v. *Durden*, (1848) 154 E R 389.)

[7] The following Acts and Ordinances were certified by the President under Art. 31 (6) :—

1. Bihar State Management of Estates and Tenures Act, 1949 (Bihar 21 of 1947).
2. Administration of Evacuee Property Ordinance, 1949 (27 of 1949).
3. Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras 26 of 1948).
4. Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras 1 of 1950).
5. Madras Electricity Supply Undertakings (Acquisition) Act, 1949 (Madras 43 of 1949).
6. East Punjab Displaced Persons (Land Resettlement) Act, 1949 (East Punjab 36 of 1949).
7. Assam Management of Estates Act, 1949 (Assam 17 of 1949).
8. Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay 67 of 1948).
9. Bombay Maleki Tenure Abolition Act, 1949 (Bombay 61 of 1949).
10. Panch Mahals Mehwassi Tenure Abolition Act, 1949 (Bombay 63 of 1949).
11. Assam Requisition and Control of Vehicles Act, 1948 (Assam 17 of 1948).
12. Reserve Bank (Transfer to Public Ownership) Act, 1948 (62 of 1948).
13. Delhi Hotels (Control of Accommodation) Act, 1949 (24 of 1949).

Zamindari Abolition Laws about the validity of which doubts had been raised and proceedings had been filed in Court. The validity of this Constitution (First Amendment) Act was itself questioned but was upheld by the Supreme Court.

(b) Article 31 (4) compared

The distinction between ART. 31A and cl. (4) of ART. 31 has been pointed out in NOTE 29. As mentioned there, this article only applies to "estates"[1] and not to any other kind of property. The word "estate" has been defined for the purpose of this article in cl. (2) thereof. (See NOTE 36.) But while cl. (4) of ART. 31 makes an Act or other law immune from attack only on the ground of the contravention of the provisions of clause (2), this article is wider in its scope and confers immunity from attack on an Act or other law on the ground of its contravention of any other provision of Part III of this Constitution also. Thus, even if a law contravenes ART. 14 or ART. 19 of the Constitution, it will be immune from attack by virtue of this article if the law is covered by its provisions.[2] In fact, it was the decision of the Patna High Court, holding that the Bihar Land Reforms Act, 1950, was void as it contravened the provisions of Article 14, that was responsible for the passing of the Constitution (First Amendment) Act introducing this article. It was held by the Patna High Court that cl. (4) of ART. 31 did not preclude an objection to a law on the ground of its contravening the provisions of ART. 14 or any other provision in Part III of the Constitution, excepting the provisions of cl. (2). Article 31A now extends the scope of immunity in regard to Acts relating to estates and authorising compulsory acquisition of rights in respect of them so as to cover all the provisions of Part III of the Constitution.[3]

(c) "Rights conferred by this Part"

This article confers immunity on the laws coming within its scope from being attacked on the ground of their being inconsistent with or taking away or abridging any of the "rights conferred by any provisions of this Part." There is no distinction between natural rights recognised by the Constitution and the rights conferred by the Constitution so far as the rights in Part III of the Constitution are concerned. All these rights must be treated as rights "conferred" by Part III of the Constitution and as being covered by the provisions of this article and if those rights are infringed, the result cannot be avoided by contending that the rights are merely recognised and not conferred by Part III of the Constitution. Thus, the right under ART. 31, cl. (2) is not merely a natural right *recognised* by the Constitution but is a right *conferred* by Part III of the Constitution and a violation of the provisions of that clause will amount to a violation of the right

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Articles 31, 31A, 31B — Note 35

[1] 1952 S C 252 (Pr 12) [A I R V 39] : 1952 S C R 889, 1020 & 1056: ILR 31 Pat 565 (S C), *State of Bihar* v. *Kameshwar Singh.*

[2] 1952 S C 252 (281) (Pr 88) [AIR V 39] : 1952 S C R 889, 1020 & 1056: ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

[3] *See* 1952 S C 252 (263, 267, 301) (Prs 11, 23, 159) : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh.*

"conferred" by Part III of the Constitution and the protection granted by ART. 31A will apply to such violation.[4]

An objection on the ground that an Act is not for a public purpose will only be barred under ART. 31A, if the element of public purpose is held to be "provided" by cl. (2) of ART. 31, and not if it is held that the element is inherent in the conception of Eminent Domain and is not provided by cl. (2) of ART. 31. Hence, on this point also, there is a resemblance between ART. 31, cl. (4) and ART. 31A. As to whether public purpose is to be regarded as "provided" by cl. (2) of ART. 31, see NOTE 9.

(d) Proviso to cl. (1) — President's assent

Under Proviso to cl. (1) of the article, where a law of the description mentioned in that clause is a law made by a Legislature of a State, the immunity from attack conferred by cl. (1) will not apply unless the law having been reserved for the consideration of the President has received his assent. Although the proviso uses the word "law" it only refers to what in fact is a Bill and not a full-fledged law. Hence, the consent of the Rajpramukh or Governor of a State is not essential before the Bill is submitted to the President for his assent.[5] See also NOTES 28 and 29 where a similar question as to the necessity of the Governor's consent to a Bill before its submission to the President has been discussed with reference to the provisions of cls. (3) and (4) of ART. 31.

(e) Provisions of Part III not inapplicable to laws relating to acquisition of estates

According to Mahajan, J., in the *State of Bihar* v. *Kameshwar Singh*,[6] the proviso to cl. (1) of ART. 31A is an indication that even with reference to estates, ART. 31, cls. (1) and (2) or the other provisions of Part III of the Constitution do not stand repealed, although their violation is condoned. In the case of laws made by the Legislature of a State, the question of compliance with the provisions of articles of Part III of the Constitution, including cls. (1) and (2) of ART. 31, has, according to Mahajan, J., been left for the consideration of the President. The effect of ART. 31A is not to make these provisions stand on the same footing as though they have been repealed but only to take the question of compliance with them out of the purview of the Court's jurisdiction.

The words "called into question in any court" occurring in cl. (4) and cl. (6) of the main article, namely ART. 31, also, therefore, only amount to the removal from the jurisdiction of the Court certain questions and not to the making of certain provisions inapplicable to certain matters. In this connection, the distinction between the wording of cl. (5) of Art. 31 in this respect and the wording of cls. (4) and (6) and of Arts. 31A and 31B may be drawn attention to. Clause (5) of Art. 31 says that nothing in cl. (2) shall affect the provisions of the laws mentioned therein, whereas cls. (4) and (6) say that the laws coming within their purview and scope shall not be called in question in a court. The words in Arts. 31A and 31B are that the laws mentioned therein shall not be deemed to be void. There is certainly a distinction between cl. (2) not affecting a particular law and a particular law not being capable of being questioned on the ground of its contravention of cl. (2).

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[4] 1952 Madh B 57 (Prs 31, 32, 34, 71, 74, 75) [A I R V 39 C 25] : I L R (1952) Madh B 178 (FB), *Ram Dubey* v. *Govt. of Madhya Bharat.* (An application under Art. 226 of the Constitution challenging the constitutionality of the Madhya Bharat Zamindari Abolition Act is not a proceeding in relation to a right which has been merely recognised, but is in regard to a right which has been conferred by the Constitution— Article 31A therefore applies to such a case —A I R 1950 S C 27, Foll.)

[5] 1952 Madh B 57 (Prs 29, 30) [AIR V 39 C 25] : ILR (1952) Madh B 178 (FB), *Ram Dubey* v. *Govt. of Madhya Bharat.* (Misc. Petn. No. 29 of 1951 (Nag), Rel. on.)

[6] 1952 S C 252 (Pr 202) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC).

(f) "Estate" — Meaning of

Buildings appurtenant to an estate are included in an "estate".[7] See also the undermentioned case.[8]

(g) Acquisition

For the purpose of Art. 31A, it is not necessary that an Act for the acquisition of estates, etc., must expressly state that the estate or the rights therein acquired under the Act vest in the State. It is sufficient if the provisions of such an Act themselves show that the acquisition is by the State.[9] Article 31A contemplates an Act providing for the acquisition of a whole estate.[10] It is not necessary that the acquisition must take place immediately or not at all. There is nothing wrong in its happening gradually or at a later date or on the initiative of an intermediary person, such as a tenant, if the actual extinguishment of the rights in the estate takes place on payment of compensation made by the State.[11]

The taking over of an estate for management by the Court of Wards is not an "acquisition" of the estate within the meaning of Art. 31A and a law, which provides for such taking over, is not covered by this article.[12]

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[7] 1953 S C 375 (383) [A I R V 40 C 85] (S C), *Gajapati Narayan* v. *State of Orissa.* (AIR 1953 Orissa 185, affirmed on appeal.)

[8] 1952 Sau 114 (Pr 12) [A I R V 39] (SB), *Kalika Kumar Sinhji* v. *Saurashtra State.* (The holding of a Mulgirassia in Saurashtra is as much an estate as the holding of Bhayats and Talukdars, and the law relating to the acquisition of such a holding is therefore covered and saved under Art. 31A.)

[9] 1952 Sau 114 (Pr 9) [A I R V 39] (SB), *Kalika Kumar Sinhji* v. *Saurashtra State.* (The Saurashtra Land Reforms Act, 1951, specifically provides for the extinguishment of the Girasdars' rights in their estate — The combined effect of the provisions contained in Ss. 31, 36 and 39 is that the estate of the Girasdar is acquired by the State and that it vests in the Saurashtra State— Thus as the Saurashtra Act fulfils the conditions of Art. 31A, it falls within the scope of that article.)

[10] 1952 Sau 114 (Pr 11) [AIR V 39] (SB), *Kalika Kumar Sinhji* v. *Saurashtra State.* (Saurashtra Land Reforms Act, 1951—The Act does provide for the acquisition of the estates, meaning the whole estate — By virtue of S. 28, the fact that only a part of the estate may be acquired on account of all the tenants not applying for occupancy rights does not affect the validity of the Act; for an Act must be judged by what it provides for and not by what might transpire in a few cases in practice.)

[11] 1952 Sau 114 (Pr 10) [AIR V 39] (SB), *Kalika Kumar Sinhji* v. *Saurashtra State.*

[12] 1953 S C 373 (375) (Pr 10) [AIR V 40 C 84]: 1953 S C R 1049 (SC), *Raghubir Singh* v. *Court of Wards, Ajmer.* (Ajmer Tenancy and Land Records Act

(b) "Extinguishment or modification of any such right"

The word "modification" (like extinguishment) in the context of ART. 31A only means a modification of the *proprietary right* of a citizen and cannot include within its ambit a mere *suspension* of the right of management of an estate for a time, definite or indefinite, as where an estate is taken over for management by a Court of Wards.[13]

36. "Estate"—Meaning of. — Article 31A, cl. (2) defines the meaning of "estate" for the purpose of the article. Malguzari lands in the Madhya Pradesh are not "estates" within the meaning of ART. 31A. Hence, the provisions of Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act, 1950 (1 of 1951) in relation to such lands are not capable of being validated under ART. 31A. But the Act being included in SCH. IX, the provisions of ART. 31B will apply and the Act is rendered valid beyond dispute under that article.[1] Arrears of rent are not "estate" within the meaning of ART. 31A.[2]

Buildings appurtenant to an "estate" are included in an "estate".[3] See also the undermentioned case.[4]

37. Scope of Article 31B.—Article 31B along with ART. 31A was introduced into the Constitution by the Constitution (First Amendment) Act, 1951. The article validates the various laws enumerated in SCH. IX to the Constitution and provides that they shall not be deemed to be void or ever to have become void, on the ground that they take away or abridge any of the rights conferred by Part III of the Constitution.[1] See NOTE 35 for the meaning of the words "rights conferred by Part III". Unlike ART. 31A, ART. 31B is not limited in its applicability to estates but applies also to properties which are not estates.[2]

(42 of 1950), S. 112—The law enacted in S. 112 manifestly infringes the Fundamental Right of a landlord guaranteed by Art. 19 (1) (f) and is void to that extent.)

[13] 1953 S C 373 (375) (Pr 10) [AIR V 40 C 84] : 1953 S C R 1049 (SC), *Raghubir Singh* v. *Court of Wards, Ajmer*. (Historically speaking, Art. 31A which has relation to Art. 31 (2) has no relevancy whatsoever to the law enacted in S. 112 of Ajmer Tenancy and Land Records Act, 42 of 1950.)

Articles 31, 31A, 31B — Note 36

[1] 1952 S C 252 (Pr 33) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.

[2] 1952 S C 252 (Pr 78) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*. (Per *B. K. Mukherjea, J.*)

[3] 1953 S C 375 (383) [AIR V 40 C 85] (SC), *Gajapati Narayan* v. *State of Orissa*.

[4] 1952 Sau 59 (65) (Pr 14) [AIR V 39] (SB), *Jayantilal* v. *State of Saurashtra*. (Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, 1949, does not come within Art. 31A of the Constitution and is not saved by that article.)

Articles 31, 31A, 31B — Note 37

[1] 1953 Hyd 21 (24) (Pr 11) [A I R 40 C 13] (FB), *Ahmad-un-Nissa Begum* v. *State*. (Hyderabad Regulations included in Sch. IX—Validity of, cannot be questioned.)

1952 Hyd 163 (170) [A I R V 39] : I.L R (1952) Hyd 595 (FB), *Ahmad-un-Nisa Begum* v. *State*. (Hyderabad (Abolition of Jagirs) Regulation is one of the legislations saved by Art. 31B.)

[2] 1952 S C 252 (Pr 23) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC), *State of Bihar* v. *Kameshwar Singh*.

Articles 31, 31A, 31B
Notes 37–38

The words "without prejudice to the generality of the provisions contained in ART. 31A" at the beginning of ART. 31B have given rise to the contention that ART. 31B is only illustrative of ART. 31A and as such cannot have a wider scope than ART. 31A. The result, according to the argument, was that Article 31B also should be limited in its applicability like ART. 31A to estates. This argument was raised before the Supreme Court in the *State of Bihar* v. *Kameshwar Singh*[3] and reliance was placed in support of the argument upon *Emperor* v. *Sibnath Banerjee.*[4] The Supreme Court rejected the contention and held that ART. 31B is not merely illustrative of ART. 31A.

38. Some zamindari abolition laws and their validity. — It has already been seen in NOTE 37 that ART. 31B was specially inserted in the Constitution by the Constitution (First Amendment) Act, 1951, for the purpose of placing beyond doubt the validity of a number of laws affecting the rights of zamindars and similar landholders. These laws are thirteen in number and have been enumerated in the 9th Schedule. Three of them, namely, the Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950), the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act, 1950 (M. P. Act 1 of 1951) and the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U. P. Act 1 of 1951) came up for consideration before the Supreme Court in *State of Bihar* v. *Kameshwar Singh*[1] and a number of other cases which were disposed of together by the Supreme Court. The common aim of these statutes, generally speaking, is to abolish zamindaries and other proprietary estates and tenures in the three States to which they relate, namely, Bihar, Madhya Pradesh and Uttar Pradesh, so as to eliminate the intermediaries by means of compulsory acquisition of their rights and interests and to bring the raiyats and other occupants of lands in those areas into direct relation with the Government. The constitutionality of these Acts having been challenged in the respective State High Courts on various grounds, the Bihar Act was declared unconstitutional and void on the ground that it contravened ART. 14 of the Constitution, the other grounds of attack being rejected, while the other two Acts were adjudged constitutional and valid. The matter was then taken before the Supreme Court. As a result of the decision of the Patna High Court relating to the Bihar Act holding that it was void as contravening ART. 14 of the Constitution, ART. 31A was introduced into the Constitution by the Constitution (First Amendment) Act of 1951 to make it clear that such laws were to be immune from attack not only on the ground of contravening cl. (2) of ART. 31 but also on the ground of contravention of any of the other provisions of Part III of the Constitution. The validity of the Constitution (First Amendment) Act was challenged before the Supreme Court in *Shankari Prasad Singh Deo* v. *Union of India*[2] and was upheld by the Supreme Court in that case. In spite of this, the validity of the aforesaid three Acts was again challenged before the Supreme Court in the *State of Bihar* v. *Kameshwar Singh*.[3] It was held by the Supreme Court that in view of the provisions of ART. 31, cl. (4) and ARTS. 31A and 31B introduced by the Constitution (First Amendment) Act, the validity of the three Acts above mentioned was not open to challenge in a court of law on the ground on which they were attacked. These grounds were in substance to the effect that ART. 31, cl. (4) and ARTS. 31A and 31B only precluded objections to the validity of the Acts on the ground of their contravention of the provisions of cl. (2) of ART. 31 and of the provisions of Part III of the Constitution. The above provisions did not, it was contended, preclude objections on the ground that the Act violated *other provisions* of the Constitution or other fundamental principles. On this basis arguments were advanced that the Acts failed to provide just and fair compensation for the acquisition of property which they authorised and also that they were not intended to achieve any public purpose and that the necessity for the existence of a pubic purpose as well as for making provision for compensation were *not* merely matters which were provided by cl. (2) of ART. 31 but formed fundamental principles which were applicable independently of cl. (2) and which were also to be implied from the legislative entries in the legislative lists under which the State Legislatures acted in passing the laws. It was also contended that the above principles as to public purpose and compensation were to be found in the spirit of the Constitution and an objection based on the ground of the violation of the spirit of the Constitution was not barred by cl. (4) of ART. 31 or ARTS. 31A and 31B. All these contentions were rejected by the Supreme Court which held that both public purpose and compensation constituted the "provisions" of cl. (2) and as such the Acts could not be challenged on the ground of their not containing these elements and that the contentions attacking the Acts could not be sustained on the basis of the entries in the legislative lists or the spirit of the Constitution. (See NOTES 10 and 29.) It was, however, held that S. 4 (b) and S. 23 (1) (f) of the Bihar Land Reforms Act were *ultra vires* the Constitution on the ground that they were colourable pieces of legislation.

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[3] 1952 S C 252 (301) (Pr 159) [AIR V 39]: 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC).

[4] 1945 P C 156 [AIR V 32] : 72 Ind App 241 : (1945) 7 F C R 195 : ILR (1945) Kar (PC) 371 (PC).

Articles 31, 31A, 31B — Note 38

[1] 1952 S C 252 [AIR V 39] : 1952 S C R 889, 1020 & 1056: ILR 31 Pat 565 (SC). [*See also* 1953 All 92 (93, 94) [AIR V 40 C 37] (DB), *Raza Ali Khan* v. *State of Uttar Pradesh.* (In spite of A I R 1952 S C 252 the validity of U. P. Act, 1 of 1951, was attacked in this case but was upheld by the Allahabad High Court.)]

See also the undermentioned cases.[4]

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[2] 1951 S C 458 (463) (Pr 13) [AIR V 38 C 60]:1952 S C R 89:ILR 30 Pat 1176 (SC).

[3] 1952 S C 252 [AIR V 39] : 1952 S C R 889, 1020 & 1056 : ILR 31 Pat 565 (SC).

[4] 1953 Madh B 97 (135) (Pr 127) [A I R V 40 C 46] (FB), *Malojirao* v. *State of Madhya Bharat*. (Per *Full Bench* — The Madhya Bharat Abolition of Jagirs Act No. 28 of 1951 is declared to be valid except as regards S. 4 (1) (g) and sub-cls. (iv) and (v) of cl. 4 of Sch. I which are declared to be illegal and inoperative and a writ of mandamus is issued to the State Government directing not to give

Right to Constitutional Remedies

Remedies for enforcement of rights conferred by this Part

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

COGNATE PROVISIONS.

Power of High Courts to issue certain writs notwithstanding anything in ART. 32 — See ART. 226.

Proclamation of emergency — Suspension of the enforcement of the rights conferred by Part III during emergencies — See ART. 359.

Clause (2) — Conferment on the Supreme Court of powers to issue certain writs for any purposes other than those mentioned in ART. 32(2)—See ART. 139.

Clause (3)—Power to make laws is in Parliament and not in the Legislature of a State with respect to any matter under ART. 32 (3) — See ART. 35 (a) (i).

COMMENTARY.

For Commentary see under ART. 226; for the sake of convenience ARTS. 32 and 226 have been dealt with in one place. ✓

Power to Parliament to modify the rights conferred by this Part in their application to Forces

33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance

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effect to the above provisions of the impugned Act: A I R 1952 S C 252, Rel. on. (Per Shinde C. J. and Dixit J., Chaturvedi J., contra.: Section 4 (1) (g) is bad both for want of public purpose and for perpetrating a fraud on the Constitution —It is also void as it contravenes the provisions of Art. 14 of the Constitution.) 1952 Sau 114 (Prs 14, 17) [AIR V 39] (SB), *Kalika Kumar Sinhji* v. *Saurashtra State.* (Saurashtra Land Reforms Act, 1951, is for public purpose.)

of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

COGNATE PROVISION.

Power to make laws is in Parliament and not in the Legislature of a State with respect to any matter under this article — See ART. 35 (a) (i).

Synopsis

1. Scope of the article.
    - (a) Analysis of article.
    - (b) Pre-Constitution laws.
    - (c) Legislative competence.
    - (d) Underlying principle—Military discipline.
    - (e) Liability of military and naval officers.
    - (f) Civil and military law.
    - (g) Authority of Civil Courts.
    - (h) Mode of applying article.
    - (i) Army operating in foreign territory.
2. "Members of Armed Forces."

1. Scope of the article.— Article 13, cl. (2) runs : "The State shall not make any law which takes away or abridges the rights conferred by this Part (Part III of the Constitution) and any law made in contravention of this clause shall, to the extent of the contravention, be void." Article 33 is an exception to the provisions of ART. 13 (2).

(a) Analysis of article

Under ART. 33, power is reserved to the Parliament to abrogate or abridge the Fundamental Rights of the members of the armed forces and forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties and the maintenance of discipline amongst them. Thus, the article applies not only to the armed forces including naval, military or air forces but also to *other* forces such as *police* who are charged with the maintenance of public order.[1] It must be noted that the power under this article is only given to the *Parliament* and not to the State Legislatures.

Further, Parliament can make a law abrogating or restricting the Fundamental Rights of members of the armed forces or of forces charged with the maintenance of public order only for the purpose of ensuring the proper discharge of their duties and the maintenance of discipline among them. In *Grant* v. *Sir Charles Gould*,[2] Lord Loughborough observed as follows :

> "The object of the Mutiny Act .... is to create a Court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers: and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to His Majesty to make articles of war, those articles are to be for the better government of his forces and can extend no further than they are thought necessary to the regularity and due discipline of the army."

Article 33 — Note 1

[1] 1951 Mad 777 (Pr 12) [A I R V 38 C 263] : I L R (1952) Mad 153 : 52 Cri L Jour 827 (DB), *R. Chatterjee* v. *Sub-Area Commander*.

[2] (1792) 126 E R 434 (450) : 2 H Bl 69.

Article 33
Note 1

(b) Pre-Constitution laws

The article only speaks of the power of the Parliament to make a law affecting Fundamental Rights in the cases mentioned. It says nothing about existing laws relating to the discipline and duties of the armed forces including the army, navy and the air force or of the police. But under Art. 35 (b), any law in force in India, immediately before the Constitution and relating to matters covered by Art. 33, shall continue in force until altered or repealed by Parliament. By virtue of this provision, laws relating to military, naval and air forces and the police, which were in existence immediately before the Constitution, will continue in force. Article 35 provides that such laws shall continue in force *notwithstanding* anything contained in the Constitution. Hence, the laws which were in force immediately before the Constitution in relation to the duties and discipline of the armed forces and of the police forces, will continue in force and be valid notwithstanding that they may contravene any of the Fundamental Rights.[3] The phrase "any law" in this context will include not only Central Acts but also Provincial Acts.

(c) Legislative competence

Under Sch. VII, List 1, Entry 2, the exclusive power of making laws regarding naval, military and air forces and any other armed forces of the Union is vested in the Parliament. But as regards the power of legislating on the subject of police and public order, such power is given exclusively to the State Legislatures under Entries 1 and 2 of Sch. VII, List 2. Under Art. 35, notwithstanding anything in the Constitution, the power of legislating on matters covered by Art. 33 is given exclusively to the Parliament and not to the State Legislatures. This provision will control the provisions of Sch. VII, List 2, Entries 1 and 2. Hence, although the legislative power as regards police and public order has been given to the State Legislatures, an exception is made in regard to matters covered by Art. 33, that is, the abrogation or abridgement of Fundamental Rights of members of the police force for the purpose of ensuring the proper discharge of their duties and the maintenance of discipline among them. In regard to these matters, the exclusive power of legislation, even with reference to the police force, is given to the Parliament and not to the State Legislatures.

(d) Underlying principle—Military discipline

The conception of subjecting members of the armed forces to special laws in the interests of military discipline and of excluding the jurisdiction of ordinary Courts to interfere with the decisions of military authorities in matters of discipline of the members of armed forces is accepted in all modern systems of jurisprudence. "Military law" as distinguished from "civil law" is the law relating to and administered by military Courts and is concerned with the trial and punishment of offences committed by officers, soldiers and other persons

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[3] **1951 Mad 777 (Pr 12) [A I R V 38 C 263] : I L R (1952) Mad 153 : 52 Cri L Jour 827 (DB),** ***R. Chatterjee* v. *Sub-Area Commander*.** **(Therefore, even after the inauguration of the Republic till the passing of Act 46 of 1950, the existing law, namely, the Indian Army Act, 1911, and the rules and orders made thereunder continued to be effective by virtue of Art. 35 (b) of the Constitution.)**

(example, sutlers and camp followers) who are, from circumstances, subjected, for the time being, to the same law as soldiers.[4] Although military personnel may thus become liable to a deprivation of the rights to which other citizens are entitled, such a deprivation is accepted as an inevitable concomitant of political organization. This is the underlying principle of this article.

In *Dawkins* v. *Paulet*,[5] Cockburn, C. J., in his dissenting judgment observed as follows :

> "It is undoubtedly true that a man on entering the army or navy subjects himself to military law, and wherever that law conflicts with the civil law applicable to the ordinary subject, he must be content to forego the rights which the ordinary law affords. And if, by any provision of the military code, a party subjected to its authority were prohibited from resorting to civil tribunals for the redress of a wrong inflicted under colour of military authority, there would be an end of the question."

Similarly, in *Reaves* v. *Ainsworth*,[6] the Supreme Court of America observed that the military law is due process of law to those in the military or naval service of the United States.

In *Kahn* v. *Anderson*,[7] it was contended that although the accused were subject to military law, they could not be tried by a *military Court* because Congress was without power to so provide consistently with the guarantees as to jury trial and presentment or indictment by grand jury, respectively secured by ART. 1, S. 8 of the American Constitution and ART. 5 of the Amendments. This contention was rejected as being without foundation, "since it directly denies the existence of a power in Congress exerted from the beginning and disregards the numerous decisions of this Court, by which its exercise has been sustained, a situation which was so obvious more than 40 years ago as to lead the Court to say in *Ex parte Reed*[8] : 'The constitutionality of the Acts of Congress, touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this Court'."

In *Dynes* v. *Hoover*,[9] Mr. Justice Wayne of the Supreme Court of America delivering the opinion of the Court observed as follows :

> "With the sentences of courts-martial which have been convened regularly and, have proceeded legally and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do,

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[4] Wharton's Law Lexicon, 14th Edn. (1938).

[5] (1869) 5 Q B 94 (109, 110) : 39 L J Q B 53.

[6] (1911) 55 Law Ed 225 (228) : 219 U S 296 (302).

[7] (1921) 65 Law Ed 469 (474) : 255 U S 1. (Trial by court-martial for murder committed by persons subject to military law—Does not infringe constitutional guarantee as to jury trial and presentment or indictment by grand jury.)

[8] (1879) 100 U S 13 (21) : 25 Law Ed 538.

[9] (1857) 15 Law Ed 838 (845) : 20 How 65.

nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, enquire into the want of the court's jurisdiction and give him redress ...... Such is the law of England. By the Mutiny Acts, courts-martial have been created with authority to try those who are a part of the army or navy for breaches of military or naval duty. It has been repeatedly determined that the sentences of those Courts are conclusive in any action brought in the courts of Common Law. But the Courts of Common Law will examine whether courts-martial have exceeded the jurisdiction given them, though it is said, 'not, however, after the sentence has been ratified and carried into execution'."

The same principle was laid down in the undermentioned decisions.[10]

(e) Liability of military and naval officers

In *Johnstone* v. *Sutton*,[11] an action for damages was brought in a civil Court against a military officer for wrongly bringing the plaintiff who was an officer subordinate to him, for trial before a court-martial by whom the plaintiff was acquitted. While holding on the merits, that even if such an action is maintainable, the judgment in the particular case should be for the defendant, Lords Mansfield and Loughborough expressed a serious doubt as to the maintainability of such an action, and in doing so, they observed as follows :

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[10] (1949) 1 All E R 242 (243), *R.* v. *Secretary of State for War*. (Plaintiff brought up before court-martial on charge of desertion—*Held* High Court could only interfere with military Courts and matters of military law in so far as civil rights of the soldier or other person with whom they dealt might be affected, and therefore, if the court-martial had not been convened in accordance with the rules of procedure which was a matter of military law and procedure, High Court had no jurisdiction to interfere.)

(1911) 55 Law Ed 225 (228) : 219 U S 296 (302), *Reaves* v. *Ainsworth*. (Decision of military tribunal acting within scope of its lawful powers cannot be reviewed or set aside by the Courts.)

(1921) 65 Law Ed 475 (479) : 255 U S 11, *Givens* v. *Zerbst*. (Courts-martial are tribunals of special and limited jurisdiction, whose judgments so far as questions relating to their jurisdictions are concerned, are always open to collateral attack.)

[11] (1786) 99 E R 1225 (1246) : 1 T R 510.

[*See also* (1866) 4 F & F 763, *Keighly* v. *Bell*. (A military person cannot maintain an action against his officer for acts done by or under orders from his superiors which they would have a right to give and which he would be bound by military law to obey, unless, at all events, he has himself caused and procured such orders, by means of reports or representations, malicious or for some sinister and improper motive and also without any reasonable or probable ground.)]

Article 33
Note 1

"The wisdom of ages hath formed a sea military code, which in the last reign was collected and digested into an Act of Parliament. The great object of this code is, that the duty of every man in the fleet shall be prescribed and regulated by rules and ordinances adapted to sea military discipline; and that every man in the fleet for any offence against his duty in that capacity or relation, shall be tried by a court-martial.

"If a man be charged with an offence against the articles, or where the articles are silent, against the usage of the Navy, his guilt or innocence can only be tried by a court-martial.

"A commander-in-chief has a discretionary power, by this military code, to arrest, suspend and put any man of the fleet upon his trial. A court-martial alone can judge of the charge. But this military law hath forseen that though it is necessary to give superiors great discretionary power, it may be abused to oppression; and therefore has provided against such abuse by the 33rd article.

"A commander who arrests, suspends, and puts a man on his trial without a probable cause, is guilty within that article, but the same jurisdiction which tries the original charge, must try the probable cause; which in effect is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction.

"The salvation of this country depends upon the discipline of the fleet; without discipline they would be a rabble, dangerous only to their friends, and harmless to the enemy.

"Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places.

"A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if upon the exercising of his authority, he is liable to be tried by a common law judicature?

"If this action is admitted, every acquittal before a court-martial will produce one.

"Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them.

"The relaxation and decay of discipline in the fleet has been severely felt. Upon an unsuccessful battle, there are mutual recriminations, mutual charges, and mutual trials. The whole fleet take sides with great animosity—party prejudices mix—if every trial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be.

> "The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal. And he who accused him unjustly is blasted for ever, and dismissed the service.
>
> 'These considerations incline us to lean against introducing this action."

In *Warden* v. *Bailey*,[12] it was argued upon the ground of a doctrine supposed to be established by the case of *Sutton* v. *Johnstone*[13] above referred to, that an inferior officer cannot maintain an action against a superior officer for imprisonment inflicted in consequence of disobedience to *any command whatsoever* issued by the superior to the inferior officer. In rejecting this contention Mansfield, C. J., observed as follows :

> "To be sure, that is a very wide inference to draw from *Sutton* v. *Johnstone*, that being only a case of imprisonment for disobedience to the orders issued in the heat of a battle, where obedience and instant obedience, is necessary."

In *Warden* v. *Bailey*,[14] above referred to, an order was made by the Colonel that the sergeants and corporals should attend an evening school for the purpose of learning to read and write. The Sergeant Major was to be the school master and all the men were to pay 8d. per week to defray the school master's salary and the expenses of fire and candle. The imprisonment inflicted was for disobedience of the above orders. Mansfield, C. J., observed with regard to these orders :

> "We think then that the order to attend the school most probably was bad, and an excess of authority, but the order of taxation was certainly so;....the subject cannot be taxed even in the most indirect way unless it originates in the lower House of Parliament."

In *Dawkins* v. *Paulet*,[15] it was held that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable or probable cause. In that case, a suit for damages was brought by a military officer against his superior officer for libel in respect of the reports made by the superior officer about the plaintiff to the higher army authorities. There was no allegation by the plaintiff that the statements complained of were false to defendant's knowledge. It was held, following *Johnstone* v. *Sutton*[16] already quoted, that the action would not lie. A similar principle was laid down in the undermentioned cases.[17]

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[12] (1811) 128 E R 253 (261) : 4 Taunt 67 (88, 89).

[13] *Note :—Sutton* v. *Johnstone* and *Johnstone* v. *Sutton* refer to the same case. In the lower Court it was *Sutton* v. *Johnstone* and in appeal, it was *Johnstone* v. *Sutton*.

[14] (1811) 128 E R 253 : 4 Taunt 67.

[15] (1869) 5 Q B 94 (113, 114) : 39 L J Q B 53. (Per *Mellor and Lush, JJ.—Cockburn, C. J., Contra.*)

[16] (1786) 99 E R 1225 : 1 T R 510.

(f) Civil and military law

In *Albert West Meads* v. *The King*,[18] it was held by the Privy Council affirming the decision of the Federal Court of India[19] that for the prosecution of a military officer before a *court-martial* for an offence under the *military code*, the sanction of the Governor-General under S. 270 of the Government of India Act, 1935, was not necessary although such sanction would be necessary for the institution of proceedings against a military officer under the *ordinary civil or criminal law*. This decision also points to the fact that a military officer being prosecuted before a *court-martial* under the military code is not entitled to all the rights and privileges to which he would be entitled if the prosecution were under the ordinary criminal law.

The above decisions show that the Civil Courts cannot interfere with the orders of military officers against their subordinates in matters which are within the jurisdiction of the military authorities. But the jurisdiction of Civil Courts is not excluded if the order impugned relates to a matter not within the authority of the military officer even though that order may be issued against a person who is the subordinate of the officer issuing the order.

(g) Authority of Civil Courts

The above principles, it is clear, will also apply to the determination of questions under ART. 33, so that even though the validity of the law made by Parliament or law existing immediately before the commencement of the Constitution may not be liable to be questioned on the ground of its being in contravention of the Fundamental Rights of the members of the military or police forces, yet where any action is taken against them by superior military or police authorities under colour of such laws, the Civil Court can enquire into the question whether the action taken is within the authority conferred by the relevant law. Courts are also entitled to examine whether the curtailment of Fundamenal Rights of military and police personnel by any such law is for the purpose of ensuring the proper discharge of their duties and the maintenance of discipline among them.

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[17] (1861) 121 E R 764 (767) : 1 B and S 400 (467), *In re Mansergh*. (Where the civil rights of a person in military service are affected by the judgment of a military tribunal in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction Court ought to interfere to protect those civil rights, e. g., where the rights of life, liberty or property are involved —Here however there was nothing of the sort or the only matter involved was military status of applicant, a thing which depends entirely on Crown.)

(1919) 35 T L R 642 (645), *Heddon* v. *Evans*. (A military officer is liable to an action for damages if in excess of his jurisdiction he commits an act which amounts to false imprisonment or other common law wrong even though he purports to act in the course of military discipline; but if his act is within his jurisdiction and is done in the course of military discipline no action will lie on the ground only that the act has been done maliciously and without reasonable and probable cause.)

(1911) 55 Law Ed 225 (228) : 219 U S 296 (302), *Reaves* v. *Ainsworth*. (Errors and injustice done in proceedings before Examining Board convened under the authority of an Act enacted to provide for promotion or retirement of army officers cannot be corrected by Courts by certiorari.)

(1875) 7 H L 744 (753) : 23 W R (Eng) 931, *Dawkins* v. *Rokeby*.

[18] 1948 P C 156 (Prs 16, 19) [AIR V 35 C 41] : 75 Ind App 185 : 49 Cri L Jour 660 (PC).

[19] 1945 F C 21 (23) [AIR V 32] : 1944 F C R 355 : ILR (1945) Kar (FC) 3 : 47 Cri L Jour 426 (FC), *A. W. Meads* v. *Emperor*.

(h) Mode of applying article

Under this article, Parliament may by law determine to what extent any of the rights conferred by Part III have to be restricted or abrogated for the purpose mentioned. In this connection, the words of Bose, J., of the Supreme Court in *Ram Singh* v. *State of Delhi*[20] should be remembered. His Lordship said with reference to Art. 19 that it is the rights conferred by Art. 19 (1) which are fundamental and not the restrictions on such rights permitted by cls. (2) to (6) of Art. 19. Hence, the mere fact that there is a special law relating to the discipline and duties of the armed forces or the police is not enough to deprive members of such forces of their Fundamental Rights under the Constitution. It must be shown when the question is raised that the infringement of Fundamental Rights is clearly covered by the enactment and further that the enactment is clearly and fully covered by the article. Thus, for instance, it is conceived that the mere fact that a certain act committed by a member of the armed forces is punishable both under the military law and under the general penal law will not deprive him of the benefit of the provisions of Art. 20 (2), and expose him to double punishment unless such liability for double punishment is made clear by the military law.

(i) Army operating in foreign territory

As to the authority of military courts over offences committed by members of an army stationed, or marching or operating in foreign territory, see the undermentioned case.[21]

2. **"Members of Armed Forces."**—"Military law" as distinguished from "civil law" is the law relating to and administered by military Courts and is concerned with the trial and punishment of offences committed by officers, soldiers and other persons (example, sutlers and camp followers) who are, from circumstances, subjected for the time being to the same law as soldiers.[1] It is conceived that the expression "members of armed forces" in this article will include the "other persons" referred to above who are governed by military law.

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[20] 1951 S C 270 (Pr 22) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 (SC).

[21] (1876) 24 Law Ed 1118 (1122) : 97 U S 509, *Coleman* v. *Tennessee*. (By the particular section, exclusive jurisdiction was not vested in the military tribunals over offences committed by persons in military service when the offence was committed in a loyal state where the civil Courts were open. When the armies of the U. S. A. were in the enemy territory, the military tribunals had under the laws of war and the authority conferred by the section exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Army marching through friendly country or stationed in it by permission of its Government or Sovereign is exempt from the civil and criminal jurisdiction of the place. *A fortiori* an army invading an enemy country would be exempt.)

Article 33 — Note 2

[1] Wharton's Law Lexicon, 14th Edn. (1938).

Except under 'martial law' a person not belonging to the armed forces cannot be tried by a military Court or under military law.[2]

Restriction on rights conferred by this Part while martial law is in force in any area

34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

COGNATE PROVISION.

Power to make laws is in Parliament and not in the Legislature of a State with respect to any matter under this article — See ART. 35 (a) (i).

Synopsis

1. Scope of the article.
2. "Where martial law was in force."
   - (a) "Martial law" — Meaning of.
   - (b) Declaration of 'martial law.'
   - (c) Existence of state of war.
   - (d) Act of Indemnity—Purpose of.
   - (e) Suspension of civil authority confined to area of actual war.
3. Acts of Indemnity.
4. "Acts done in connection with the maintenance or restoration of order."

1. Scope of the article. — Article 33 deals with the question of military discipline in times of *peace*. That article provides for the validity of laws which are intended to ensure the proper discharge of duties by military and police personnel and the maintenance of discipline among them. The present article deals with the situation that arises when *martial law* is in force in any part of India.

Transactions of the sovereign power, which come under the category of 'act of State,' are not justiciable in a court of law. Acts done by the military authorities at a time of actual war or insurrection amounting to actual war are similarly immune from being questioned in a court of law under the ordinary law of the land. The reason is that at such times there is no *law* at all which is applicable. The will of the military commander is the only law at such times. But it is only in the area where war is actually raging and only during the period that the war is actually raging that the authority of the civil courts and of the civil law is, as it were, in a state of suspended animation. When peace is restored, civil law and the authority of municipal courts are automatically restored.[1]

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[2] (1866) 18 Law Ed 281 (296) : 4 Wall 2, *Ex parte Milligan*. (Military Commission cannot try citizens when civil Courts are open — Right of trial by jury is preserved to every one accused of crime who is not attached to the army or navy or militia.)

(1798) 27 State Tr 613, *Wolfe Tone's Trial*. (Civilian sentenced by Court-martial — Habeas Corpus.)

Acts of Indemnity are passed for the purpose of protecting military officers from legal liability for what they may have done when martial law was in force. It is obvious that such Acts purport to legalize infringements of the civil rights of the population by the military during the time of the disturbance. Where the Constitution guarantees Fundamental Rights, as under this Constitution, such Acts would be *ultra vires.* This article is intended to make such Acts of Indemnity valid in spite of the fact that such Acts seek to legalize the infringement of Fundamental Rights.

Article 33 deals only with members of the armed forces and of forces charged with the maintenance of public order. The article provides that although the special laws governing their discipline and duties may deprive them of their Fundamental Rights or restrict such rights, the special laws will be valid. But ART. 33 does not refer to *other* persons, so that in time of peace, the rights of other persons cannot be restricted by the application of military law or by military action.[2] But ART. 34 is equally applicable to members of the armed forces as well as to other people. Acts of Indemnity will legalize the proceedings of military authorities when martial law was in force, whether such proceedings affect the rights of the members of armed forces or other persons.

Neither ART. 33 nor this article applies to acts of *foreign* troops, during war which form the subject of *International* Law.

Article 33 may be said to deal with the validity of *military* law which is not the same thing as 'martial law' while this article provides for the validation of acts done under 'martial law.'

The protection under the article can be given not only to a person in the service of the Union or a State but also to other persons who have assisted in restoring or maintaining order.

The power under this article, as that under ART. 33, is given only to the Parliament and not to the State Legislatures.

Under the article only acts in connection with the restoration or maintenance of order can be legalized or validated.

(a) "Martial Law"—Meaning of

2. **"Where martial law was in force."**—This article authorizes the Parliament to pass Indemnity Acts in regard to things done for maintaining or restoring order in an area in which martial law was in force. 'Martial law' is defined as follows in Wharton's LAW LEXICON :[1]

Article 34 — Note 1

[1] (1866) 18 Law Ed 281 (295) : 4 Wall 2, *Ex parte Milligan.*

[2] (1866) 18 Law Ed 281 (296) : 4 Wall 2, *Ex parte Milligan.*

Article 34 — Note 2

[1] Wharton's Law Lexicon, 14th Edition (1938), p. 641.

> "'Martial law,' in the proper sense of the term, means the suspension of ordinary law and the Government of a country or part of it by military tribunals. It must be clearly distinguished (i) from military law and (ii) from that 'martial law' which forms part of the laws and usages of war. The term 'martial law' is also sometimes used as meaning the common law right of the Crown to repel force by force in the case of insurrection, invasion or riot and to take such exceptional measures as may be necessary for the purpose of restoring peace and order."

Thus 'martial law' means the suspension of ordinary law and the imposition of military rule.

'Military law' has been described by the same authority[2] as follows :

> " 'Military law,' as distinguished from 'civil law,' is the law relating to and administered by military courts and is concerned with the trial and punishment of offences committed by officers, soldiers and other persons (example, sutlers and camp followers), who are from circumstances subjected for the time being to the same law as soldiers. But the term 'military law' is frequently used in a wider sense and as including not only the disciplinary but also the administrative law of the army, as for instance, the law of enlistment and billeting."

Thus ART. 33 is concerned with *military law* while ART. 34 is concerned with *martial law* which, as seen above, is not identical with military law.

(b) Declaration of 'martial law'

The article requires that martial law must have been "in force." What is the meaning of the phrase "where martial law was in force?" When a state of war exists, the actions of the military during such war are not justiciable. As Lord Halsbury put it in *D. F. Marais Ex parte*,[3] "Once let the fact of actual war be established, and there is a universal consensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of the military authorities." The civil court has jurisdiction, however, to question whether there did exist a war or an insurrection amounting to war so as to justify the imposition of military rule. But where an Act of Indemnity is passed, the civil court will have no jurisdiction to question whether the situation actually amounted to a war or only a riot. Thus, there is no necessity for an Act of Indemnity, when actually there was a state of war and this fact is not questioned. When the article speaks of martial law having been in force in any area, therefore, the article only means that martial law was *declared* in that area and military rule was established there. By the expression "where martial law was in force" the article evidently does not contemplate that even in cases where martial law had been *proclaimed*, it must be open to a person to raise in court the question whether actually the situation amounted to a war or a rebellion or only a riot. The expression "where martial law was in force" has been used in the article only in the sense that the territory, as a matter of fact, had been placed under military rule.

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[2] Wharton's Law Lexicon, 14th Edn. (1938), pp. 655-656.

[3] (1902) 1902 App Cas 109 (115) : 85 L T 734 (PC).

In *Tilonko* v. *Attorney-General of Natal*,[4] Lord Halsbury observed as follows :

> "The notion that martial law exists by reason of the proclamation is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force."

Thus, in the above quotation Lord Halsbury has used the expression "martial law" as meaning the right to administer force against force in actual war. This meaning is covered by the latter part of the definition extracted from Wharton's LAW LEXICON above. But in the context of this article this meaning is not suitable as it leads to the result that an Act of Indemnity is passed for legalizing and validating matters which are not justiciable at all. The object of an Act of Indemnity is to preclude questions being raised as to whether the situation actually amounted to a war or a rebellion so as to justify the measures taken by the military or fell short of that degree of gravity and seriousness which would have amounted to a war or rebellion. The reason, as stated already, is that if it is granted that there was war or rebellion amounting to war, then there is no question of *indemnity*.

Although thus an Act of Indemnity passed under ART. 34 would, in cases where martial law was actually declared in any area, preclude the raising of any question as to an actual state of war or rebellion having existed there, such an Act can be passed only in respect of acts done in connection with the maintenance or restoration of order in the area under martial law. In other words, the article does not create the *legal fiction* of a state of war or rebellion having existed in the area. If that had been the case, there would be no necessity to impose any such limitation, because, war means that for the duration there is no law at all.

The question arises whether on an Act of Indemnity being passed under this article, it would be open to the military, when charged with having done acts which were not necessary for the maintenance or restoration of order, to plead that there was actually a state of war and that, therefore, although the Act of Indemnity only applied to acts done for the restoration or maintenance of public order, they could rely on the general doctrine that when war is on, the actions of the military during the war are not justiciable in a court of law. It is conceived that such a plea would be open to the military authorities if they prove that the situation did amount to *war*. But when that question is not raised and plea is only taken under the Indemnity Act, the conditions and terms of that Act will have to be fulfilled. Such conditions and terms would only protect, under this article, acts done in connection with maintenance or restoration of public order. If the law attempts to protect other acts which infringe Fundamental Rights, it would be void under ART. 13 (2), as it would not be saved by the terms of this article.

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[4] **(1907) 1907 App Cas 93 (94) : 76 L J P C 29.**

(c) Existence of state of war

Even where an Act of Indemnity is not passed, if a state of war exists, this means that so long as such state continues there is no law in force. During such a period the ordinary courts have no jurisdiction over the action of the military authorities. Even where the military authorities establish military courts and govern the country through such courts, they are not subject to the jurisdiction of the ordinary courts. In *Tilonko* v. *Attorney-General of Natal*,[5] Lord Halsbury observed as follows :

> "If there is war, there is the right to repel force by force. But it is found convenient and decorous from time to time to authorize what are called 'courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so-called 'courts-martial' administering summary justice under the supervision of a military commander analogous to regular proceedings of courts of justice is quite illusory. Such acts of justice are justified by necessity, by the fact of actual war."

On the above principles, it was held in *In re Clifford and O'Sullivan*[6] that no writ of prohibition could issue against a military court in an area under martial law on the ground *inter alia* that the officers constituting the military court neither acted nor claimed to act as a judicial tribunal in any legal sense.

In *R.* v. *Allen*[7] it was held that in times of civil disturbances and insurrection the jurisdiction of civil Courts over actions of military authorities is ousted and that civil Courts have no jurisdiction *durante bello* to interfere with the decision of a military court sitting in a martial law area even where a capital sentence has been pronounced, and is about to be executed for an offence not punishable capitally under the ordinary criminal law.

In *Higgins* v. *Willis*,[8] it was held that where a state of war exists,

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5. (1907) 1907 App Cas 93 (94) : 76 L J P C 29.

6. (1921) 2 App Cas 570 (581) : 90 L J P C 244.

7. (1921) 2 Ir R 241 : 65 S J 358.

[*See also* (1921) 2 Ir R 317, *Rex* v. *Strickland.*

(1923) Ir R 5 : 67 Sol Jo 125, *Ex parte Erskine Childers.* (Where a state of war is actually existing the civil Court has no jurisdiction to interfere to prevent the carrying out of a sentence imposed by a military Court.)]

8. (1921) 2 Ir R 386. (But plaintiff has a right to have his case proceeded with so soon as a state of war no longer prevails and such action should be stayed until further order.)

an action for damages for alleged wrongful destruction of property by military forces in a martial law area cannot be tried.

(d) Act of Indemnity — Purpose of

It has been stated above that where martial law has been declared in a particular area, that would give occasion to an Act of Indemnity or other legislation being passed by the Parliament under this article. But this does not mean that a state of war will *ipso facto* come into existence merely because martial law has been proclaimed in a certain area. Notwithstanding such proclamation of martial law, it may be contended in a court of law that as a matter of fact there was no state of war to justify the actions of the military. But where in addition to the proclamation of martial law, legislation is passed under ART. 34 by Parliament validating the proceedings of the military authorities in the martial law area and indemnifying them for their actions in restoring or maintaining order, it cannot be contended subsequently in a court of law that there was no state of war to justify the acts of the military. To quote again Lord Halsbury in *Tilonko* v. *Attorney-General of Natal*:[9]

> "The notion that martial law exists by reason of the proclamation . . . is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is right to repel force by force . . . . But the question whether war existed or not may be a question of doubt. . . . But no such question arises here. An Act of Parliament has been passed . . . which in terms enacts the legality of the sentences in question . . . . ."

Thus, in the absence of an Act of Indemnity or other kind of legislation contemplated by ART. 34, it would be open to a person to question the actions of the military during a period of disorder or civil commotion, on the ground of the absence of a state of war, in spite of a proclamation of martial law. When there is actual war, the acts of the military cannot be questioned, whether there is an Act of Indemnity or not.

(e) Suspension of civil authority confined to area of actual war

When there is no actual war raging in a particular place, citizens who are not members of the armed forces cannot be tried by military courts.[10] In *Ex parte Milligan*,[11] Mr. Justice Davis of the Supreme Court of America observed as follows :

> "This Court has judicial knowledge that in Indiana the Federal Authority was always unopposed and its Courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in a civil life, in no wise connected with a military service."

Mr. Justice Davis rejected the contention that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it) has the power within the limits of his military district to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will. The learned Judge observed further :

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[9] (1907) 1907 App Cas 93 (94) : 76 L J P C 29.

[10] (1866) 18 Law Ed 281 (295) : 4 Wall 2, *Ex parte Milligan.*

[11] (1866) 18 Law Ed 281 (296) : 4 Wall 2.

> "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. There are occasions when martial rule can be properly applied. If, in foreign invasion or civil war the courts are actually closed and it is impossible to administer criminal justice according to law, then on the theatre of active military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society ; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration ; for, if this Government is continued after the Courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion, it could have been enforced in Virginia, where the national authority was overturned and the Courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion martial rule may become a necessity, in one State, when in another it would be 'mere lawless violence'."

The fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging in that district.[12] It will be seen that this view does not really conflict with the views expressed in *Ex parte Milligan*[13] above quoted, as the latter refers to cases where the normal working of the courts is not disturbed at all.

This article enables Parliament by law to shut out from the Courts all controversy about the question whether war actually existed in a particular area where martial law was proclaimed.

3. **Acts of Indemnity.** — Under this article, Parliament may absolve from legal liability persons in respect of their acts in restoring or maintaining order during a period in which martial law was in force in a certain area. Parliament may also by law validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area. This power is given to the Parliament "notwithstanding anything in the foregoing provisions of this Part." This means that although the acts complained of amounted to an infringement of Fundamental Rights, Parliament can, by law,

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[12] (1902) 1902 App Cas 109 (114):85 L T 734, *Ex parte D. F. Marais.* (*Elphinstone* v. *Bedreechund,* (1830) 1 Knapp P C 376, Foll.)

[13] (1866) 18 Law Ed 281 (296) : 4 Wall 2.

validate them and confer on the actors immunity from legal liability in respect of the acts in question. Thus, the Constitution enables the Parliament to condone the infringements of Fundamental Rights when martial law is declared in any territory in India.

In *Phillips* v. *Eyre*[1] Cockburn, C. J., observed as follows about the objections against legislation of this nature :

> "There can be no doubt that every so-called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted those wrongs, not at the expense of the community for whose alleged advantage the wrongful acts were done, but at the expense of individuals who, innocent possibly of all offence, have been subjected to injury and outrage often of the most aggravated character. It is equally true, as was forcibly urged on us, that such legislation may be used to cover acts of the most tyrannical, arbitrary and merciless character, acts not capable of being justified or palliated even by the plea of necessity, but prompted by local passions, prejudices, or fears,—acts not done with the temper and judgment which those in authority are bound to bring to the exercise of so fearful a power, but characterised by reckless indifference to human suffering and an utter disregard of the dictates of common humanity. On the other hand, however, it must not be forgotten that against any abuse of local legislative authority in such a case protection is provided by the necessity of the assent of the Sovereign, acting under the advise of Ministers, themselves responsible to Parliament. We may rest assured that no such enactment would receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity. The present indemnity is confined to acts done in order to suppress the insurrection and rebellion, and the plea contains consequently the necessary averments that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose; and it will, therefore, be incumbent on the defendant to make good these averments in order to support his plea."

In that case, an action was brought in England for assault and false imprisonment of the plaintiff in the Island of Jamaica. The defendant pleaded that since the grievances complained of, an Act of Indemnity had been passed by the Legislature of Jamaica and assented to by the Crown, which enacted that all personal actions, suits, indictments, prosecutions and proceedings, present or future, against any person for acts done in good faith, after the proclamation of martial law, in the suppression of a rebellion, which had broken out in the island, should be discharged and made void, and that any person,

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Article 34 — Note 3

[1] (1869) 4 Q B 225 (242, 244) : 38 L J Q B 113.

by whom such acts had been done, should be acquitted and indemnified against the Queen and all other persons; and that the defendant, the Governor of the island, and all acting under his authority were indemnified in respect of all acts done in order to put an end to the rebellion and such acts were made and declared to be lawful. The defendant also pleaded that the grievances complained of were acts done within the indemnity of the Act. It was held that the Act of Indemnity was a sufficient answer to the suit of the plaintiff.

It may be noted that although the Act was of Jamaica, it was held to be a good defence to a suit in an English Court. The principle is that the *lex loci* or the law of the place where the cause of action arises and not the law of the place where the suit is brought should govern the rights and liabilities of the parties so far as substantive law is concerned, although in matters of procedure the law of the Court in which the suit is brought will apply.

4. "Acts done in connection with the maintenance or restoration of order."—This article enables the Parliament to grant by law immunity only in respect of acts done in connection with the maintenance or restoration of order in the area in which the martial law was in force. In *Phillips* v. *Eyre*,[1] Cockburn, C. J., observed:

> "We may rest assured that no such enactment would receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion and under the pressure of the most urgent necessity."

Thus, it is in accordance with a well recognized principle that the protection under this article extends only to acts done in connection with the maintenance or restoration of order in the affected area. The burden of proof is on the person, who has done the impugned act, to show that it was done by him in connection with the restoration or maintenance of order in the affected area.[2]

In *Wright* v. *Fitzgerald*,[3] it was held that martial law must not be enforced wantonly and without due regard to humanity. In that case, defendant, who was the Sheriff of a certain district in Ireland, was engaged in suppressing an insurrection in Ireland. Having received information that plaintiff was secretary of a revolutionary association, he arrested him and ordered him to be flogged, although the plaintiff had offered to surrender. In an action brought by the plaintiff, no charge having been brought against him, the defendant contended that by the severity of the system of dealing with the rebels he had gained useful information and restored order in the district. This plea was not accepted and the plaintiff was held entitled to damages. It was observed by the Court that the jury was not to imagine that the Legislature by enabling Magistrates to justify under the Indemnity Bill had released

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Article 34 — Note 4

[1] (1869) 4 Q B 225 (243) : 38 L J Q B 113.

[2] (1869) 4 Q B 225 (239) : 38 L J Q B 113, *Phillips* v. *Eyre*.

[3] (1799) 27 State Tr 759.

Article 34
Note 4

them from feelings of humanity or permitted them wantonly to exercise power, even though it be to put down rebellion.

In *Mayer* v. *Peabody*,[4] it was held by the Supreme Court of America that where the Governor of a State was empowered under the law to call upon the military arm of the State Government to suppress an insurrection and he in good faith ordered the arrest of a certain person, although without sufficient reason for doing so, the act of the Governor would be justified. It was observed as follows:

> "Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action, after he is out of office, on the ground that he had not reasonable ground for his belief."

It is conceived that the above principles will apply to cases under this article.

Legislation to give effect to the provisions of this Part.

35. Notwithstanding anything in this Constitution,—

(*a*) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(*i*) with respect to any of the matters which under clause (3) of Article 16, clause (3) of Article 32, Article 33 and Article 34 may be provided for by law made by Parliament; and

(*ii*) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (*ii*);

(*b*) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (*i*) of clause *(a)* or providing for punishment for any act referred to in sub-clause *(ii)* of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.

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[4] (1909) 53 Law Ed 410 (416) : 212 U S 78 (85).

Explanation. — In this article, the expression "law in force" has the same meaning as in Article 372.

COGNATE PROVISIONS.

Article 16 (3) provides for requirement as to residence within a State prior to employment or appointment to an office under that State.

Article 32 (3) provides for empowering any Court other than Supreme Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court with respect to issue of writs.

Article 33 empowers Parliament to modify the Fundamental Rights in their application to Armed Forces or the Forces charged with the maintenance of public order.

Article 34 provides for restriction on Fundamental Rights while martial law is in force in any area.

The State—Interpretation of—See ART. 12.

Commencement of this Constitution—Meaning of—The Constitution came into force on 26-1-1950—See ART. 394.

Clause (a) (ii)—Offence—Definition of—See ART. 367 (1) read with the General Clauses Act, 1897, S. 3 (38).

Clause (a) (ii) — "Offences under this Part"—See ART. 17 under which enforcement of any disability arising out of untouchability is made an offence and ART. 23 (1) which, while prohibiting traffic in human beings and forced labour, makes any contravention of that provision an offence.

Explanation.—"Law in force"—Expl. I under ART. 372 is as follows:

> "The expression 'law in force' in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas."

1. Scope of the article.—This article can be divided into two parts, one of which is prospective and the other retrospective. Clause (a) is prospective, cl. (b) is retrospective. But the subject-matter of both the clauses is the same. The clauses relate to legislation about certain matters. These matters are stated in sub-cls. (i) and (ii) of cl. (a). They are as follows:

(i) Matters under ART. 16 (3)—(prescribing residence within a State as qualification for employment in a State).

(ii) Matters under ART. 32 (3)—(empowering Courts other than the Supreme Court and High Courts to issue writs for enforcement of Fundamental Rights).

(iii) Matters under ART. 33—(abrogation or restriction of Fundamental Rights of members of armed forces and the police in the interests of discipline and efficiency of the forces).

Article 35
Note 1

(iv) Matters under Art. 34—(Act of Indemnity after martial law).

(v) Prescribing punishment for enforcement of any disability arising out of untouchability (Art. 17).

(vi) Prescribing punishment for traffic in human beings and imposition of *begar* and other forms of forced labour (Art. 23 (1)).

In regard to the above six matters the prospective provision in cl. (a) of this article enacts that legislation can only be passed by the Parliament and not by the State Legislatures. With regard to the first four items the respective provisions in the Constitution already enact that the legislative power is only vested in the Parliament. Being matters relating to Fundamental Rights, they cannot be affected otherwise than as expressly provided by the Constitution. So, even in the absence of an express provision that the State Legislatures shall not have power to pass laws in regard to such matters, the very provision contained in the respective articles which only confers power on the Parliament impliedly excludes the power of the State Legislatures. So in regard to these four items, Art. 35 (a) amounts only to a specific provision enacting that the Parliament and not the State Legislatures shall have the legislative powers in regard to them. But as regards the other two items, Arts. 17 and 23 do not contain any provision as to the authority by which the punishment can be prescribed. Under Art. 35 (a), such punishment can only be prescribed by the Parliament and not by any State Legislature.

Clause (b), which is retrospective, is concerned with the laws in existence immediately before the coming into force of the Constitution and dealing with the above six items of subjects. Clause (b) saves the validity of these laws, notwithstanding the fact that they have not been made by the Parliament. Thus, the Army Act (8 of 1911) continued in force and was applicable to members of armed forces even after the commencement of the Constitution, until the Army Act (46 of 1950) was passed. Hence, the restrictions or curtailments of Fundamental Rights of members of armed forces as a result of the Army Act of 1911 are validated by cl. (b) of this article, although such Act was not passed by Parliament.[1]

Similarly, with regard to prescribing punishments for acts declared to be offences under Part III of the Constitution (Items (v) and (vi) above), a Provincial enactment, passed prior to the Constitution and imposing punishment for enforcement of disability on the basis of untouchability, will be valid under cl. (b) of this article, notwithstanding that it is not passed by Parliament. Thus, in *State* v. *Gulab Singh*[2] it was held by the Allahabad High Court that the provisions of the U. P. Removal of Social Disabilities Act (14 of 1947), imposing punishment for enforcing certain customary disabilities of members of scheduled castes, are valid. But one comment has to be made on this

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Article 35 — Note 1

[1] 1951 Mad 777 (Pr 12) [AIR V 38 C 263] : ILR (1952) Mad 153 : 52 Cri L Jour 827 (DB), *R. Chatterjee* v. *Sub-Area Commander.*

[2] 1953 All 483 (Pr 7) [AIR V 40 C 230] : 1953 Cri L Jour 1103 (DB).

Article 35
Note 1

decision. The decision is based on the ground that ART. 35 (a) is prospective and does not affect the validity of laws already in existence at the commencement of the Constitution. It is held that therefore there is no inconsistency between the above U. P. Act and the provisions of ART. 35 so as to make the Act void under ART. 13 (1). It is not clear why their Lordships have not referred to the specific provisions of cl. (b) of ART. 35 which clinched the issue. So also a pre-Constitution Provincial enactment prescribing punishment for traffic in human beings will be valid.[3]

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[3] 1953 Cal 522 (524) (Pr 7) [AIR V 40 C 198] : 1953 Cri L Jour 1187 (DB), *Raj Bahadur* v. *Legal Remembrancer*. (Suppression of Immoral Traffic Act (Bengal Act 6 of 1933) is valid.)

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

PART IV — GENERAL.

Synopsis

1. Directive Principles of State Policy—General.
   - (a) Introductory.
   - (b) Value of Directive Principles—Different views.
   - (c) Constitutional importance of Directive Principles.
   - (d) Conventions of British Constitution compared.
   - (e) Responsibility of the people.
   - (f) Stability of national policy.

(a) Intrcductory

1. Directive Principles of State Policy — General. — Part IV of the Constitution (ARTS. 36 to 51) is modelled on similar provisions of the Irish Constitution of 1937. The provisions in this Part are not directly enforceable in a Court of law. But the principles laid down in them are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws (ART. 37). The legal effect of these provisions and the extent to which they are cognizable by the Courts of law are discussed in NOTE 1 on ART. 37. The provisions are intended to lay down in general terms the objects which the framers of the Constitution desired that the State should pursue in guiding the destinies of the nation. Part III contains negative injunctions to the State not to do various things while this Part contains positive commands to the State to promote various objects. The principles laid down in this Part may be taken to express the salient features of the conception of the Constituent Assembly about the new social and economic order which it wanted to bring about through the channels of the Constitution. The preamble to the Constitution sets forth the ideals which the new Constitution was intended to secure and the Directive Principles of State Policy form a more detailed exposition of those ideals.

(b) Value of Directive Principles — Different views

There is a difference of opinion as to the value and usefulness of the inclusion of this chapter in the Constitution. According to one view it is of no value and is out of place in a written Constitution.[1] According to this view, the Part constitutes nothing more than a political manifesto, devoid of any actual constitutional importance. One critic called it on the floor of the Constituent Assembly a set of new year resolutions.[2] Another critic likened it to a cheque on a bank payable at the convenience of the bank.[3]

According to a *second* view it is not only *not* out of place in the Constitution but is calculated to effectively secure the realization of the ideals set forth in these provisions. Dr. Ambedkar was of this

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Part IV — General — Note 1

[1] The Constitution of India by G. N. Joshi, 2nd Edition, p. 108.

[2] Mr. Nasiruddin—Constituent Assembly Debates. (Taken from Venkoba Rao's Article in (1953) 1 M L J (Journal) 9 (11).)

[3] Prof. K. T. Shah—Constituent Assembly Debates. (Taken from Venkoba Rao's Article in (1953) 1 M L J (Journal) 9 (11).)

view. When the draft Constitution was introduced in the Constituent Assembly he said in his speech[4] :

> "The Directive Principles are like the Instruments of Instructions which are issued to the Governor-General and the Governors of the Colonies and to those of India by the British Government under the 1935 Act. What is called Directive Principles is merely another name for Instrument of Instructions. The only difference is that they are instructions to the Legislature and the Executive. Whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these Instruments of Instructions which are called Directive Principles. He cannot ignore them."

A *third* view may be described as a sort of compromise between these two views. According to this view, although the provisions are purely of a hortatory nature, and are not directly enforceable in a court of law, they serve an important purpose. Thus, Alan Gledhill in THE REPUBLIC OF INDIA observes[5] :

> "Most of the Directive Principles would be found in any Liberal manifesto and it is refreshing to find India taking her stand on political principles established after centuries of struggle in the West, and now all too frivolously and wantonly questioned and abandoned. . . . . It would be superficial to dismiss these precepts as good resolutions fit only for paving stones on the broad and primrose-strewn way. The lives of countless individuals have been shaped and redirected by moral precepts impinging upon their minds, and it is not difficult to find instances of similar precepts directing the course of the history of nations."

Similarly, Mr. Kenneth C. Wheare, Gladstone Professor of Government and Public Administration at the University of Oxford, observes as follows[6] :

> "The Indian Constitution is a liberal Constitution. There is something heroic these days in a people declaring publicly that they have established their Government in order to secure to all its citizens justice, liberty, equality and fraternity. These words have an old fashioned, nineteenth century ring about them, yet they need re-assertion in these days. The British student will feel perhaps that the Constitution contains rather too much assertion of abstract rights for, like the Irish Constitution, the Indian Constitution undertakes to guarantee a wide range of rights and privileges to the people.
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> "Difficult to justify to the practical-minded British observer, perhaps, is the large section embodying the 'Directive Principles of

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[4] Constituent Assembly Debates. (Taken from A I R 1951 Punj 93 (97) (Col 1) (DB), *Om Parkash* v. *State of Punjab.*)

[5] The Republic of India by Alan Gledhill, page 161.

[6] *Vide* Prof. Kenneth C. Wheare, in his article on India's New Constitution : *See* 54 Cal W N Lii (Liv) (Notes).

State Policy.' As these principles cannot be enforced in any Court, they amount to a little more than a manifesto of aims and aspirations. In this matter of declarations of rights and of directives of State policy, the Indian Constituent Assembly has followed the Irish Constitution and European practice rather than the less colourful and more legalistic documents which serve as Constitutions for the other members of the Commonwealth.

"One thing is certain. If these declarations of liberal principles, strange as they may seem in a legal document to British eyes, help the Indian Constitution on its way and assist its people in working their Government, they are more than justified. This is the biggest liberal experiment in the Government of men by themselves that has ever been tried."

(c) Constitutional importance of Directive Principles

It is submitted that even though the principles enunciated in Part IV are not directly enforceable in a Court of law, it would be too cynical a view to take that they have no value. To what extent and in what ways a court of law can take cognizance of these Directive Principles of State Policy is, as already stated, considered under ART. 37. But apart from the strictly *legal* aspect, it seems to be a positive gain to have well-defined aims of public policy consecrated by the Constitution itself. It must be remembered that the Constitution is one given by the people of the country to themselves and not one imposed from without. The preamble to the Constitution and the Directive Principles of State Policy, therefore, together constitute an authoritative declaration of the aims and aspirations of the Indian people formulated by their representatives after solemn and mature deliberation.

These principles will, therefore, naturally be looked up to by the people of the country as well as their leaders for guidance in the shaping of the policies of their Government. Although the principles enunciated lack the sanction of enforceability through courts, they will have the sanction of public opinion as expressed in elections. The successes and failures of the Government will naturally come to be tested in the light of the principles enunciated in the Constitution. A Government, which acts contrary to these principles, will be acting *unconstitutionally*, that is contrary to the Constitution.

As the late Mr. Alladi Krishnaswamy Ayyar said in his speech in the Constituent Assembly[7] "no ministry responsible to the people can afford light-heartedly to ignore the provisions in Part IV of the Constitution" although having regard to the wide nature of the subjects dealt with in these articles and the obvious difficulty in making those subjects justiciable, they have been classed as *Directive* Principles of State Policy. Mr. Alan Gledhill in his book THE REPUBLIC OF INDIA observes as follows[8] :

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[7] Constituent Assembly Debates. (Taken from Venkoba Rao's Article in (1953) 1 M L J (Jour.) 9 (11).)

[8] The Republic of India, by Alan Gledhill, p. 162.

"If the Indian Constitution becomes vested with the cope of sanctity essential to its durability it will be difficult for any public figure to propose any important legislative measure without making an appeal either to the Fundamental Rights or the Directive Principles. Measures will be attacked by the opposition as 'unconstitutional' in so far as they conflict with the Directive Principles."

(d) Conventions of British Constitution compared

Moreover, it seems to us that an exaggerated importance is being given by some critics to the fact that the principles enunciated in this Part are not enforceable by a court of law. Such critics seem to forget that in matters constitutional there are such things as conventions and that conventions are not enforceable through courts. But constitutional conventions are often of equal potency with legally enforceable principles. The great importance of conventions under the English Constitution clearly shows that enforceability in a court of law is not absolutely necessary to give practical efficacy to a principle. In Halsbury's LAWS OF ENGLAND,[9] it is stated as follows :

> "Today, as in the past much of the practical working of the Constitution depends less upon substantive law enforced by the Courts than upon conventional usages founded partly upon the precedents afforded by history and partly upon the needs of the time, which may be said for practical purposes of Government to have acquired the force of customary law."

Dicey in his INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION says[10]:

> "Constitutional understandings are admittedly not laws; they are not, that is to say, rules which will be enforced by the Courts. If a premier were to retain office after a vote of censure passed by the House of Commons, if he were (as did Lord Palmerston under like circumstances) to dissolve, or strictly speaking to get the Crown to dissolve, Parliament, but unlike Lord Palmerston, were to be again censured by the newly elected House of Commons, and then after all this had taken place, were still to remain at the head of the Government,—no one could deny that such a Prime Minister had acted unconstitutionally. Yet no court of law would take notice of his conduct. Suppose, again, that on the passing by both Houses of an important Bill, the King should refuse his assent to the measure or (in popular language) put his 'veto' on it. Here there would be a gross violation of usage, but the matter could not by any proceeding known to English law be brought before the Judges. Take another instance. Suppose that Parliament were for more than a year not summoned for the despatch of business. This would be a course of proceedings of the most unconstitutional character. Yet there is no court in the land before which one could go with the complaint that Parliament had not been assembled. Still the conventional rules of the Constitution, though not laws, are, as it is constantly asserted,

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[9] Halsbury's Laws of England, 2nd Edition, Vol. 6, p. 387 (Para 432).

[10] Introduction to the Study of the Law of the Constitution by Dicey, 9th Edition, Chapter XV, Pages 439, 440.

Part IV
General
Note 1

> nearly if not quite as binding as laws. They are, or appear to be, respected quite as much as most statutory enactments, and more than many."

Thus, the mere fact that a principle is not enforceable in a court of law does not deprive it of all value as a constitutional principle and its violation will be as unconstitutional as the violation of a principle or provision which can be enforced in a court of law. Hence, there is no point in sneering at the Directive Principles of State Policy as being a mere political manifesto. In fact Dicey uses the expression 'constitutional or political *ethics*' to describe the customs and practices, maxims or precepts which are not enforced or recognized by the Courts. E. A. Freeman in his GROWTH OF THE ENGLISH CONSTITUTION says[11] :

> "We now have a whole system of political morality, a whole code of precepts for the guidance of public men which will not be found in any page of either the statute or the common law, but which are in practice held hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right. In short, by the side of our written law, there has grown up an unwritten or conventional Constitution. When an Englishman speaks of the conduct of a public man being constitutional or unconstitutional he means something wholly different from what he means by conduct being legal or illegal."

It is true that the constitutional conventions in England are not written down and further that they do not lay down the objectives of State policy but are concerned with the working of the machinery of the Government and the interrelations between the different organs of the Government. But notwithstanding these differences, the fact remains that here we have a monumental example of a system which is working with absolute efficacy without the sanction of direct enforceability in a court of law.

No doubt, it has been pointed out by Sir Berriedale Keith in his edition of RIDGE'S CONSTITUTIONAL LAW OF ENGLAND that ultimately the constitutional conventions in England have the sanction of the force of law. This sanction lies in the fact that a Ministry which defied the Commons would find itself without legal authority to expend funds, and on the expiration of the annual Army and Air Force Act the maintenance of these forces would be illegal. The Courts would not support the Ministry in any illegal measures. The Ministry would thus be forced to resign or the Government of the country would come to a standstill. Although thus ultimately it is the force of law that serves as the sanction behind the constitutional conventions in England, there is no direct means of enforcing in a court of law the constitutional conventions.

So far as this point is concerned, the similarity between the constitutional conventions of England and the Directive Principles of State Policy in the Indian Constitution seems to be indisputable. Just as in the case of constitutional conventions in England, so in the case of Directive Principles of State Policy the vigilant and lively public opinion inside and outside Legislatures may operate as the sanction behind the Directive Principles. If such sanctions have been effective in England, there does not seem to be any reason why with the growth of healthy political life in India, they should not be effective here also.

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[11] Growth of the English Constitution by Freeman. (Taken from Dicey's Introduction to the Study of the Law of the Constitution, 9th Edition, Pages 418—419.)

(e) Responsibility of the people

But a good deal will depend upon the public and the leaders of the public and the political education of the masses as well as of the classes. But if the people of the country and their leaders do not avail themselves of the opportunities afforded by the Constitution that will not be a fault of the Constitution. It is in the hands of the people by their apathy and indifference to reduce to a farce and a mere scrap of paper the best of the constitutions that can be conceived and framed. It is an old adage that a people gets the kind of government it deserves. So it is up to the people of India to make the best of their Constitution that has been framed, and make its idealism a blessing and not a mockery. If they fail to do so the fault will not be that of the Constitution.

(f) Stability of national policy

There is another aspect of the Directive Principles which must be specially mentioned. As already pointed out above, Directive Principles are the deliberate formulation of the heads of national policy, not by any particular political party in a party convention or by a mere legislative body but by the representatives of a nation assembled in solemn conclave to lay down the constitution for the government of the country. To adopt the words of the late Chief Justice Kania of India, the Directive Principles represent not the 'temporary will of a majority' in the Legislature but the deliberate wisdom of the nation, exercised while settling the paramount and permanent law of the country.[12] Hence the political, social and economic ideology expressed in the Directive Principles and forming part of the Constitution is intended to impart continuity to the national policies and make them comparatively free from the vicissitudes of fortune of political parties, who may come into and go out of power from time to time.

Thus, apart from the legal aspect the formulation of these principles in the Constitution will, it seems to us, more effectively help the nation in its progress to the goals set forth than if there was no definition of the goals of public policy in the Constitution.

See also NOTE 1 on ART. 37.

Definition

36. In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.

JAMMU AND KASHMIR

Part IV of the Constitution does not apply to the State of Jammu and Kashmir—See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, Cl. 3.

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[12] 1950 S C 27 (42) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 (SC), *Gopalan v. State of Madras.*

Article 36
Note 1

COGNATE PROVISION.

Art. 12, the first article of Part III, of the Constitution is as follows: "In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

1. Scope. — This article adopts for the purpose of this Part the definition of the words "the State" in ART. 12. The notes under that article may be referred to. As seen there, a local authority like a municipality is covered by the words "the State". And hence, these Directive Principles of State Policy are applicable to such municipal bodies also.[1]

Application of the principles contained in this Part.

37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

COGNATE PROVISION

The State—Meaning of—See ART. 33.

Synopsis

1. Scope of the article.
   - (a) Introductory.
   - (b) Directive Principles—Instrument of Instructions—Comparison with.
   - (c) Directive Principles and Fundamental Rights—Correlation.
   - (d) Directive Principles subject to other provisions of Constitution.
   - (e) Power and duty of State to give effect to Directive Principles subject to other provisions of Constitution.
   - (f) Laws inconsistent with Directive Principles—Validity.
   - (g) Power of Court to take cognizance of Directive Principles.
   - (h) Illustrative cases.
   - (i) Value of Directive Principles.
   - (j) Can the President withhold assent to Bill on ground of its being inconsistent with Directive Principles?

(a) Introductory

1. Scope of the article.—This article states what is to be the legal effect of the principles of State policy laid down in ARTS. 38 to 51. The article comprises two parts:

(a) that the provisions of this part are not enforceable by any court[1]

Article 36 — Note 1

[1] 1952 All 753 (758) (Pr 20) [AIR V 39] (FB), *Buddhu* v. *Allahabad Municipality*. (Directives contained in Arts. 47 and 48 apply to Municipal Boards as much as to the State Government.)
1953 Cal 333 (Pr 8) [AIR V 40 C 121], *Mangru* v. *Budge Budge Municipality.*

Article 37 — Note 1

[1] 1953 Mad 21 (22) (Pr 3) [AIR V 40 C 8] (DB), *Thomas M. In re.* (Article 46 does not confer any enforceable right on any one.)

(b) that nevertheless the principles laid down in them are of fundamental importance in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

This means that *subject to the condition that the principles are not enforceable by any court,* they are of fundamental importance and should be given effect to by the Executive and the Legislature.

(b) Directive Principles — Instrument of Instructions — Comparison with

The Directive Principles are like the constitutional conventions in England (see Part IV—General) and the Instrument of Instructions issued by His Majesty to the Governor-General under S. 13 of the Government of India Act, 1935.[2] Sub-section (2) of S. 13 of that Act provided as follows :

> "The validity of anything done by the Governor-General shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him."

It will be seen from the speech of Dr. Ambedkar in the Constituent Assembly extracted, in the note 'Part IV—General' that he expressly stated that the Directive Principles are like the Instrument of Instructions which are issued to the Governor-General and the Governors of the Colonies and to those of India by the British Government under the Act of 1935. The only difference is that the Directive Principles are instructions to the Legislature and the Executive.

(c) Directive Principles and Fundamental Rights — Correlation

As the Directive Principles are not enforceable by any Court, they cannot override the provisions relating to Fundamental Rights in Part III of the Constitution.[3] In the *State of Madras* v. *Champakam Dorairajan,*[4] the Supreme Court observed as follows :

> "The Directive Principles of the State Policy, which by ART. 37 are expressly made unenforceable by a court, cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under ART. 32. The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in Part III. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III,

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[2] 1951 Punj 93 (Pr 18) [A I R V 38 C 22] : I L R (1951) Punj 344 (DB), *Om Parkash* v. *State of Punjab.*

[3] 1952 Punj 309 (319) (Pr 39) [AIR V 39] : I L R (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.* (Article 51 does not enable law to be made in violation of Fundamental Right though the law may be based on treaty with another country.)

[4] 1951 S C 226 (Pr 8) [AIR V 38 C 40] : 1951 S C R 525 (SC). (A I R 1951 Mad 120, Affirmed.)

there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the legislative and executive powers and limitations conferred on the State under different provisions of the Constitution."

In that case the question was about the validity of the Communal Government Order of the Madras Government fixing proportionate seats for different communities for admission into educational institutions. It was held by the Supreme Court that the Communal Government Order offended the provisions of Art. 29 (2), which provides as follows: "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

It was argued on behalf of the Government of Madras that having regard to the provisions of Art. 46 of the Constitution, the State is entitled to maintain the Communal Government Order and that if because of that Order the petitioner was unable to get admission into an educational institution, there was no infringement of her Fundamental Rights. It was also contended that the provisions of Art. 46 override the provisions of Art. 29 (2). Under Art. 46, the State is enjoined to protect with special care the educational and economic interest of the weaker sections of the people. The contentions on behalf of the Madras Government were rejected completely by the Supreme Court and it was held that a citizen cannot be denied his right under Art. 29 (2) on the ground of the State doing something in discharge of its duty under Art. 46 to promote with special care the educational interests of the weaker sections of the people. [Article 15 (4) has since been added into the Constitution by the Constitution (First Amendment) Act, 1951, enabling the State to make special provision, notwithstanding anything contained in Art. 29 (2), for the advancement of socially and educationally backward classes of citizens. See notes on Arts. 15 and 29. Thus the Fundamental Rights have been modified so as to promote the objects laid down in the Directive Principles in this part.]

In *Om Parkash* v. *State of Punjab*,[5] it was held by the Punjab High Court that Art. 46 should be taken as an exception to Art. 29 (2). This was also the view of the dissenting Judge, Somasundaram J., in *Champakam Dorairajan* v. *State of Madras*.[6] This view has now been definitely overruled by the Supreme Court decision in *State of Madras* v. *Champakam Dorairajan*[7] above referred to.

Thus, the Supreme Court has clearly laid down that the Directive Principles of State Policy cannot justify any action by the State in derogation of any of the Fundamental Rights conferred by Part III of the Constitution.

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[5] 1951 Punj 93 (97) [AIR V 38 C 22] : ILR (1951) Punj 344 (DB). (This decision is not good law in view of AIR 1951 S C 226.)

[6] 1951 Mad 120 (Pr 59) [AIR V 38 C 14] : ILR (1951) Mad 149 (FB).

[7] 1951 S C 226 [AIR V 38 C 40] : 1951 S C R 525 (SC).

(d) Directive Principles subject to other provisions of Constitution

The Supreme Court has also laid down in the observations quoted above that the Directive Principles cannot override the *other* provisions of the Constitution, relating to the legislative and executive powers of the State and the limitations imposed thereon. Thus, the Supreme Court has clearly laid down that the Directive Principles are subject to the other provisions of the Constitution. In other words, the Directive Principles cannot be given effect to if they come in conflict in a particular case with the operation of any other provision of the Constitution.

To similar effect is the judgment of the Full Bench of the Bombay High Court in *Fram Nuserwanji Balsara* v. *State of Bombay.*[8] In that case, the question was about the effect of ART. 47, under which, among other things, the State is enjoined to endeavour to bring about the prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health. The point under discussion was about the validity of certain provisions of the Bombay Prohibition Act (25 of 1949). One of the questions raised in this connection was about the legislative competence of the Bombay Legislature to enact the provisions, having regard to the relevant provisions of the Government of India Act, 1935. In that connection, although the Act in question was one passed long before the coming into force of the Constitution, reference was made for some reason, which is not clear, to the provisions of ART. 47 above referred to in support of the argument in favour of the competency of the Bombay Legislature. The Full Bench rejected the contention pointing out that ART. 47 cannot confer legislative competency where it was otherwise lacking. Chagla, C. J., who delivered the judgment of the Full Bench, observed as follows in the course of his judgment :

> "Article 37 of the Constitution provides that the Directive Principles are 'fundamental in the governance of the country' but are not enforceable by any court. They are in the nature of Instrument of Instructions, which both the Legislature and the Executive are expected to respect and to follow, but they do not confer any legislative competence on a Legislature in respect of any matter over which it has no competence."

(e) Power and duty of State to give effect to Directive Principles subject to other provisions of Constitution

In *State of Madras* v. *Champakam Dorairajan,*[9] the Supreme Court observed that so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions of Part III, there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the legislative and executive powers and limitations conferred on the State under different provisions of the Constitution. Thus the power of the State to make laws in accordance with the Directive Principles but subject to the other provisions of the Constitution, is beyond question.

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[8] 1951 Bom 210 (Pr 16) [AIR V 38 C 42] : I L R (1951) Bom 17 : 52 Cri L Jour 80 (FB). (The case went up in appeal to Supreme Court : See AIR 1951 S C 318 —But the point here stated is not affected by the appeal.)

[9] 1951 S C 226 (Pr 8) [AIR V 38 C 40] : 1951 S C R 525 (SC).

But clearly, the effect of ART. 37 is not merely permissive. It is much more than that. The article makes it the *duty* of the State to apply the Directive Principles in making laws. The Supreme Court in the observations above referred to, would never have meant to say that ART. 37 only *permits* legislation in accordance with Directive Principles. The observations of the Supreme Court were directed to pointing out that in seeking to make laws according to the Directive Principles, the State could not transgress the provisions relating to Fundamental Rights and other provisions of the Constitution.

(f) Laws inconsistent with Directive Principles—Validity

But the question has been raised as to whether legislation otherwise in accordance with the Constitution but inconsistent with the Directive Principles will be valid. Thus, for instance, suppose a law is made to abolish prohibition, which the State is enjoined to promote under ART. 47, or suppose the State makes a law in pursuance of a policy to discourage village panchayats contrary to ART. 40. Will such laws be valid? The answer to the question seems to be quite clear. Supposing such a law is held *invalid* by a Court as being contrary to the provisions of Part IV, the Court will only be enforcing such provisions. Such enforcement is clearly against the prohibitory provisions of ART. 37. As pointed out in note "Part IV General," the sanction behind the Directive Principles is not by direct enforcement by a court declaring as *ultra vires* any law on the ground of its contravening the Directive Principles. The sanction is only that of public opinion which can be made equally potent. The suggestion made by the learned writer of an article in the Madras Law Journal[10] that the law which is otherwise in accordance with the Constitution but inconsistent with the Directive Principles, will be *ultra vires*, is, it is submitted, not correct. While the suggestion is based on the fact that the Directive Principles are fundamental in the governance of the country and that the State is enjoined, as a duty, to apply the Directive Principles in making laws, the suggestion overlooks the fact that these provisions of ART. 37 are subject to the opening clause of the article, namely, that the provisions contained in this part shall not be enforceable by any Court.

(g) Power of Court to take cognizance of Directive Principles

Then the question arises as to whether a court of law would be entitled to take into consideration the Directive Principles in any case. The answer to this question is a clear 'Yes.' By taking into consideration the Directive Principles the Court will not be "enforcing" them but merely taking cognizance of the fact that they are fundamental in the governance of the country.

The following are some of the ways in which Directive Principles can be taken into consideration by a court of law in deciding cases. *Firstly*, as the preamble to an Act has no direct operative effect nor can override the clear provisions of an enactment, (see Preamble NOTE 1) so also the Directive Principles cannot be relied on when a question of the interpretation of the Constitution arises for overriding a clear provision of the Constitution.[11] But when there is doubt or ambiguity in enactment, reference to preamble, when it is likely to be helpful in throwing light on the meaning of the provisions, is not forbidden. (See Preamble NOTE 1.) Similarly, it is conceived that there would be no objection to reference to Directive Principles for understanding the meaning of the provisions of the Constitution which are doubtful or ambiguous. *Secondly*, the Directive Principles clearly constitute a part of the scheme of the Constitution. Whenever a question arises before a Court whether in interpreting an ambiguous provision in the Constitution or otherwise as to the scheme of the Constitution, reference to the Directive Principles will not be forbidden. *Thirdly*, ART. 19 authorises the imposition of reasonable restrictions on the Fundamental Rights granted by the article. In considering what is a reasonable restriction, the provisions of the chapter on Directive Principles will be clearly relevant. A restriction which promotes one of the objects mentioned in the provisions relating to Directive Principles will naturally be regarded as reasonable by the Court.[12] *Fourthly*, when a question arises as to whether a certain matter is for the public benefit, or in public interest, (as for instance, while considering the restrictions on Fundamental Rights under ART. 19) a reference to the Directive Principles would be relevant. The above are illustrative of the way in which a Court would be entitled to take into consideration the Directive Principles. Those principles are bound to influence the decisions of Courts in any number of ways.

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[10] "Prohibition: Constitutional Position Regarding" by K. Venkoba Rao, M. L., Advocate, Madras, (1953) 1 M L J (Journal) 9 (11).

(h) Illustrative cases

A few decided cases may be referred to here to illustrate how the Directive Principles may be legitimately considered by the Courts while adjudicating on the controversies before them. In *State of Bihar* v. *Kameshwar Singh*,[13] the Supreme Court relied upon both the Preamble to the Constitution as well as ART. 39 of the Directive Principles of State Policy in arriving at its decision that certain zamindari abolition legislation had been passed for a public purpose within the meaning of ART. 31 of the Constitution. A similar course was also followed in *Suryapal Singh* v. *U. P. Government*[14] by a Full Bench of the Allahabad High Court. As was expressed in the latter case, a law made for the purpose of securing an aim declared in the Constitution to be a matter of State Policy is for a public purpose.

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[11] "Prohibition : Constitutional Position Regarding" by K. Venkoba Rao, M. L., Advocate, Madras. (1953) 1 Mad L Jour (Jour) 9 (11).

[12] 1951 S C 318 (329) (Pr 25) [AIR V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara*. (Article 47 under which the State is enjoined to bring about prohibition of consumption of intoxicating drinks except for medicinal purposes may be taken into account when considering the reasonableness of the provisions of a prohibition law under Art. 19.)

1953 Orissa 171 (177) (Pr 20) [AIR V 40 C 58] : ILR (1953) Cut 45 (DB), *State of Orissa* v. *Mt. Kamala Debi*.

[13] 1952 S C 252 (Pr 52) [A I R V 39] : 1952 S C R 889, 1020, 1056 : I L R 31 Pat 565 (SC).

[14] 1951 All 674 (683) [AIR V 38 C 182] : I L R (1952) 2 All 46 (FB).

[*See also* 1951 Pat 91 (Pr 89) [AIR V 38 C 15]: ILR 30 Pat 454 (SB), *Kameshwar Singh* v. *State of Bihar*. (Connotation of the expression "public purpose' in the Indian Constitution is fairly wide and comprehensive because it embraces all purposes of the Union or a State.)]

In *Mangru* v. *Budge Budge Municipality*,[15] it was held by a single Judge of the Calcutta High Court that the Municipality of Budge Budge had *no jurisdiction* under the Bengal Municipal Act to close down slaughter houses in the Municipality so long as the law was as he supposed it to be, in spite of the fact that under ART. 48 of the Directive Principles of State Policy the "State" (which included the Municipality) was under a duty to take steps for prohibiting the slaughter of cows and calves. It was held that the Directive Principles were not enforceable by any Court and the Municipality was not justified in acting contrary to the law on the ground of acting according to the Directive Principles in Part IV of the Constitution. The decision shows that so long as there is a valid law in force that law has to be complied with, although non-compliance may be more in accord with the Directive Principles of State Policy. This decision illustrates the proposition that a law may be valid though inconsistent with the Directive Principles of State Policy, although a law inconsistent with *Fundamental Rights* will be void.

The decision, however, went up in appeal before a Full Bench of the Calcutta High Court in *Budge Budge Municipality* v. *Mangru*.[16] In that appeal the majority of the Full Bench held, contrary to the decision of the single Judge in the lower Court, that the Municipality had, under the Municipal Act, a *discretion* in the matter of keeping open slaughter houses within municipal limits and was not bound to keep open slaughter houses for the benefit of any person who wanted to carry on trade as a dealer in meat. It was held that the Municipality acted quite within its powers in deciding to close down the slaughter houses for slaughter of cows, calves, etc. It is clear that when there is no legal obligation to keep open the slaughter houses, the action of the municipality in closing down slaughter houses for the slaughter of cows and calves would be in accordance with Directive Principles of State Policy and, not being in infringement of any law, would be perfectly valid. The view of the Full Bench thus illustrates the proposition in *Champakam Dorairajan's case* that when there is no inconsistency with the Fundamental Rights or any provisions of the Constitution, the State is free to give effect to the Directive Principles.

This principle is also illustrated by the Full Bench decision of the Allahabad High Court in *Buddhu* v. *Municipal Board, Allahabad*.[17] In that case it was held that the Allahabad Municipality was, equally with the State Government, under a duty, under ART. 47, to take steps for raising the level of nutrition and standard of living of the people and with a view to this end might prohibit the slaughter of cows, calves, bulls and bullocks within the municipality to enable the public to have a sufficient supply of milk and also to ensure that a sufficient number of draught cattle were available for agricultural operations. It was also held that if such prohibition affected the Fundamental Right of persons under ART. 19 (1) (g) to carry on any trade, business or occupation they chose, such restriction on Fundamental Right was justified in view of the Directive Principles in ARTS. 47 and 48, as a 'reasonable' restriction under ART. 19 (6).

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[15] 1953 Cal 333 (Pr 8) [AIR V 40 C 121].

[16] 1953 Cal 433 (Pr 50) [AIR V 40 C 165) (SB).

[17] 1952 All 753 (Pr 20) [AIR V 39] (FB).

(i) Value of Directive Principles

The real question under ART. 37 is whether a law which is inconsistent with the Directive Principles can be valid and if such law can be valid, what purpose is served by providing that the Directive Principles are of fundamental importance and that it is the duty of the State to apply them in making laws. On this question, as already said, although a law cannot be impugned as being inconsistent with Directive Principles of State Policy, it does not mean that such principles have no place in the judicial consideration of questions coming before the Courts. The Directive Principles apart from their *political* and psychological value, pointed out in note 'Part IV —General', have a *legal* importance as well, in the sense that in proper cases they will be taken into consideration by the Courts in the adjudication of controversies before them.

(j) Can the President withhold assent to Bill on ground of its being inconsistent with Directive Principles?

The question has also been raised whether the President can withhold his assent to a Bill under ART. 111 on the ground of such Bill being in contravention of the Directive Principles. Article 111 gives the President an absolute power to refuse assent to a Bill passed by both Houses of Parliament and there is no limitation on such power with reference to the ground on which the President may withhold his assent to the Bill under that article. Hence there does not seem to be any legal objection to the President refusing his assent to a Bill on the ground of its inconsistency with the Directive Principles of the State Policy. But the question whether the President as the constitutional head of the Government acting on the advice of his Ministry will be free to refuse assent to a Bill passed by both Houses of Parliament when the Ministry is backing the Bill is a different one. For further discussion, see NOTE 1 on ART. 111.

State to secure a social order for the promotion of welfare of the people.

38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

COGNATE PROVISION

The State — Meaning of—See ART. 36.

1. Public welfare through justice. — If this article is analysed it will be seen that the *object* of the article is the promotion of the welfare of the people. The means by which this object is to be secured is to establish a particular kind of social order. The essence of this social order is to be that justice, social, economic and political, should be its keynote and should inform all the institutions of national life. Thus, public welfare through justice is the core of the article. Welfare and justice may, therefore, be said to be the twin objects of the Constitution.

The Preamble to the Constitution also sets forth in the forefront of the objectives sought to be secured, justice, social, economic and political. The same ideal is repeated in this article with an addition in two respects:

firstly, the justice is to be translated into the terms of a social order in which justice, social, economic and political shall inform all the institutions of the national life ;

secondly, the object of establishing such a social order is given, such object being the welfare of the people.

Thus, the ideal set forth in the Preamble is amplified and clarified in this article by its being shown what is meant by justice, social, economic and political, and also by stating what is the object of having such justice.

This article, although it amplifies the objects set out in the Preamble, is of a general nature. The next article is more specific although of a comprehensive character. Each of the subsequent articles in this Part, however, deals with a particular head of policy.

Certain principles of policy to be followed by the State.

39. The State shall, in particular, direct its policy towards securing—

(*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood ;

(*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;

(*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

(*d*) that there is equal pay for equal work for both men and women ;

(*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

COGNATE PROVISION

The State—Meaning of—See ART. 36

Synopsis

1. Scope of the article.
   - (a) Welfare of workers and fair distribution of wealth.
   - (b) Full employment.
   - (c) Adequate wages.
   - (d) Humane conditions of work.
   - (e) Equality between sexes.
   - (f) Distribution of wealth.
   - (g) Judicial cognizance of article.
2. Citizens.
3. Clauses (b) and (c).

(a) Welfare of workers and fair distribution of wealth

1. Scope of the article. — This article particularises some of the methods by which the goal of general welfare through justice, translated into the terms of a new social order, is to be achieved. The article contains six clauses which broadly fall into two divisions. Clauses (a), (d), (e) and (f) deal specially with the *welfare of workers*, and cls. (b) and (c) deal with the *distribution of wealth.*

A study of the Directive Principles shows that there is a distinct emphasis on *justice to workers.* This justice may be regarded as falling under three heads:

(i) right to work, that is, right to get work, which would yield an adequate means of livelihood;

(ii) an adequate wage for the work ; and

(iii) reasonable and humane conditions of work.

These three different aspects are found provided for in the Directive Principles in more than one article.

(b) Full employment

Thus, ART. 39, cl. (a) directs the State to see that all citizens have an adequate means of livelihood. Article 41 provides that the State should, within the limits of its economic capacity and development, make effective provision for securing the right to work. Similarly, under ART. 43, the State is enjoined to endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work.

(c) Adequate wages

As regards the right to adequate wages, this again is expressed in several articles. In ART. 39 (a), the State is directed to see that citizens, men and women equally, have a right to an adequate means of livelihood. Under ART. 43, the State is enjoined to endeavour to secure to all workers a living wage and conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Under ART. 39, cl. (d), the State is directed to see that there is equal pay for equal work for both men and women. Again under cl. (f) of the article, the State is to direct its policy to securing that childhood and youth are protected against exploitation and against moral and material abandonment. There is again a general directive to the State under ART. 47 to regard the raising of the level of nutrition and the standard of living of its people. In addition to these provisions, the direction that too much concentration of wealth or of material resources in the hands of a few people should be avoided, itself implies that the worker should have a liberal share in the nation's wealth.

(d) Humane conditions of work

As regards conditions of work, this aspect also is emphasized in several articles. For instance, under ART. 39, cl. (e), the policy of the State should be to see that the health and strength of the workers, men and women, and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength. Under cl. (f) of the same article, childhood and youth are to be protected against exploitation and against moral and material abandonment. Under ART. 42, the State is specifically enjoined to make provision for securing just and humane conditions of work and for maternity relief. Again under ART. 43, the State is to endeavour to secure to all workers conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

Thus, the three aspects of the welfare of workers have received special attention at the hands of the Constituent Assembly in these Directive Principles of State Policy.

(e) Equality between sexes

The aspect of justice in the provisions relating to workers is brought out also in the fact that equality between men and women has been enjoined in regard to the right to an adequate means of livelihood (cl. (a)), and also in regard to rate of payment for work (cl. (d)).

(f) Distribution of wealth

The other subject covered by this article is, as already stated, distribution of wealth in the nation. This is dealt with in cls. (b) and (c).

(g) Judicial cognizance of article

As seen in NOTE 1 on ART. 37, the Directive Principles of State Policy can be taken into consideration by the Court when applying the provisions of the Constitution and in interpreting them. Thus, in construing the meaning of the expression "public purpose" in ART. 31 and in determining whether a certain Act providing for the acquisition of rights in property compulsorily is for public purpose, the provisions of cls. (b) and (c) may be considered by the Court. Thus, in *State of Bihar* v. *Kameshwar Singh*,[1] the Zamindari Abolition Act, which was in question in that case, was held to have been passed for a public purpose and in arriving at this conclusion the Supreme Court took into consideration the provisions of cls. (b) and (c) of this article Mahajan, J., observed as follows in the course of his judgment :

> "The Preamble of the Constitution says that India has been constituted into a Sovereign Democratic Republic to secure to all

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Article 39 — Note 1

[1] 1952 S C 252 (Pr 52) [AIR V 39] : 1952 S C R 889, 1020 & 1056 : I L R 31 Pat 565 (SC).

its citizens justice, social, economic and political. Article 39 of the Directive Principles of State Policy states as follows : 'The State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.' Now, it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act, therefore, is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible. In other words, shortly put, the purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community as advised."

Similarly, in *Raj Rajendra Maloji Rao* v. *State of Madhya Bharat*,[2] a Full Bench of the Madhya Bharat High Court, in dealing with the validity of another Act of a similar type, cited passages from the Supreme Court judgment referred to above and observed as follows:

> "Jagir lands were taken in order to avoid concentration of large blocks of lands in a few hands and to follow the Directive Principle laid down in ART. 39 (b) and (c) of the Constitution. These Directive Principles are as follows . . . . Evidently the object of this legislation is to distribute the ownership and the control of the material resources so as to subserve best the common good and to avoid concentration of wealth and means of production to the common detriment."

2. **Citizens.** — For definition of citizen, see notes on ART. 5. See also ART. 19, NOTE 15. The corporation is not a citizen within the meaning of cl. (a) of this article. "Citizens" under this clause must be "men and women".[1]

3. **Clauses (b) and (c).**—As seen in NOTE 1, Acts for the abolition of zamindari system have been held to promote the ends mentioned in cls. (b) and (c), and as such to subserve a public purpose within the meaning of ART. 31.

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40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Organisation of village panchayats.

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[2] 1953 Madh B 97 (Pr 4) [AIR V 40 C 46] (FB).

Article 39 — Note 2

[1] 1952 Punj 9 (Pr 54) [AIR V 39 C 2] : I L R (1952) Punj 11 (DB), *Jupiter General Ins. Co.* v. *Rajagopalan.*

COGNATE PROVISION

The State—Meaning of—See ART. 36.

1. Scope.—The revival of village panchayats is an old cry with Indian publicists. This article, however, did not find a place in the original draft of the Constitution and was inserted owing to the insistent demand of a majority of members that the importance of village panchayats should find a place in the Constitution. It is a controversial question, however, whether judicial powers must be entrusted to village panchayats. The opinion of some very high placed persons seems to be against the wisdom of such a step.[1] No doubt, there is a crying need for elimination of law's delays and the simplification of legal procedure, but it may be doubted whether the entrustment of judicial power to lay bodies of villagers without legal education and training will solve the problem satisfactorily. Society seems to have advanced too far for such methods of administration of justice, except in very simple cases.

Right to work, to education and to public assistance in certain cases.

41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

COGNATE PROVISION

The State—Meaning of—See ART. 36.

1. Scope of the article.—This article places upon the State the responsibility of finding work for all people and also to provide for education and give relief in case of unemployment, old age, sickness and disablement and in other cases of undeserved want. The State is to do these things within the limits of its economic capacity and development. The article is of a mixed nature. It contains three ideas: (a) right to work, (b) right to education and (c) right to relief in case of want. The right to work is covered also by ART. 39, cl. (a) and by ART. 43. As regards the right to education, ART. 45 provides that the State shall endeavour to provide within a period of ten years from the commencement of the Constitution for free and compulsory education for all children until they complete the age of fourteen years.

A provision for relief in case of undeserved want is a common feature of modern States and in advanced countries much progress is

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Article 40 — Note 1

[1] *See* 1953 Mad 388 (389) (Pr 1) [A I R V 40 C 137] : 1953 Cri L Jour 656, *Venkatachala Naicken* v. *Panchayat Board.* (Per *Somasundram, J.*—"This case is a good instance to show that in this country the Panchayat Courts ought not to be invested with criminal jurisdiction. They seem to be carried away by the local politics and the criminal feelings that they happen to entertain against persons.")

made in this direction, though in India nothing substantial has been done till now. No doubt, the limits of the economic capacity of the State have to be taken into account and unless substantial improvement is made in the material and economic capacity of the country, much progress cannot be expected in the matter of public assistance to the needy.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

Provision for just and humane conditions of work and maternity relief.

COGNATE PROVISION

The State—Meaning of—See ART. 36.

1. **Scope of the article.** — As stated in NOTE 1 on ART. 39, concern for the worker and his welfare is one of the dominant notes of the Part on Directive Principles of State Policy. Under this article, the State is enjoined to make provision for securing just and humane conditions of work and for maternity relief. Under ART. 39, cl. (e), the State is asked to direct its policy towards securing that the health and strength of the workers, men and women, and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength. Similarly, cl. (f) of ART. 39 wants the State to try to see that childhood and youth are protected against exploitation and against moral and material abandonment. Under ART. 43 the State is to try to secure to all workers conditions of work ensuring a decent standard of life and enjoyment of leisure and social and cultural opportunities. It will be noticed that under ART. 42 it is peremptorily required to make provision for securing just and humane conditions of work and for maternity relief. The language used in ART. 42 is in contrast with that in some other articles in the same Part in which it is provided that the State shall *endeavour* to do something or to direct its policy towards securing certain objects or to take some steps to do something. This shows the importance which the Constituent Assembly attached to the matter of securing just and humane conditions for workers and providing maternity relief.

43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Living wage, etc., for workers.

COGNATE PROVISION

The State—Meaning of—See ART. 36.

1. Scope of the article. — This article again shows the special concern of the Constituent Assembly for the welfare of the workers. The article enjoins the State to endeavour to secure to all workers, agricultural, industrial or otherwise, work, a living wage and decent conditions of work, so as to ensure to the workers sufficient leisure and the enjoyment of social and cultural opportunities.[1] It will be seen thus that the article combines in one provision all the three aspects of labour welfare mentioned in the notes on ART. 39, namely, full employment, an adequate return for the work and decent conditions of work. The other articles in which the same topic has been dealt with have been referred to in NOTE 1 on ART. 39 and the notes on ARTS. 41 and 42. This article contains a rider to the effect that in particular, the State shall endeavour to promote cottage industries on individual or co-operative basis in rural areas. From the context in which the article occurs, it seems that while the previous articles have in special view workers in industrial concerns, this article is general and applies to all classes of workers and also to workers whether employed by others or working independently.

Uniform civil code for the citizens.

44. The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

COGNATE PROVISION

The State—Meaning of—See ART. 36.

1. Scope of the article.—Under ART. 25 freedom of conscience and the right freely to profess, practise and propagate religion have been conferred on all persons as a Fundamental Right under the Constitution. But at the same time, the article saves the power of the State to make laws regulating or restricting secular activity which may be associated with religious practice, or providing for social welfare and reform. Thus, the Fundamental Right as to freedom of religion does not preclude the State from making laws for introducing social reforms or for restricting or regulating secular activity although such activity may be associated with religious practice. Hence, as seen in the notes on ART. 25, there is no constitutional impediment to legislation affecting the personal law of the people. In fact, Entry 5 in LIST 3 of SCH. VII expressly gives legislative power to the Parliament as well as the State Legislatures to make laws relating to marriage and divorce, infants and minors, adoption, wills, intestacy and succession, joint family and partition, and all matters in respect of which parties in judicial proceedings were immediately before the

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Article 43 — Note 1

[1] 1953 Orissa 171 (177) (Pr 20) [AIR V 40 C 58] : I L R (1953) Cut 45 (DB), *State of Orissa* v. *Mt. Kamala Debi.* (Orissa Tenants Protection Act (3 of 1948), Ss. 4 and 6 — Restrictions are reasonable and are in conformity with Art. 43.)

commencement of this Constitution subject to their personal law. What ART. 44 aims at is that eventually there should be a uniform civil code for all citizens of India and that instead of their being governed by separate systems of personal law in regard to marriage, divorce, succession and inheritance, adoption and other matters, they should be governed by one system of law on the basis of territoriality even with regard to the matters in which they are subject to different systems of personal law now.

The reason for this provision is that it is considered that a uniform civil code will bring about uniformity in the way of life of the people, which in its turn will make for national solidarity and unity. The trend in modern times is everywhere in favour of having territorial laws in preference to personal laws (see for example, modern Turkey) and ART. 44 is an expression of that trend.

Provision for free and compulsory education for children.

45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

COGNATE PROVISION

The State — Meaning of — See ART. 36.

1. **Scope of the article.** — This article expresses a long cherished ambition of the Indian people — free and compulsory elementary education for all children in the nation. Evidently the article aims at including even a part of secondary education within its ambit. The goal of free and compulsory elementary education for all children has been before the nation at least since the time of the Elementary Education Bill of the late Hon'ble Mr. Gokhale. The goal is yet to be realized. This article sets a time limit of ten years within which provision should be made for the achievement of the ideal set forth in it.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

COGNATE PROVISIONS

The State — Meaning of — See ART. 36.

The Scheduled Castes and the Scheduled Tribes—Interpretation of — See ART. 366 (24) and (25).

Synopsis

1. Scope of the article.
   - (a) General.
   - (b) This article and the principle of equality among all classes enacted in the Constitution.
   - (c) "Weaker sections of the people."

(a) General

1. Scope of the article.—This article aims at the upliftment of backward communities, especially of Scheduled Castes and Scheduled Tribes. The article places on the State the duty to promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the Scheduled Castes and Scheduled Tribes, and to protect them from social injustice and all forms of exploitation. As seen in the note on ART. 37, the Directive Principles of State Policy are not enforceable by a court of law[1] and do not control the provisions as to Fundamental Rights in Part III of the Constitution. Hence, when there is a conflict between the Directive Principles and the Fundamental Rights, the latter will prevail and the State will not be able to justify any breach of Fundamental Rights by an appeal to the Directive Principles.

(b) This article and the principle of equality among all classes enacted in the Constitution

Thus, under ART. 15 (1), the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Similarly, under ART. 29 (2) no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. It was held by the Supreme Court[2] (confirming on appeal the decision of the Madras High Court) that these provisions are not affected by ART. 46 and that, therefore, an infringement of such provisions cannot be justified on the ground that it was committed by the State in pursuance of its duty under ART. 46. In order to enable the State to help backward classes of citizens by making special provisions for their benefit, although such provisions may involve discrimination against other classes of citizens, ART. 15 (4) was added by the Constitution (First Amendment) Act, 1951, S. 2. This provision specifically refers to ART. 15 and ART. 29 (2) and says that notwithstanding anything contained in those provisions, the State shall not be prevented from making any special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes and Scheduled Tribes. There is a similar

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Article 46 — Note 1

[1] 1953 Mad 21 (22) (Pr 3) [A I R V 40 C 8] (DB), *Thomas M. In re.* (Article 46 does not create any enforceable right in favour of any one.)

[2] 1951 S C 226 (Prs 8, 11) [A I R V 38 C 40] : 1951 S C R 525 (SC), *State of Madras* v. *Champakam Dorairajan.* (Confirming AIR 1951 Mad 120.)
[*See also* 1952 Bom 461 (Pr 4) [AIR V 39] : I L R (1953) Bom 44 (DB), *Jagwant Kaur* v. *State of Bombay.* (The fact that under Art. 46 the State is enjoined to promote with special care the educational and economic interests of the scheduled caste does not mean that the State is permitted to discriminate in favour of Harijans so as to contravene the Fundamental Right conferred upon citizens by Art. 15 (1). Dictum—"We dare say that after the amendment [of Art. 15] it would be possible for the State to put up a Harijan colony in order to advance the interest of the backward class (referred to in cl. (4) of Art. 15") .)]

provision in Art. 16 (4) with regard to appointments under the State. Under that provision reservation of appointments for members of backward classes is permitted. But unless a case comes strictly within the terms of exceptions like these, the Fundamental Rights guaranteed by Part III of the Constitution must prevail and their infringement cannot be justified on the basis of the Directive Principles.

For instance, Art. 46 requires the State to promote with special care the educational and economic interests of the "weaker sections of the people". But Art. 15 (4), which creates an exception to Art. 15 and Art. 29 (2), enables the State to make special provision only for the advancement of "socially and educationally backward classes of citizens". Hence, unless a class of citizens is socially and educationally backward, discrimination in its favour under Art. 15 (4) would be illegal although, for some reason, such class is regarded as a 'weaker section' of the people. For instance, it may be economically a weaker section of the people. But unless it is socially and educationally backward it will not be entitled to the benefit of Art. 15 (4).

Conversely, a class of citizens may be socially and educationally backward but economically not so and may not be regarded as a weaker section of the people. In such a case, although Art. 46 may not apply, Art. 15 (4) may apply. In the case of Scheduled Castes and Scheduled Tribes, however, both Art. 46 and Art. 15 (4) apply.

(c) "Weaker sections of the people"

The question as to whether a community falls under the description of 'a weaker section' of the people is a matter for the Court to decide in each case. Similarly, whether a class of citizens is "socially and educationally backward" for the purpose of Art. 15 (4) or is a "backward class" within Art. 16 (4) is a matter for the Court to decide in each case. In *Champakam Dorairajan* v. *State of Madras*,[3] Vishwanatha Sastri, J., observed as follows about the claim of the non-Brahmin Hindus of the Madras Presidency to constitute one of the "weaker sections" of the community :

> "I am unable to assent to the suggestion of the Advocate-General that non-Brahmin Hindus constitute one of the 'weaker sections of the community'. A community which has furnished successive Vice-Chancellors of great distinction for all the three Universities in this State, several law officers of the State like Advocate-Generals, Public Prosecutors and Government Pleaders, distinguished Judges of this Court, competent administrative officers functioning both in the Union Government and as heads of districts and departments in this State, physicians, surgeons and obstetricians of all-India reputation, industrial magnates, mill owners and entrepreneurs of great business ability and affluence and nine out of twelve Ministers of this State administering its affairs to-day, cannot, with any sense of appropriateness, be described as a weak section of the body politic requiring discriminative protection against other sections. In all the competitive walks of life the members of the non-Brahmin Hindu

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[3] 1951 Mad 120 (132) [AIR V 38 C 14] : I L R (1951) Mad 149 (FB).

community are in the forefront having won their place, I dare say, by reason of their ability, industry, educational attainments and organising capacity. I am not bound, as a Judge, to affect a cloistered aloofness or seclusion from facts that every person in the State is aware of and to insist pedantically on detailed evidence of matters of common knowledge especially when dealing with the constitutional rights and privileges of citizens."

For definition of Scheduled Castes and Scheduled Tribes, see ART. 366, cls. (24) and (25) read with ARTS. 341 and 342.

See also NOTE 1 on ART. 37.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

COGNATE PROVISION

The State — Meaning of — See ART. 36.

1. Scope of the article. — This article deals specially with the duty of the State in the matter of raising the level of nutrition and the standard of living of the people, and in regard to the improvement of public health. In particular, the State is asked to bring about the prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health.

The term "State" in this article, will include a Municipal Board.[1] See also NOTE 1 on ART. 36. The promotion and maintenance of the health of the inhabitants of a municipality, including the raising of the level of nutrition, is a duty cast upon a Municipal Board not only under the municipal law but also under the Constitution. If, with a view to increasing the milk supply and the production of food grains, a Municipal Board, by framing a bye-law, placed a ban upon the slaughter of bulls, bullocks, cows and calves, the action would be in pursuance of a policy enjoined by the Constitution as well as the particular municipal law.[2] Article 48 contains a specific direction to the State that it should endeavour to take steps for prohibiting the slaughter of cows and calves and other milch and draught cattle. Thus, the action of a Municipal Board, in prohibiting the slaughter of bulls, bullocks, cows and calves in a municipality, would be in accordance with the policy directed under both ARTS. 47 and 48. So, when an

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Article 47 — Note 1

[1] 1952 All 753 (Pr 20) [AIR V 39] (FB), *Buddhu* v. *Allahabad Municipality.*

[2] 1952 All 753 (Pr 20) [AIR V 39] (FB), *Buddhu* v. *Allahabad Municipality.*

objection is raised that such prohibition interferes with a citizen's Fundamental Right of carrying on any occupation, trade or business under Article. 19 (1) (g), it would be open to the Court to take into consideration these two articles in determining whether the restrictions imposed are reasonable within the meaning of ART. 19, cl. (6). See also NOTE 1 on ART. 37.

Similarly, the closing down of municipal slaughter houses would be in accordance with the policy directed by ARTS. 47 and 48. But if under the law as it is, the municipality is *bound* to keep municipal slaughter houses open, it cannot, so long as the law is not changed, close the slaughter houses merely because such closure will be in accordance with the Directive Principles of State Policy. See these aspects discussed in NOTE 1 on ART. 37.

The directive in ART. 47 that the State should endeavour to bring about prohibition of the consumption of intoxicating drinks will not by itself confer legislative competency on a Legislature to pass a law to effectuate this policy where such competency is otherwise lacking.[3] But where the validity of a law of prohibition is attacked as infringing the Fundamental Right of citizens under ART. 19, this article may be taken into consideration and it may be held that in view of its provisions the prohibition of the consumption of intoxicating drinks is a "reasonable restriction."[4] At the same time, the fact that medicinal preparations are expressly excepted from this article may also be taken into consideration and it may be held that the prohibition of *all* liquids containing alcohol, *including toilet and medicinal preparations*, is unreasonable and violative of a citizen's Fundamental Right under ART. 19.[5]

48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

Organisation of agriculture and animal husbandry.

COGNATE PROVISION

The State — Meaning of — See ART. 36.

1. Scope of the article. — Under this article, the State is directed to endeavour to organize agriculture and animal husbandry on modern and scientific lines and in particular take steps for preserving and improving the breeds and prohibiting the slaughter of cows

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[3] 1951 Bom 210 (Pr 16) [AIR V 38 C 42] : I L R (1951) Bom 17 : 52 Cri L Jour 80 (FB), *Fram Nusserwanji Balsara* v. *State of Bombay*.

[4] 1951 S C 318 (329) (Pr 25) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jour 1361 (SC), *State of Bombay* v. *F. N. Balsara*.

[5] 1951 S C 318 (329) (Pr 25) [A I R V 38 C 55] : 1951 S C R 682 : 52 Cri L Jou 1361 (SC), *State of Bombay* v. *F. N. Balsara*.

Article 48 — Note 1

and calves and other milch and draught cattle. The directive in this article is in accordance with India's character as essentially an agricultural country. The directive to take steps for prohibiting the slaughter of cows and calves and other milch and draught cattle is *specific* in the matter. But such prohibition would also be covered by the provisions of ART. 47 under which the State is directed to regard it as one of its primary duties to raise the level of nutrition and the standard of living of the people and the improvement of public health.[1] See the note on ART. 47.

This article, however, would not enable, by itself, a Municipal Board to prohibit the slaughter of cows or bullocks where under the *existing municipal law* the Municipality is not entitled to do so. But when there is no such legal compulsion to permit the slaughter of cows, etc., the Municipality is entitled to prohibit it (see this aspect discussed with reference to case-law in ART. 37, NOTE 1 and ART. 47 NOTE 1).

Protection of monuments and places and objects of national importance.

49. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by Parliament by law to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

COGNATE PROVISION

The State — Meaning of — See ART. 36.

1. Scope of the article.—The Directive Principles are not devoted exclusively to material ends. Cultural objects are not lost sight of. Article 41 calls upon the State to take steps within the limits of its economic capacity and development for securing the right of every one in the nation to education. Similarly, ART. 43 urges the State to secure to all workers conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Under ART. 45 the State is enjoined to take steps to introduce free and compulsory education for all children until they complete the age of fourteen years. These articles deal with the importance of providing for the education of the youth of the nation. The present article also deals with a cultural object. It places the State under a duty to protect every monument or place or object of artistic or historic interest, declared by Parliament by law to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be. The article applies not only to monuments but also to places or objects. The monument or place or object must be of artistic or historic interest to come within the scope of this article. Further, the monument or place or object should be

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Article 48 — Note 1

[1] 1952 All 753 (Pr 20) [AIR V 39] (FB), *Buddhu* v. *Allahabad Municipality*.

declared by Parliament by law to be of national importance.[1] Thus, the article aims at the preservation of monuments, places and objects of national importance whether their interest is historical or artistic. As to the power of legislation on this subject, see SCH. VII, LIST 1 Entry 67, and LIST 3 Entry 40.

There is already on the statute book the Ancient Monuments Preservation Act, 1904, the object of which is to preserve to India its ancient monuments in antiquities and to prevent the excavation by unauthorised persons of sites of historic interest and value.

50. The State shall take steps to separate the judiciary from the executive in the public services of the State.

Separation of judiciary from executive.

COGNATE PROVISION

The State—Meaning of—See ART 36.

1. Separation of Judiciary and Executive. — The separation of the Judiciary from the Executive was one of the reforms for which Indian leaders had been agitating for a very long time before the advent of Independence. Hence, it is in the fitness of things that the matter has found mention in the Directive Principles of State Policy.

The separation of the Judiciary from the Executive is an essential requirement for the maintenance of popular liberties. The reason is that such separation alone will ensure the independence of the Judiciary and unless there is an independent Judiciary there can be no freedom in a country. As Montesquieu has put it "there is no liberty, if the power of judging be not separated from the legislative and executive powers."

Sidgwick in his ELEMENTS OF POLITICS[1] says :

> "It is clearly desirable that the judicial functionary before whom the accused person is brought should be distinct from the executive and independent of its influence. This independence is further required to secure an impartial trial in any case in which the conduct of private persons which is alleged to be illegal is certainly inconvenient to the executive. It is also required to secure the effectiveness of another of the constitutional bulwarks of freedom . . . the right of suing or prosecuting Government officials for any illegalities committed by them in performance of their functions. For if the conduct of one member of the executive had to be judged by another, or by a judge practically under its control, the *esprit de corps* which may be presumed to exist in the executive as a body,

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Article 49 — Note 1

[1] As an instance of such a law, see the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 71 of 1951.

Article 50 — Note 1

[1] Sidgwick, Elements of Politics, p. 481, 3rd Edition, 1908, quoted in 'Dr. Katju and the Separation of the Executive and Judicial Functions', (1949) 3 Indian Law Review 99 (100).

and its natural tendency to resist any restriction on its powers, would diminish the complainant's chance of obtaining an impartial hearing and adequate redress."

The case for the separation of the Judiciary from the Executive was put by Meredith, J. of the Patna High Court as follows[2]:

> "First of all, what is meant by the separation of these functions, and what does it involve? It means the establishment of the principle that the Judge who tries a case must be completely impartial, uninterested in the success of either side, and independent of outside influence." Continuing, he stated: "this general principle involves two consequences, first that a Judge or Magistrate who tries a case must not be in any manner connected with the prosecution or interested in the prosecution. Second, that he must not be in direct administrative subordination to any one connected with the prosecution (or indeed the defence). Both these aspects of the matter are equally important and both reveal defects in our present system, whereunder the Magistrate who tries a case, or hears a criminal appeal, is frequently himself a Sub-divisional Officer or District Magistrate connected with the police and the prosecution, and interested in its success, as by reason of the executive side of his duties he is responsible for the maintenance of law and order; and whereunder the Magistrate trying a case is also under the direct administrative control of the executive authorities, the Sub-divisional Officer, the District Magistrate, the Commissioner, and the Executive Officers of Government, who are highly interested in the success of Crown cases.
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> "Quite clearly it is impossible for a Judge to take a wholly impartial view of the case he is trying if he feels himself to any extent interested in or responsible for the success of one side or the other. That is the first aspect. Quite clearly, it is equally impossible for him to take an impartial view of the case before him if he knows that his posting, promotion, and prospects generally depend on his pleasing the executive head of the district, the District Magistrate, who is also the head of the local police, who has frequent confidential conferences with them and generally controls the work of the Police Superintendent. Thus, the separation of functions means and involves the elimination of these two evils. That they are evils few will question.
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> "Our civil judiciary has established a very fine reputation for honesty, impartiality and independence, and this has been especially marked during the difficult war years . . . Applications in the High Court for transfer of cases from particular Munsifs are so rare as to be well-nigh non-existent. When we look at the Magistrates, sad to say, a very different picture is presented. Applications for transfer of cases in the High Court on grounds of bias, or interest in the prosecution, are numerous. The opinion is, I believe, general

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[2] Quoted in 'Dr. Katju and the Separation of the Executive and Judicial Functions', (1949) 3 Indian Law Review 99 (102-104).

amongst the people that Magistrates do not always dare to decide cases as they would like to do; that in the case of a Subordinate Magistrate, the Sub-divisional Officer, who is his superior, has a finger in the pie; that similarly the District Magistrate has means of influencing the decision of cases by the Sub-divisional Officers. Such fears or accusations may be largely unjust, but they are there, and you all know the hackneyed maxim that 'justice must not only be done, it must appear to all that it is done.' Why then are Munsifs as a body trusted by the public while the Magistrates as a body are not? Undoubtedly it is all due to the system of union in the magistracy of executive and judicial functions; in the subordination of the magistracy, not to the High Court, but to the executive authorities. Can you blame a man for lack of independence, who knows that if he acquits in too many cases he will be given a black mark, or may be posted to a bad station, and is likely to be passed over for promotion? Obviously you cannot. Yet that, I am afraid, is what is inherent in our present system. The subordinate Magistrates are under the administrative control of the Sub-divisional Officer, he in turn under that of the District Magistrate, and thence the hierarchy proceeds direct through the Commissioner to the Executive Government."

In spite of the embodiment of the principle in the Constitution itself as a Directive Principle of Policy, there is a tendency in some quarters to think that the matter has lost its importance after the end of foreign rule and the establishment of a people's Government. But this view seems to overlook the fact that the principle of separation of Judiciary from the Executive is a fundamental principle of universal application, although, no doubt, under foreign rule, the evils following from the union of judicial and executive functions are bound to be greater. In this connection the following words of Lord Hewart in his 'THE NEW DESPOTISM[3]' may be quoted:

> "The public official is not independent. As a civil servant he is liable to be dismissed at any time without notice, and without any enforceable right to compensation. One would have thought it perfectly obvious that no one employed in an administrative capacity ought to be entrusted with judicial duties in matters connected with his administrative duties. The respective duties are incompatible. It is difficult to expect in such circumstances that he should perform the judicial duties impartially. Although he acts in good faith and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind, as everybody who has had any dealings with public officials knows, to bear on the matter he has to decide. More than that, it is his duty, as an official, to obey any instructions given him by his superiors, and in the absence of special instructions to further what he knows to be the policy of his

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[3] Quoted in 'Dr. Katju and the Separation of the Executive and Judicial Functions', (1949) 3 Indian Law Review 99 (104).

department. His position makes it probable that he should be subject to political influences."

It may be added that steps are being taken in various States to give effect to the reform recommended in this article.

As to the general question of the theory of separation of powers, see notes on ART. 245.

Promotion of international peace and security.

51. The State shall endeavour to —

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and

(d) encourage settlement of international disputes by arbitration.

COGNATE PROVISION

The State—Meaning of—See ART. 36.

Synopsis

1. Scope of the article.
2. Respect for treaty obligations — Clause (c).
3. Respect for international law — Clause (c).
    - (a) International law—Meaning of.
    - (b) Jurisdiction of Courts.
    - (c) Private international law.
    - (d) Theory of adoption as domestic law.
    - (e) Construction of statutes.
    - (f) Sources of international law —Text books.
    - (g) Civil Procedure Code, S. 13.

1. Scope of the article. — This article gives a directive to the State as to its relations with other countries. The State is called upon to put forth its efforts for promoting international peace and security and for the maintenance of just and honourable relations between nations. Fostering respect for international law and treaty obligations is specifically mentioned in cl. (c), although this would appear to be covered by the clause as to the maintenance of just and honourable relations between nations. Clause (d) asks the State to encourage the settlement of international disputes by arbitration. This seems to be but an aspect of promoting international peace and security. Thus, the article is not too cryptic in its enunciation of what ought to be the aims of the foreign policy of the country but attempts to state them with sufficient amplitude.

2. Respect for treaty obligations—Clause (c).—Clause (c), which specifically directs the State to foster respect for international law and treaty obligations in dealings between nations, is intended to bring about the establishment of the rule of law among nations.

As seen in the note on Art. 37, the Directive Principles of State Policy cannot control the provisions as to Fundamental Rights. This principle applies to this article also. Hence, a law which is inconsistent with the Fundamental Rights conferred by Part III of the Constitution will be void, although it may be intended to give effect to a treaty with another country. Thus, in *Ajaibsingh* v. *State of Punjab*,[1] it was held by Bhandari, J. that a provision in the Abducted Persons (Recovery and Restoration) Act, 1949, for removal from India of any citizen of India who came within the definition of abducted person was *ultra vires* and void as being in contravention of the Fundamental Right of every citizen under Art. 19 (1) (g) to carry on any business, trade or occupation or practice any profession, as such right necessarily means that the citizen must be allowed to remain in India. It was further held that the infringement of a citizen's Fundamental Right under Art. 19 cannot be validated on the ground of its being necessary to carry out a treaty with another country, which the State is directed under Art. 51 to honour. In that case, the treaty in question was an agreement with Pakistan, in which both the countries agreed to take steps for the recovery and restoration of abducted persons, who had been abducted in the communal riots between Hindus and Muslims in the wake of the partition of India in 1947.

There is a difference between the Constitution of India and that of the United States in this matter. Under the Constitution of the United States, even international agreements to which the executive Government is a party are part of the supreme law of the land.[2] Section 2 of Art. VI of the Constitution of the United States, runs as follows :

> "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Even so, it has been held that the Supreme Court of America has power to set aside treaties as *ultra vires*.[3] There is no provision in the Constitution of India which declares that all treaties to which the Government of India is a party shall be vested with statutory authority. Article 51 declares the Directive Principle that the State shall foster

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Article 51 — Note 2

1. 1952 Punj 309 (319) (Pr 39) [AIR V 39]: ILR (1952) Punj 381: 1952 Cri L Jour 1313 (FB).

2. 1952 Punj 309 (319) (Pr 39) [AIR V 39]: ILR (1952) Punj 381: 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab*.
(1829) 2 Pet 253 (314) : 7 Law Ed 415 (435), *Foster and Elam* v. *Neilson*.

3. 1952 Punj 309 (319) (Pr 39) [AIR V 39]: ILR (1952) Punj 381: 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab*.
Willis on Constitutional Law of the United States, 1936 Edn., page 154 (Citing *Ware* v. *Hylton* (1796) 3 Dall 199 : 1 Law Ed 568, and *Missouri* v. *Holland* (1920) 252 U S 416 : 64 Law Ed 641.)

respect for international law and treaty obligations and ART. 253 empowers Parliament to make any law for the purpose of implementing the treaty obligations of India. But treaties with foreign countries do not by themselves become part of the law of the land[4] as in the United States. As already stated, Acts passed for implementing treaties will be void to the extent to which they are inconsistent with the Fundamental Rights conferred by Part III of the Constitution.[5]

See also NOTE 3.

(a) International law — Meaning of

3. Respect for international law—Clause (c).

— Clause (c) of this article specifically calls upon the State to foster respect for international law in the dealings of organized peoples with one another. International law or the law of nations consists of those rules which govern sovereign States in their relations and conduct towards each other. The law of nations is essentially a species of conventional law. It has its source in international agreement. It consists of the rules which sovereign States have agreed to observe in their dealings with each other.[1] Lord Russell of Killowen defined international law as the sum of the rules or usages which civilised States have agreed shall be binding upon them in their dealings with one another.[2]

The words "international law" include both public international law and private international law or the conflict of laws. To adopt the words of Justice Gray in *Hilton* v. *Guyot*,[3] 'international law' in its widest and most comprehensive sense includes not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law or the conflict of laws and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation.

(b) Jurisdiction of Courts

Under this clause, the State is enjoined to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. The clause clearly applies to the foreign policy of the nation, and deals with international dealings and relations. So far as this aspect of the subject is concerned, it is outside the purview of

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[4] 1951 Raj 153 (155) (Prs 9, 11) [AIR V 38 C 72] (DB), *Nanka* v. *Government of Rajasthan.* (Extradition treaty between Maharaja of Indian State and British Government not incorporated in municipal law of State is not binding on subject.)

[5] 1952 Punj 309 (319) (Pr 39) [AIR V 39] : ILR (1952) Punj 381 : 1952 Cri L Jour 1313 (FB), *Ajaib Singh* v. *State of Punjab.*

Article 51 — Note 3

[1] Salmond on Jurisprudence, 9th Edition, pp. 41-42.
[*See* (1871) 20 Law Ed 822 (826) : 14 Wall 170, *Sears* v. *The Scotia.* (Law of the sea like all the laws of nations rests upon the common consent of civilised communities.)

[2] (1905) 2 K B 391 (407) : 74 L J K B 753, *West Rand Central Gold Mining Company* v. *Rex.* (The above language was used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration. This was quoted and adopted by Lord Alverstone C. J. in this case.)

[3] (1895) 40 Law Ed 95 (108) : 159 U S 113 (163).

Courts. In other words, the dealings between sovereign States are not justiciable in a court of law. In *West Rand Central Gold Mining Co.* v. *Rex*,[4] Lord Alverstone, C. J., observed that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal courts.

(c) Private international law

But taking the word 'State' in this article in the broad sense in which it is defined in ART. 12 (which definition applies to Part IV also; see ART. 36), and also giving a wide interpretation to cl. (c), it would seem that without unduly straining the language of the article, it can be made to include also the duty of *Courts* to apply the accepted principles of international law in cases of conflict of laws. Both in the United States and in England, private international law, subject to such modifications as may have been made by the municipal law of the country, is treated as part of the municipal law administered by the courts, and applicable to cases involving a conflict of laws. Thus, the above interpretation of cl. (c) would only be in accord with the accepted practice of civilized nations.

Thus, in *Hilton* v. *Guyot*,[5] Justice Gray of the Supreme Court of America observed as follows:

> "International law in its widest and most comprehensive sense —including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation by reason of acts, private or public, done within the dominion of another nation—is part of our law, and must be ascertained and administered by the Courts of Justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination."

In *The Nereide*,[6] the Supreme Court of America observed as follows:

> "The Court is decidedly of opinion that reciprocating to the subjects of a nation or retaliating on them its unjust proceedings towards our citizens is a political, not a legal, measure. It is for the consideration of the Government, not of its Courts. The degree and the kind of retaliation depend entirely on considerations foreign to its tribunals. If it be the will of Government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the Government will manifest that will by passing an Act for the purpose. Till such an Act be passed, the Court is bound by the law of nations which is a part of the law of the land."

In *West Rand Central Gold Mining Co.* v. *Rex*,[7] Lord Alverstone, C. J., observed as follows:

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[4] (1905) 2 K B 391 (409) : 74 L J K B 753.

[5] (1895) 40 Law Ed 95 (108) : 159 U S 113 (163).

[6] (1815) 3 Law Ed 769 (780) : 9 Cranch 388.

[7] (1905) 2 K B 391 (407) : 74 L J K B 753.

> "It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country and that to which we have assented along with other nations in general may properly be called international law and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant."

In *Indian and General Investment Trust Ltd.* v. *Sri Ramchandra,*[7a] Sinha, J., of the Calcutta High Court observed as follows:

> "The name 'Private International Law' is rather unfortunate because it is difficult to conceive of a law which is both international and at the same time private (Hibbert's INTERNATIONAL PRIVATE LAW—XXVII). It is called 'private' inasmuch as it deals with the legal relations of individuals and not of States; it is 'international' inasmuch as it deals with conflicts of laws of different nations. It is properly called law, inasmuch as its rules are enforced by Courts, and in that respect it is a branch of the ordinary law of the land."

(d) Theory of adoption as domestic law

But international law is applied by municipal Courts of a country only on the theory of its having been adopted by such country. In *West Rand Central Gold Mining Co.* v. *Rex,*[8] Lord Alverstone, C. J., after declaring that international law will be acknowledged and applied by municipal tribunals of England, proceeded to observe as follows:

> "But any doctrine so invoked must be one really accepted as binding between nations and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it."

In *Chung Chi Cheung* v. *R.,*[9] Lord Atkin observed as follows:

> "It must always be remembered that, so far at any rate as the Courts of this country are concerned, international law has no validity, save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue, they seek to ascertain the relevant rule, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

In the *Schooner Exchange* v. *M. Faddon,*[10] Marshall, C. J., of the Supreme Court of America observed as follows:

[7a] 1952 Cal 508 (515) (Pr 20) [AIR V 39].

[8] (1905) 2 K B 391 (407) : 74 L J K B 753.

[9] (1938) 4 All E R 786 (790) : 1939 App Cas 160.
[*See also* (1906) 8 F (Just Cas) 93, *Mortensen* v. *Peters.*]

[10] (1812) 3 Law Ed 287 (293) : 7 Cranch 116.

Article 51
Note 3

"The jurisdiction of Courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but if understood, not less obligatory.

"The world being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by common usage and by common opinion growing out of that usage.

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilised world .... This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."

In *Hilton* v. *Guyot*[11] also, it was affirmed that consent is the real basis of the applicability of international law by the judicial tribunals of a country. In that case while dealing with the effect of foreign judgments Mr. Justice Gray observed as follows:

"No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation as put in force within its territory whether by executive order, by legislative Act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has been often criticized, no satisfactory substitute has been suggested.

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[11] **(1895) 40 Law Ed 95 (108) : 159 U S 113 (163).**

> "'Comity' in the legal sense is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to international duty and convenience and to the rights of its own citizens or of other persons, who are under the protection of its laws."

On the principles discussed above, it is clear that Indian Courts are not bound to apply any rules as being rules of Private International Law except in so far as such rules have been accepted as part of the domestic law of the country. In *Indian and General Investment Trust Ltd.* v. *Sri Ramchandra,*[11a] Sinha, J., observed as follows :

> "Hitherto we have invariably followed the English rules. In fact, the Judicial Committee of the Privy Council in England being the ultimate authority in these matters, nothing else could be expected. Many of the decisions, as will be found, are based on the fact that India at some time formed a dependent colony under the British Crown. Circumstances, however, have now altered, and in my opinion it is no longer incumbent upon us to follow the English rules, or for the matter of that, any rule excepting our own."

(e) Construction of statutes

Although international law is applied by the municipal Courts of a country only on the theory of its having been adopted by such country as its domestic law, in construing legislative enactments of a country the Courts will be slow to adopt a construction which will conflict with international law. In *Murray* v. *Schooner Charming Betsy,*[12] Chief Justice Marshall of the Supreme Court of America observed as follows :

> "It has also been observed that an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and, consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country. These principles are believed to be correct and they ought to be kept in view in construing the Act under consideration."

In other words, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law. Although the judges may not pronounce an Act *ultra vires* as contravening international law, they may recoil, in case of ambiguity, from a construction which would involve a breach of the ascertained and accepted rules of international law.[13]

(f) Sources of international law — Text books

In matters of *international law* the Court is entitled to inform itself of the law by reference to authoritative text books and decisions and the question is not one of evidence as in the case of *foreign law.*

[11a] 1952 Cal 508 (515) (Prs 21, 22) [AIR V 39].

[12] (1804) 2 Law Ed 208 (226) : 2 Cranch 64 (116).

[13] (1883) 8 P D 101 (107), *Bloxam* v. *Favre.*
Craies on Statute Law, 5th Edn., (1952), p. 67.
Maxwell on Interpretation of Statutes, 5th Edn., (1912), p. 237.

In *In re Piracy Jure Gentium*,[14] the question before the Privy Council was as to whether actual robbery is an essential element of piracy at sea according to international law. In giving a negative answer to the question Lord Sankey delivering the judgment of the Privy Council observed as follows :

> "In considering such a question the Board is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal Courts, and last, but not least, opinions of jurisconsults or text book writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no Legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague tribunal, and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible, not only to seek a consensus of views, but to select what appear to be the better views upon the question."

In *Hilton* v. *Guyot*,[15] Justice Gray of the Supreme Court of America observed as follows :

> "The most certain guide no doubt for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the Courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators and from the Acts and usages of civilised nations."

In *West Rand Central Gold Mining Co.* v. *Rex*,[16] Lord Alverstone, C. J., observed :

> "The mere opinions of jurists however eminent or learned that it (alleged proposition of international law) ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations."

(g) Civil Procedure Code, S. 13

Section 13 of the Code of Civil Procedure relating to the conclusive nature of foreign judgments in India is an instance of international law being recognised and made part of the domestic law of India.

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[14] (1934) 103 L J P C 153 (154) : 1934 App Cas 586.

[15] (1895) 40 Law Ed 95 (108) : 159 U S 113 (163).

[16] (1905) 2 K B 391 (407) : 74 L J K B 753.

PART V

THE UNION

1. **Scheme of Part V.**—This part and Parts VI, VII and VIII lay down the structure of Government for the Union and for the States in Parts A, B and C of the First Schedule. The structure of Government is broadly divided into three departments, the Executive, the Legislature and the Judiciary. This division only follows the time-honoured division of governmental functions into legislative, executive and judicial ones.

2. **Theory of separation of powers.**—See Notes on ART. 245.

CHAPTER I.—THE EXECUTIVE

The President and Vice-President

The President of India.

52. There shall be a President of India.

JAMMU AND KASHMIR

Part V of the Constitution applies to the State of Jammu and Kashmir with certain exceptions and modifications—See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, cl. (3).

These exceptions and modifications are indicated under the respective articles under the heading "Jammu and Kashmir."

1. **Analogous and cognate provisions.**—There is no specific provision in the Constitution of the United States that there shall be a President. But there is only a provision corresponding to ART. 53 that the executive power shall be vested in the President of the United States of America. But there are such provisions in the Constitution of Eire, 1937, and in that of Burma. Article 12 (1) of the Constitution of Eire (Ireland) of 1937, reads :

> "There shall be a President of Ireland *(Uachtaran nah Eireann)*, hereinafter called 'the President,' who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law."

Section 45 of the Constitution of Burma practically reproduces the above provision in the Constitution of Ireland.

As regards cognate provision in the Constitution, ART. 153 provides that there shall be a *Governor* for each State.

2. **Presidential and parliamentary systems of executive — Distinction between**—See Notes on ARTS. 74 and 75.

Article 53

Executive power of the Union.

53. (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall—

(*a*) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or

(*b*) prevent Parliament from conferring by law functions on authorities other than the President.

GOVERNMENT OF INDIA ACT, 1935

NOTE.—For text of S. 7 (1) of the Government of India Act, 1935, which corresponds to this article, see NOTE 1 on this article.

COGNATE PROVISIONS

Existing law—Interpretation of—See ART. 366 (10).

Executive power of the Union — Extension of, while a Proclamation of Emergency is in operation—See ART. 353.

Synopsis

1. Analogous and cognate provisions.
   - (a) United States of America.
   - (b) Ireland.
   - (c) Burma.
   - (d) Government of India Act, 1935.
2. Parliamentary and Presidential systems of execution—Distinction between.— See commentary on ARTS. 74 and 75.
3. Theory of separation of powers.—See Notes on ART. 245.
4. The executive and other branches of Government — Relations between.
5. The Executive and the Judiciary. —See NOTE 4.
6. Executive power—Meaning of.
   - (a) Introductory.
   - (b) Power of Executive to act without authority of law passed by Legislature.
   - (c) Can State engage in trade without legal authority ?
   - (d) Scope of executive power.
   - (e) Liberal construction.
   - (f) Inherent connotation of "executive power."
   - (g) Limits on executive power.
   - (h) No power to infringe private rights.
   - (i) Distinction between 'legislating' and 'acting.'
   - (j) The function of the Executive.

Article 53
Note 1

7. "Shall be exercised by him .... subordinate to him."
    - (a) Exercise of power through subordinate.
    - (b) Conferment of powers on authorities other than President—Clause 3 (b).
    - (c) Power to make decisions.
    - (d) Minister whether subordinate to President.
8. President whether "State."
9. "In accordance with this Constitution"—Clause (1).
10. Supreme command of Defence Forces.
11. War and peace, power as to.
    - (a) Under American Constitution.
    - (b) Under Indian Constitution.
    - (c) Under British Constitution.
    - (d) Executive, powers of
12. Delegation of functions to other authorities by law— Clause (3).

1. Analogous and cognate provisions.—Article II, Section 1 (1) of the Constitution of the United States of America provides as follows:

(a) United States of America

> " The executive power shall be vested in a President of the United States of America . . . ."

This corresponds to cl. (1) of this article. Article II, Section 2 (1) provides as follows :

> " The President shall be Commander-in-Chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States . . . ."

This corresponds to cl. (2) of this article.

(b) Ireland

Article 12 (1) of the Irish Constitution runs as follows :

> " There shall be a President of Ireland, hereinafter called 'the President,' who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law."

(c) Burma

Section 45 of the Burmese Constitution runs as follows :

> "There shall be a President of the Union, herein after called 'the President' who shall take precedence over all other persons throughout the Union and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law."

(d) Government of India Act, 1935

Section 7 (1) of the Government of India Act, 1935, runs as follows :

> " Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him, but nothing in the section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing Indian law on any Court, Judge or Officer, or on any local or other authority."

Thus, it will be seen that cls. (1) and (3) of this article are substantially modelled on S. 7 (1) of the Government of India Act, 1935.

Under the Government of India Act, 1935, the Commander-in-Chief of His Majesty's forces in India was a separate officer appointed by warrant under the Royal Sign Manual under S. 4 of the Act, whereas under this article, the supreme command of the Defence Forces of the Union is also vested in the President.

Corresponding to this article with reference to the executive power of the Union, ART. 154 of the Constitution provides that the executive power of the State (Part A State) shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. Article 154 (2) corresponds to cl. (3) of this article.

Under S. 3 (8) of the General Clauses Act, 1897, "Central Government" means the President, just as under S. 3 (60) of the same Act, "State Government" means the Governor or Rajpramukh of the State, as the case may be. The provisions of the General Clauses Act thus closely follow those in the Constitution by practically identifying the Central Government with the President in whom is vested the executive power of the Union, and the State Government with the Governor or the Rajpramukh in whom is vested the executive power of the State.

2. Parliamentary and Presidential systems of execution — Distinction between —See commentary on ARTS. 74 and 75.

3. Theory of separation of powers.—See Notes on ART. 245.

4. The executive and other branches of Government — Relations between.—Although the Constitution of India does not in so many words provide for a separation of powers in the strict sense of the term, between the Legislature, the Judiciary and the Executive, there are specific provisions in regard to the three heads of powers embodied in different portions of the Constitution, which have to be read together. Whatever the relative degree of importance enjoyed by the three organs of the State, the powers of each one of them have to be exercised as fundamentally subject to the provisions of the Constitution relating to that organ individually as well as to the provisions relating to the other organs. Whatever the limits within which the Judiciary in India can function in relation to the Union Parliament and State Legislature and whatever the residual powers of the Executive under the Constitution over and above what is defined in the specific articles thereof, the Executive must respect the decisions of the Judiciary and, as in England, can avoid their due operation only by appropriate legislation. In India, as in England, it is the business of the Courts to apply the Constitution and the laws and in cases properly brought before them, the Judiciary exercises control over executive action, in so far as to refuse to uphold as valid any act of Government which is not supported by the Constitution or by some law. The authority of the Courts as regards the executive action arises when the Executive exceeds its authority, in which case the agents and instruments through which the action is carried out are personally responsible to the law and to the Courts. While on the one hand it is not the business of the Courts to pass judgments on the policy of executive action, the Executive on the other hand has no authority to pass verdict upon the validity of a judgment even though the Executive may believe it to be erroneous. It is the respect that is accorded by one organ of the State to the others that ensures that healthy working of the Constitution which is the acid test of its merits, whatever the paper value of its provisions.[1]

Article 53 — Note 4

[1] 1953 Mad 41 (Prs 9, 10, 21, 22, 23) [A I R V 40 C 17] : 1953 Cri L Jour 224 (DB), *In re A. K. Gopalan.* (AIR 1948 Bom 417, AIR 1949 Pat 247, AIR 1915

In this connection it may be noted that under ART. 144, all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

See also note on "Theory of separation of powers" under ART. 245.

5. The Executive and the Judiciary.—See NOTE 4.

(a) Introductory

6. Executive power — Meaning of. — Under cl. (1) of this article the executive power of the Union is vested in the President. Similarly, under ART. 154 (1), the executive power of the State is vested in the Governor. The expression "executive power" is not defined in the Constitution. But the Constitution being a written one, the powers of the different organs of Government, including the Executive, must be spelt out from the Constitution itself.[1]

In Wharton's LAW LEXICON[2] the expression "executive power" has been explained as follows :

> "Executive, that branch of the Government which puts the laws into execution as distinguished from the legislative and judicial branches. The body that deliberates and enacts laws is legislative; the body that judges and applies the laws in particular cases is judicial; and the body that carries the laws into effect or superintends the enforcement of them, is executive. The executive authority, in all monarchies, is vested in the sovereign."

Laski in his GRAMMAR OF POLITICS[3] observes as follows :

> "Since the time of Aristotle, it has been generally agreed that political power is divisible into three broad categories. There is, first, the legislative power. It enacts the general rules of the society. It lays down the principles by which the members of the society must set their course. There is, secondly, the executive power. It seeks to apply those rules to particular situations; where, for instance, an Old Age Pension Law has been enacted, it pays out the specified sum to those entitled to receive it. There is, thirdly, the judicial power. This determines the manner in which the work of the Executive has been fulfilled. It sees to it that the exercise of executive authority conforms to the general rules laid down by the Legislature; it may, as in *Rex* v. *Secretary of State for Home Affairs*; *O'Brien Ex parte*[3a] declare that the particular order issued is, in fact, *ultra vires*. It settles also the relationship between private citizens, on the one hand, and between citizens and the Government upon the other, where these give rise to problems which do not admit of solution by agreement."

P C 106 (2) : 1915 App Cas 750, (1916) 1 K B 596, AIR 1931 P C 248 : 1931 App Cas 662 and ILR 22 Mad 270, Foll.)

Article 53 — Note 6

[1] **1951 All 257 (309) (Pr 261) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB),** ***Motilal* v. *Uttar Pradesh Government.***

[2] **Wharton's Law Lexicon, 14th Edition, page 388.**

[3] **Grammar of Politics by H. J. Laski, 2nd Edition, page 295.**

[3a] **(1923) 2 K B 361 (377, 378).**

(b) Power of Executive to act without authority of law passed by Legislature

Although the distinctive mark of the Executive is that it carries out the laws made by the Legislature, *its power is not confined to the execution of the laws* passed by the Legislature. It has powers conferred by the Constitution itself expressly or impliedly.

(c) Can State engage in trade without legal authority ?

The meaning of "executive power" under this Constitution came in for consideration by a Full Bench of the Allahabad High Court in *Motilal* v. *U. P. Government.*[4] In that case, one of the questions considered by the Full Bench was whether the Government of a State has power under this Constitution to carry on trade or business, as for example, by running a Government bus service, in the absence of a legislative enactment authorising the State Government to do so. The majority of the Full Bench answered this question in the affirmative, while Agarwala, J., dissented from the view of the majority. The learned Judges adopted different lines of approach in dealing with the case, although the majority agree that the State Government can run a Government bus service without being specifically authorized to do so by an Act of the Legislature.

Malik, C. J., observed as follows in the course of the judgment (paras 43 and 44, at page 266 of A. I. R. 1951 Allahabad.)

> "In a written Constitution the executive power must be such power as is given to the Executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. I do not find it necessary, however, in these cases, to attempt to catalogue the executive powers of the State but *it must be more than merely executing the laws.* (italics ours). As regards the right of the State to carry on business or trade without legislative sanction it must be remembered that the State is entitled to hold property and 'business' can mean management of the property or putting it to such use as might yield an income. There is no reason why the State should not have the right to manage its own property and carry on such trade or business as a citizen has the right to carry on so long as such activity does not encroach upon the rights of others or is not contrary to law. If money is needed for such enterprise and the Legislature provides funds for it by passing the Appropriation Act and the Finance Act, there is no reason why the State should not be allowed to buy buses and put them on public roads and ply them for hire. If in the interest of the general public and to provide them with transport amenities the Government decides to run transport buses, it would only be discharging one of its primary duties."

His Lordship also distinguished the case of *Blackpool Corporation* v. *Locker*[5] on the ground that in that case, the action of the authorities affected prejudicially the rights of a citizen, which could not be done under well-established principles, except under the sanction of law.

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[4] 1951 All 257 (Prs 47, 49, 69, 112, 261, 435) [AIR V 38 C 51] : I L R (1951) 1 All 269 (FB).

[5] (1948) 1 All E R 85 : (1948) 1 K B 349.

Article 53
Note 6

His Lordship also pointed out that if a State wants to establish a monopoly in any business or nationalize any industry, its action would be prejudicial to the Fundmental Rights of citizens to carry on any trade, business or industry under ART. 19 of the Constitution and therefore would require the authority of a valid law to support it.

Mootham and Wanchoo, JJ., who delivered a common judgment, also held that there was no need for a specific legislative enactment to enable a State Government to run a bus service. Their ground of decision was as follows (Page 281, paras 112 and 113 of A. I. R. 1951 Allahabad.)

> "The expression 'executive authority' which is used in the Government of India Act, 1935, is also not there defined, but there can, we think, be no doubt that by that expression was meant those powers which by S. 33 of the earlier Government of India Act, 1915, were conferred on the Governor-General, namely, 'the superintendence, direction and control of the civil and military Government of India.' The question is, as we have said, by no means free from difficulty, but upon the whole we think that we may reasonably infer that the words 'executive power' in the Constitution have substantially the same meaning as 'executive authority' in the Act of 1935, and that it is the superintendence, direction and control of the civil Government of a State which is vested in the Governor of the State. It follows, therefore, we think, that although an executive act by a State Government may not be authorized by legislative enactment it will nevertheless be within the executive power of the State if— (i) it is not an act which has been assigned in the Constitution of India to other authorities or bodies such as the Legislature, the Judiciary or the Public Service Commission, (ii) it is not contrary to the provisions of any law, and (iii) it does not encroach upon or otherwise infringe the legal rights of any member of the public . . . It has not been shown to us that the act of the State in putting its own buses on the roads is contrary to any law, or that, taken by itself, that act infringes the legal rights of any member of the public. We see, therefore, nothing illegal *per se* in the State Government running a bus service on the public highways."

Sapru, J. after an elaborate consideration of the provisions of the Constitution held that the power to run a Government bus service was incidental to the power of acquiring property which was expressly conferred by ART. 298 of the Constitution, inasmuch as the ownership of property carried with it its management and utilization in a productive manner.

Agarwala, J., who dissented from the majority view and held that the State Government had no power to run a bus service in the absence of an Act of the Legislature authorising it to do so, observed as follows (Page 329, para 433) :

> "The Indian Constitution is a written Constitution. Any powers that the different organs of Government enjoy must have their

source in that Constitution or in what is necessarily implied from what is stated therein. Thus, it may be laid down that the executive powers of the Governments in India must be confined to: (a) powers expressly conferred by the Constitution; (b) powers expressly conferred by Legislature and (c) implied powers.

> "Implied powers are also of two kinds: (i) Those which vest in the Government by virtue of what is called 'its primary and inalienable functions' or sovereign power, i. e., defending the State against external and internal enemies and maintaining law and order, and (ii) those which are necessary for the exercise or performance of a general power conferred or duty enjoined by the Constitution or statutory enactments."

As regards the argument that the running of a Government bus service was incidental to the power of acquiring property under ART. 298, His Lordship rejected the argument and pointed out that an implied power must be a necessary implication and not a conjectural or an argumentative one.

(d) Scope of executive power

It will be seen from the above review of the judgments in *Motilal* v. *U. P. Government*[5a] that in spite of the different lines of approach adopted, none of the Judges has *confined* executive power to merely *executing* the laws passed by the *Legislature*. It will be seen further, that Mootham and Wanchoo, JJ., on the one hand and Agarwala, J., on the other have attempted to lay down in general terms the meaning of "executive power" under this Constitution. Mootham and Wanchoo, JJ., have taken a broad view and have practically held that executive power would cover the residue of governmental power not assigned specifically to other bodies and organs of Government provided that there is no infringement of any provision of the Constitution or of law, and provided also that there is no infringement of rights of any person involved. Agarwala, J., on the other hand, would concede to the Executive only powers which are given by the Constitution or the Legislature expressly or by necessary implication, except in the case of what he calls the primary or inalienable functions of sovereign power, that is, defending the State against external or internal enemies and maintaining law and order.

It will thus be seen that the two views represent two opposite points of view.

Although Malik, C. J., has not laid down in general terms the meaning of the expression "executive power" under the Constitution, the general trend of his observations seems inclined in favour of the broader view taken by Mootham and Wanchoo, JJ. For instance, he says that the executive power of the State must include all powers that may be needed to carry into effect the aims and objects of the Constitution. He also says:

> "There is no reason why the State should not have the right to manage its own property and carry on such trade or business as a

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[5a] 1951 All 257 [AIR V 38 C 51]: ILR (1951) All 269 (FB).

Article 53
Note 6

citizen has the right to carry on, so long as such activity does not encroach upon the rights of others . . . or is not contrary to law . . . If in the interest of the general public and to provide them with transport amenities the Government decides to run transport buses, it would only be discharging one of its primary duties."

(e) Liberal construction

It is submitted that although in a written Constitution the powers of the different organs of Government have to be derived only from the Constitution, a liberal construction should be adopted and where two constructions are possible, that construction which is most beneficial to the widest possible amplitude of the powers conferred must be adopted.[6] In this view the broader view taken by Mootham and Wanchoo, JJ., which Malik, C. J., also seems inclined to support, seems to be the better view.

(f) Inherent connotation of "executive power"

This, however, does not mean that the Executive ceases to be the organ of the Government charged with the duty of carrying out the laws passed by the Legislature. But when the ground is not covered by any law and there is no question of overriding the will of the Legislature or violating any provision of the Constitution or of the rights of any person, there does not seem to be any reason for not holding that the Constitution by the very provision by which it vests the executive power in a certain authority endows such authority with the power to act in such cases. It seems to us that any other view is likely to have a paralysing effect on the Government and to deprive it of the power to act in innumerable cases which it may not be possible to bring, by any stretch of language, within the purview of any specific legal or constitutional provision. In fact, there is no express or specific provision in the Constitution to the effect that the executive authority should carry out the laws made by the Legislature. This power and duty of the Executive has only to be derived from the provision that the executive power is vested in a certain functionary.

Thus, where a certain provision in the Constitution vests, in *general terms*, the executive power in certain authority, it is not necessary that the extent of the executive power must only be gathered from the *other* provisions of the Constitution to the exclusion of the former provision, which merely vests the executive power in the authority without defining what it is. In other words, the extent of the executive power, for the purpose of the Constitution, conferred by the provision should be gathered not only from the specific provisions of the Constitution which confer various powers on the executive authority but also from the connotation of the expression "executive power." In determining the connotation of the expression "executive power," however, the Court should have regard to the provisions of the Constitution itself and should not import ideas and conceptions which are foreign to the Constitution.

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[6] 1935 P C 158(162) [AIR V 22] (PC), *British Coal Corporation* v. *King*. (*A. G. for Canada* v. *Everett & Cain*, 1906 App Cas 542 and *Edwards* v. *A. G. Canada*, 1930 App Cas 124, Foll.)

That the general grant of the executive power by itself and without reference to any other provision of the Constitution is capable of conferring on the executive authority power to act is borne out by the following passage from CONSTITUTIONAL LAW OF THE UNITED STATES by Willis[7]: "The general grant of the executive power or the power to choose the means of enforcing specific functions as part of the executive power may include the power to act in emergency situations." No doubt, these words limit the power to act under the general grant to *emergency* situations. But the proposition clearly implies the point that a general grant of executive power, *without more*, is capable by itself of conferring a specific power to act.

This view of the effect of a general provision conferring executive power is borne out not only by the judgments of Mootham and Wanchoo, JJ., in the above Full Bench case but also by that of Agarwala, J., who differed from them. For, Agarwala, J., clearly concedes that executive power includes certain "primary and inalienable functions of sovereign power" which need not be derived from any specific provision of the Constitution or law expressly or impliedly. This necessarily means that such "primary and inalienable functions of sovereign power" are conferred on the executive authority only by the *general grant* of the executive power.

As to what is to be included within such inherent connotation of the expression 'executive power,' it has already been seen that the view of Mootham and Wanchoo, JJ., on the one hand and that of Agarwala, J., on the other, in the above Allahabad Full Bench case, represent two opposite points of view. It has also been shown how the broader view of Mootham and Wanchoo, JJ., which Malik, C. J., also seems inclined to support, seems to be the better view.

(g) Limits on executive power

Even taking a broad view of executive power, however, the limits imposed by Mootham and Wanchoo, JJ., in the quotations from their judgment, which we have given above, should be borne in mind. These limits are as follows :

(i) The power must not be one which is assigned to some other authority, under the Constitution, such as the Legislature, the Judiciary or the Public Service Commission. Thus, the Executive has no power to legislate;

(ii) the power claimed for the Executive must not be contrary to any provision of law ; and

(iii) the power claimed must not encroach upon or otherwise infringe the legal rights of any member of the public.

It will be seen (1) that these limitations only imply that the power of the Executive is subject to the provisions of the Constitution however extensive it may be, (2) that the executive power is necessarily subordinate to the legislative power and subject to legislative control, and (3) that the Executive is not above the law but must respect the law in the same way as an ordinary citizen and that it cannot affect the rights of a member of a public unless there is a law of the Legislature validly passed, which entitles it to do so.

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[7] Constitutional Law of the United States by Willis, 1936 Edition, page 161.

(h) No power to infringe private rights

With reference to the last point mentioned above, it may be mentioned that it is the fundamental principle of British jurisprudence, which has been adopted also by Indian Courts, that the Executive cannot deprive any person of his life, liberty or property or other rights except in accordance with law.[8] But this does not mean that even when there is no infringement of any person's legal rights, the Executive is powerless to act unless it is authorised to do so by an Act of the Legislature.

(i) Distinction between 'legislating' and 'acting'

A distinction must also be made between *legislating* and *merely acting*. When a State Government decides to run a government bus service, it cannot be said that it *legislates*. A decision by the Executive which is only intended for its own action, cannot be called legislating. In this view, with great respect, Agarwala, J.'s observation to the effect that when the Executive decides to launch on a new activity and run a State bus service, it thereby *legislates*, (which it cannot do) as part of the process, does not seem to be correct. Salmond in his JURISPRUDENCE[9] observes as follows:

> "Legislation is that source of law which consists in the declaration of legal rules by a competent authority. It is such an enunciation or promulgation of principles as confers upon them the force of law."

It is not clear what 'enunciation or promulgation of principles' is made by the Government when it decides to run a bus service. So also, "a law" says Austin, "is a command which obliges a person or persons to a course of conduct."[10] A rule, the observance of which is left to the good pleasure of those for whom it is laid down, is not a law.[11] It is difficult to see under what legal obligation the State Government is to run or continue to run a bus service after it once decides to do so. Supposing after starting a bus service, the Government decides to stop it, will any member of the public be entitled to question its action as being illegal? If not, where is the question of the decision of the Government to run a bus service amounting to making of a law or legislating?

(j) The function of the Executive

From the above discussion, it will be clear that although the Constitution has adopted the method of dividing governmental functions into three categories as executive, legislative and judicial, yet, this only means (as regards the executive) that the Executive has no legislative or judicial power. It does not mean that the only function of the Executive is to *execute* or carry out the laws passed by the Legislature and that the Executive has no power at all to act in the absence of an Act of a Legislature.

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[8] 1931 P C 248 [A I R V 18] : 100 L J P C 152 (157) (PC), *Eshugbai* v. *Government of Nigeria*.
(1948) 1 All E R 85(99, 100) : (1948) 1 K B 349, *Blackpool Corporation* v. *Locker*.

[9] Salmond's Jurisprudence, 9th Edition, page 206.

[10] Austin's Jurisprudence, Vol. 1, page 96. (Cited in Salmond's Jurisprudence, 9th Edition, page 24.)

[11] Salmond's Jurisprudence, 9th Edition, page 25.

The Executive, however, is as already stated, always subordinate to the Legislature and subject to the control of the Legislature. The law is laid down by the Legislature and it is carried out by the Executive. In this sense, the executive function of the Government is of a secondary character. But in point of fact, apart from the purely theoretical point of view, the functions of the executive branch of the Government are of very great importance. In this connection the following passage from Leacock's ELEMENTS OF POLITICAL SCIENCE[12] may be quoted :

> "In a certain sense, inasmuch as the making of the law is logically antecedent to its execution and to decisions as to its meanings, the legislative function is the chief of the powers of Government. 'The Legislative power,' says Judge Story in his COMMENTARIES ON THE CONSTITUTION, 'is the great and overruling power in every free Government.' Looked at in a purely theoretical light, the executive function of the Government (the carrying out of the law) appears in a quite mechanical and secondary aspect. In point of fact, however, the functions of the executive branch of the Government are of great importance. No matter how explicitly laws are made, they must of necessity leave a wide discretionary power in the hands of those who enforce them ; in many matters—most notably in relations with foreign States—the executive branch of Government must act without explicit instructions, and is no longer to be regarded as merely the agent of the legislative branch of the Government. The organised physical force—armies, navies, police, etc.,—is at the command of the Executive,—is, in a sense, a part of the Executive. It is with the Executive (in the shape of police, revenue officers, post-masters, etc.) that the individual citizen is chiefly in contact. Indeed in any modern Government the Executive, even apart from the army and navy, vastly outnumbers the two other branches."

(a) Exercise of power through subordinate

7. "Shall be exercised by him ...... subordinate to him." — The executive power of the Union, which is vested in the President under cl. (1) of this article, may be exercised by him personally and directly or through officers subordinate to him. Under the Government of India Act, 1935, S. 7 (1) also, the executive authority, which was vested under that provision in the Governor-General, could be exercised by him either directly or through officers subordinate to him. The executive power vested in the Governor of a State under ART. 154 (1) is also capable of being exercised by him either directly or through officers subordinate to him. Under S. 49 (1) of the Government of India Act, 1935, the executive authority vested in the Governor of a Province was similarly made capable of being exercised by the Governor directly or through officers subordinate to him.

The provision for the executive power being exercised either directly or through subordinate officers is obviously meant to meet the physical impossibility of the President directly exercising all the powers of the Executive. The exercise of powers through subordinate

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[12] Leacock's Elements of Political Science, 1921 Edition, pages 135, 136.

Article 53
Note 7

officers should, however, be in accordance with the Constitution. See in this connection the provisions of ART. 77.

(b) Conferment of powers on authorities other than President —Clause 3 (b)

Under cl. (3), sub-cl. (b), the Parliament has power to confer by law functions on authorities other than the President. Similarly, under sub-cl. (a) of cl. (3), functions may be conferred upon the Government of a State or other authority by any "existing law." Where functions are thus conferred on authorities other than the President by law made by Parliament or by any existing law, such functions, although they may pertain to executive power of the Union, are outside the authority of the President and officers subordinate to him. Thus, although the conferment of functions on other authorities under cl. (3) may be a *delegation* of the executive power, the delegates are not responsible to the President like the officers subordinate to the President who under cl. (1) exercise the power of the President in accordance with the Constitution, and who are responsible to the President.

Under the Government of India Act, 1935, S. 7 (1) as well as S. 49 (1) also, there was provision for the conferment of powers directly by law on subordinate authorities. It was held that where power was so conferred directly by the law on a subordinate authority that authority was not responsible to the Governor or the Governor-General, as the case might be. Thus, in *Emperor* v. *Sib Nath Bannerji*,[1] it was held by the Privy Council that sub-s. (5) of S. 2 of the Defence of India Act, 1939, provided a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority, defined in the sub-section with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under S 49 (1) of the Government of India Act, 1935, the Governor remained responsible for the action of his subordinate taken in his name. The same principle would apply to cases under this Constitution also. Hence, as already stated, while the President or the Governor is responsible for the action taken by his subordinates under ART. 53 (1) or ART. 154 (1), as the case may be, he is not responsible for the action of the authorities on whom functions are directly conferred by law under ART. 53 (3) or ART. 154 (2).

(c) Power to make decisions

The "exercise of power" mentioned in ART. 53 (1), refers not only to the carrying out of a decision but to the making of the decision also. This principle follows from *Emperor* v. *Sib Nath Banerji*[1a] already referred to, in which it was held by the Privy Council, with reference to S. 49 (1) of the Government of India Act, 1935, that the expression "executive authority" in that section was used in the broader sense as including both the decision as to action and the carrying out of such decision.

Article 53 — Note 7

[1] 1945 P C 156 (162) [AIR V 32] : 72 Ind App 241 : (1945) 7 F C R 195 : I L R (1945) Kar (PC) 371 (PC).

[1a] 1945 P C 156 [AIR V 32] : 72 Ind App 241 : (1945) 7 F C R 195 : ILR (1945) Kar (PC) 371 (PC).

In that case the question was about the validity of preventive detention of a certain person under R. 26 of the Defence of India Rules. The detention had been ordered in the particular case by the Home Minister of the Provincial Government. The validity of the detention was questioned on the ground that inasmuch as the power under the rules had been conferred on the Provincial Government and inasmuch as under the General Clauses Act, the Provincial Government meant the Governor of the Province, the personal satisfaction of the Governor about the necessity of the detention was necessary to validate the detention and that the satisfaction of the Home Minister was not sufficient. It was held that under S. 49 (1) of the Government of India Act, 1935, the executive authority of the Province could be exercised by the Governor directly or through officers subordinate to him and that the exercise of power through subordinates meant the exercise of discretion by the subordinate himself and that the personal satisfaction of the Governor in the matter was not necessary. On the above principle, under the present article also, when a subordinate of the President exercises executive power in accordance with the Constitution, he may exercise his own discretion and take action on his own personal satisfaction about the necessity or desirability of such action and it is not necessary that the President must be personally satisfied about such necessity or desirability.

(d) Minister whether subordinate to President

In *Emperor* v. *Sib Nath Bannerji*,[2] the question also arose as to whether the Home Minister of a Province was an officer "subordinate to the Governor of a Province" within the meaning of S. 49 (1) of the Government of India Act. It was held by the Privy Council overruling the decision of the Calcutta High Court in *Emperor* v. *Hemendra Prosad Ghose*[3] that the Home Minister was an officer "subordinate to the Governor" within the meaning of S. 49 (1). Lord Thankerton in delivering the judgment of the Privy Council, observed :

> "While a Minister may have duties to the Legislature, the provisions of S. 51 as to the appointment, payment and dismissal of Ministers and S. 59 (3) and (4) of the Act of 1935 and the Business Rules made by virtue of S. 59 place beyond doubt that the Home Minister is an officer 'subordinate to the Governor.' "

As this Constitution also contains similar provisions, relating to the question involved, the above decision of the Privy Council will apply to this Constitution also and accordingly a Minister of the Union Cabinet would be an officer subordinate to the President and a Minister of the Cabinet of the State Government would be an officer subordinate to the Governor.

8. President whether "State."—Under Art. 12, "the State" includes the Government of India. For all practical purposes, the Government is synonymous with the Executive of a country. Under this article, the executive power of the Union is vested in the President. Hence, the President in regard to his official acts may be held to be covered by the definition of "State" under ART. 12. Hence, the prohibition against the State denying to any person equality before the law or equal protection of the laws under Article 14 and against discriminating against any citizen on grounds only of religion, race, caste, etc., under ART. 15 is applicable to the official acts of the President.[1] It may be noted in this connection that under S. 3 (8) of the General Clauses Act, the expression "Central Government" means the President, so that the "Government of India" under ART. 12 may be equated to the President, also by reason of S. 3 (8) of the General Clauses Act.

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[2] 1945 P C 156 (163) [A I R V 32] : 72 Ind App 241 : (1945) 7 F C R 195 : ILR (1945) Kar (PC) 371 (PC). (AIR 1939 Cal 529, Overruled.)

[3] 1939 Cal 529 (529, 530) [AIR V 26] (SB). (Overruled in AIR 1945 P C 156(PC).)

9. "In accordance with this Constitution"—Clause (1). — Under ART. 53 (1), the executive power of the Union, which is vested in the President, shall be exercised "in accordance with this Constitution." This refers not only to the manner of exercising power but to the exercise of the power itself, so that the effect of the provision is that the power which is exercised should be in accordance with the Constitution. But in determining whether a certain power is in accordance with the Constitution, the provisions of ART. 53 (1) as well as other provisions of the Constitution should be taken into consideration. Hence, the mere general grant of executive power under ART. 53 (1) may be held to confer a certain power although such power may not be conferred by any other provision of the Constitution expressly or impliedly. See NOTE. 6.

The words "in accordance with this Constitution" also govern the exercise of executive power through officers subordinate to the President. See ART. 77; see also NOTE 6.

10. Supreme command of Defence Forces. — Under the Government of India Act, 1935, S. 4, the Commander-in-Chief of His Majesty's Forces in India was a different functionary from the Governor-General. Under this article, the supreme command of the Defence Forces in India is vested in the President as part of the executive power of the Union. The words "without prejudice to the generality of the foregoing provision" in cl. (2) imply that the supreme command of the Defence Forces forms part of the executive power of the Union. This gives effect to the principle of the supremacy of the civil power over the military.

Under the Constitution of the United States (ART. II S. 2 (1)) the President shall be the Commander-in-Chief of the Army and Navy of the United States. There is no provision in the American Constitution that the exercise of the power of the President as Commander-in-Chief of the Army and Navy shall be regulated by law. Under ART. 53 (2), it is expressly provided that the exercise of the supreme command

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Article 53 — Note 8

[1] 1952 Punj 143 (Pr 4) [AIR V 39 C 52] : ILR (1951) Punj 321 (FB), *Gurmukh Singh* v. *Union of India.*

of the Defence Forces vested in the President shall be regulated by law. Under Entry 2 of LIST 1 in SCH. VII, naval, military and air forces and other armed forces of the Union are subjects allotted to Parliament for legislation.

Under the British Constitution, the administration of the army is in the hands of the King, who, unless expressly controlled by an Act of Parliament, cannot be controlled by Courts.[1]

(a) Under American Constitution

11. War and peace, powers as to. — Under the Constitution of United States of America, ART. I, S. 8 sub-s. (11), the Congress has power to declare war, grant letters of marque and reprisal, make rules concerning captures on land and water. Under cl. (12) of the same article, the Congress has power to raise and support armies and under cl. (13) it has power to provide and maintain a navy. Under cl. (14), the Congress has power to make rules for the government and regulation of the land and naval forces. As seen in NOTE 1, under ART. II, S. 2 (1) of the Constitution of the United States, the President shall be Commander-in-Chief of the army and navy of the United States.

In *Ex parte Milligan*,[1] the Supreme Court of America made the following observation, as regards the powers of the Congress and the President, in matters pertaining to the armed forces of the nation and war and peace:

> "Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigour and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.
>
> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns nor can the President, or any commander under him without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling

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Article 53 — Note 10

[1] (1932) 101 L J K B 478 (482): (1932) 2 K B 197, *China Navigation Co.* v. *Attorney-General.* (Demand of money for protection of British ships against pirates in China coast is not illegal.)

Article 53 — Note 11

[1] (1866) 18 Law Ed 281 (301, 302): 4 Wall 2.

necessity, which justifies what it compels or at least insures acts of indemnity from the justice of the Legislature."

(b) Under Indian Constitution

Under the Constitution of India, the exercise of the power of supreme command of the Defence Forces, which is vested in the President under cl. (2) of this article, is required to be regulated by law. It is clear that this does not mean that the Legislature can direct the conduct of campaigns, inasmuch as such direction would not be making the law regulating the exercise of the command but would amount to exercising the command itself.

(c) Under British Constitution

Under English law, the Sovereign alone has the power of declaring war and peace.[2] In *Janson* v. *Driefontein Consolidated Mines Ltd.*,[3] Lord Halsbury observed that though it cannot be said that it is now the existing international understanding that unless there is some public declaration of war, there is no war, yet it is essential that the hostility must be the act of the *nation* which makes the war. In the same case, Lord MacNaghten observed as follows :

> "In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war . . . However critical may be the condition of affairs, however imminent war may be, if and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge, there is peace — peace with all attendant consequences for all its subjects".

In *Kawasaki* v. *Bantham S. S. Co. Ltd.*,[4] Sir Wilfrid Greene, M. R., observed as follows :

> ". . . if in any particular litigation a question arises whether or not this country is at war with another country, that is a matter of which the Courts of this country will take judicial notice and if the Courts find themselves unable from their own knowledge to take that notice, the source of information to which they must address themselves is one, and one only — namely, the executive Government whose function it is to make war or not to make war, and whose decision as to whether or not a state of war exists concludes the matter".

(d) Executive, powers of

Thus, under the British Constitution the executive Government has the power of declaring war or peace and also of declaring whether a state of war or peace exists with regard to another country. Under Sch. VII List 1, Entry 15 of the Constitution of India, the Union Parliament has the exclusive right of making laws relating to war and peace. This, however, cannot mean that the actual declaration of war or making of peace is to be done by the Parliament. The Parliament has the power to make laws about war and peace, but the implementation of such laws is a matter for the executive authority.

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[2] (1799) 1 Ch Rob 196, *The Hoop.*

[3] (1902) 1902 App Cas 484 (493, 497) : 87 L T 372.

[4] (1939) 1 All E R 819 (823) : (1939) 2 KB 544. (*Janson* v. *Driefontein Consolidated Mines Ltd.*, (1902) 1902 App Cas 484, Ref. to.)

Further, as seen in NOTE 7, the power of the executive authority is not limited to the carrying out of laws passed by the Legislature. Hence, although the Executive is bound to act according to the laws passed by the Legislature, it is not absolutely without power to act, in the absence of a legislative enactment, when the act does not affect the legal rights of any one or contravene the provisions of the Constitution. The issue of a notification[5] by the President declaring that the state of war between India and Germany (World War II) has ceased to exist from 1st January, 1951, is only consistent with this view. If it were the case that the Executive is powerless to act in any matter relating to war or peace unless and until there was a law passed by the Parliament authorising the Executive to do so, the President's notification, above mentioned, would be *ultra vires.*

In this connection, it may also be pointed out that there is a difference between the provisions of the American Constitution and the Indian Constitution in regard to the power to declare war. Under ART. I, S. 8 of the Constitution of United States, the Congress shall have power to declare war. So under the American Constitution the actual declaration of war is to be made by the Congress. But under the Constitution of India, under ART. 246 read with SCH. VII, LIST 1 Entry 15, it is the power of *making laws* with reference to war and peace that is given to the Parliament.

When there is no question of making any law but the question is only about taking certain action, as for example, declaring whether a state of war between India and another country exists or not, it does not seem to be necessary that the Executive must first be authorised by Legislature to take the action. In this respect, there does not seem to be any substantial difference between the Constitution of India and the British Constitution, under which also, as seen already, the power of declaring war or peace or declaring whether a state of war or peace exists between Great Britain and another country, is vested in the Executive.

12. Delegation of functions to other authorities by law —Clause (3).—It has already been seen in NOTE 8 that while Article 53 (1) provides for the President delegating his executive power to his subordinates, ART. 53 (3) provides for a statutory delegation of executive powers to other authorities. As seen in NOTE 8, such authorities would not be responsible to the President. There is a similar provision in ART. 154 which deals with the executive power of a State. Similar provisions are also contained in the Government of India Act, 1935, Ss. 7 and 49, dealing respectively with the executive authority of the Federation and of the Province.

In *Kendall* v. *United States,*[1] Justice Thompson of the Supreme Court of United States observed as follows :

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[5] Gazette of India, 1951, Part I, S. 1, Extraordinary, Page 1, (Notification No. D7104—Eur. II/50).

Article 53 — Note 12

[1] (1838) 9 Law Ed 1181 (1215) : 12 Peters 524.

"The theory of the Constitution undoubtedly is that the great powers of the Government are divided into separate departments; and so far as these powers are derived from the Constitution, the departments may be regarded as independent of each other. But beyond that all are subject to regulations by law, touching the discharge of the duties required to be performed. The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot, be claimed by the President. There are certain political duties imposed upon many officers in the executive department the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character".

Thus, it is seen that even under the American Constitution, executive functions can be assigned by law to authorities who are not responsible to the President.

Election of President.

54. The President shall be elected by the members of an electoral college consisting of —

(*a*) the elected members of both Houses of Parliament; and

(*b*) the elected members of the Legislative Assemblies of the States.

JAMMU AND KASHMIR

Article 54 shall apply to the State of Jammu and Kashmir subject to the modifications —

(a) that the references therein to the elected members of both Houses of Parliament and to each elected member of either House of Parliament shall be deemed to include, respectively, a reference to the representatives of the State in those Houses and to each such representative,

(b) that the references to the elected members of the Legislative Assemblies of the States and to each such elected member shall be deemed to include, respectively, a reference to the members of the Constituent Assembly of the State and to each such member, and

(c) that the population of the State shall be deemed to be forty-four lakhs and ten thousand.

—See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, Cl. 3 and SCH. II as amended.

COGNATE PROVISIONS

Election Commission — Superintendence, direction and control of the preparation of the electoral rolls for election of President to vest in the Election Commission—See ART. 324 (1).

Amendment seeking to make change in ART. 54 — Procedure for such amendment—See ART. 368.

(a) United States of America

1. **Analogous provisions.**—Under the Constitution of the United States also, the President is chosen by indirect election. The procedure is as follows : Each State appoints a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. The actual method of choosing these electors is left to the discretion of each State Legislature. All the State Legislatures have directed that the Presidential electors shall be chosen at the polls by the qualified voters of the State. The electors then meet in their respective States and vote by ballot for President. The votes are sent to the President of the Senate and counted in the Houses of the Congress sitting in a joint session. The person having the greatest number of votes becomes President if such number be a majority of the whole number of electors appointed and if no person have such majority, then from the persons having the highest numbers, not exceeding three, the House of Representatives chooses immediately by ballot the President. (Article II, S. 1 (2) and Amendment of 1804, ART. 12.)

Thus, under the American Constitution the electoral college is itself *elected*, while under the Indian Constitution, there is no *special* election of the electoral college for the election of the President but the electoral college consists of the elected members of the two Houses of Parliament and of the Legislative Assemblies of the different States. Another point of difference that may be noted is that the election of the President of the United States is by the straight vote system and not by the system of proportional representation by the single transferable vote as provided by ART. 55 (3).

(b) Eire

In Ireland, under the Irish Constitution of 1937, ART. 12, sect. (2), the President shall be elected by the direct vote of the people.

(c) Burma

Under the Constitution of the Union of Burma, S. 46, the President shall be elected by both Chambers of Parliament in joint session by secret ballot. Subject to the provisions of Chap. V, election to the office of President shall be regulated by Act of Parliament.

2. **Scope of the article.**—The Indian Constitution has adopted the system of indirect election of the President in preference to direct election by adult suffrage. The mode of election laid down in this article represents a compromise of different principles. Firstly, as the Constitution contemplates only the Parliamentary system of executive,

Article 54
Note 2

it would have been a little anomalous to have a President elected on adult franchise, inasmuch as such a President should appropriately enjoy real power under the Constitution and not merely be the constitutional head with the real power being vested in the Ministry and the Legislature. At the same time, if the President had been elected only by members of the Parliament, the result would be that the President as well as the Union Ministry would only represent in practice the same point of view, namely that of the *majority party in Parliament.* In order to make the Presidential office more broad-based, the electoral college is made to include the elected members of the *Legislative Assemblies of the States.* This has also the additional advantage of investing the President with greater moral independence and authority than would be the case if he had been a mere creature of the majority party in the Parliament. The total voting strength of the members of the Parliament has, however, been made equal to that of the elected members of the Legislative Assemblies of all the States by being weighted under ART. 55 (2) (c).

The superintendence, direction and control of the conduct of election of the President is vested in the Election Commission (ART. 324).

Under ART. 71, all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court.

Manner of election of President.

55. (1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner :—

(a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly;

(b) if, after taking the said multiples of one thousand, the remainder is not less than

five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one;

(c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

Explanation. — In this article, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

JAMMU AND KASHMIR

Article 55 shall apply to the State of Jammu and Kashmir subject to the modifications—

(a) that the references therein to the elected members of both Houses of Parliament and to each elected member of either House of Parliament shall be deemed to include, respectively, a reference to the representatives of the State in those Houses and to each such representative,

(b) that the references to the elected members of the Legislative Assemblies of the States and to each such elected member shall be deemed to include, respectively, a reference to the members of the Constituent Assembly of the State and to each such member, and

(c) that the population of the State shall be deemed to be forty-four lakhs and ten thousand.

—See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, Cl. 3 and SCH. II as amended.

COGNATE PROVISIONS

Election Commission — Superintendence, direction and control of the preparation of the electoral rolls for election of President to vest in the Election Commission—See ART. 324 (1).

Amendment seeking to make change in ART. 55—Procedure for such amendment—See ART. 368.

Synopsis

1. Analogous provisions.
2. Scope of the article.
3. Proportional representation.

1. Analogous provisions. — Under the Irish Constitution also (ART. 12, S. (2) (iii)), the election of the President should be by secret ballot and on the system of proportional representation by means of the single transferable vote.

2. Scope of the article. — After providing in ART. 54 that the President shall be elected indirectly by an electoral college, the Constitution proceeds to provide in this article that the mode of election shall be by the system of proportional representation by means of the single transferable vote (ART. 55 (3)). Clauses (1) and (2) of the article provide for weighting of votes for the purpose (a) of securing, as far as possible, uniformity in the scale of representation of the different States and (b) for securing parity between the States as a whole and the Union, at the election of the President. For the purpose of securing such uniformity and parity the method is laid down in sub-cls. (a), (b) and (c) of cl. (2). The draft Constitution gives the following illustrations to sub-cls. (a) and (b) of cl. (2) in the footnotes of ART. 44 of the draft Constitution corresponding to this article :

"The method of calculation set out in cl. (2) of ART. 44 may be illustrated as follows :

Illustrations to sub-cls. (a) and (b) of cl. (2) :

(i) The population of Bombay is 20,849,840. Let us take the total number of elected members in the Legislative Assembly of Bombay to be 208 (i. e. one member representing one lakh of the population). To obtain the number of votes which each such elected member will be entitled to cast at the election of the President, we have first to divide 20,849,840 (which is the population) by 208 (which is the total number of elected members), and then to divide the quotient by 1,000. In this case, the quotient is 100239. The number of votes which each such member will be entitled to cast would be 100,239/1000 i. e. 100 (disregarding the remainder 239 which is less than five hundred.)

(ii) Again the population of Bikaner is 1,292,938. Let us take the total number of elected members of the Legislature of Bikaner to be 130 (i. e. one member representing roughly ten thousand of the population). Now applying the aforesaid process, if we divide 1,292,938 (i. e. the population) by 130 (i. e. the total number of elected members), the quotient is 9945. Therefore, the number of votes which each member of the Bikaner Legislature would be entitled to cast is 9945/1000 that is 10 (counting the remainder or 945 which is greater than five hundred as equivalent to 1000.)

Illustration under sub-cl. (c) of cl. (2) :

If the total number of votes assigned to the members of the Legislatures of the States in accordance with the above calculation be 74,940 and the total number of elected members of both the Houses of Parliament be 750, then to obtain the number of votes which each member of either House of Parliament will be entitled to cast at the election of the President, we should have to divide 74,940 by 750. Thus the number of votes which each such member will be entitled to cast in the case would be $\frac{74{,}940}{750} = 99\frac{23}{25}$ i. e. 100 (the fraction $\frac{23}{25}$ which exceeds one-half being counted as one.)"

Although cl. (2) appears to be complicated, it would be found on analysis to amount only to two simple principles :

1. The number of votes given to the Houses of Parliament should be equal to the total number of votes given to all the Legislatures in India.
2. The voting strength of each voter in the State Legislature must be proportionate to the population he represents.

3. Proportional representation. — Under clause (3), the President is required to be elected in accordance with the system of proportional representation by means of the single transferable vote.

The system of proportional representation by means of the single transferable vote is intended to secure, as far as possible, the representation in the elected body, of all the groups or interests in the electorate, in proportion to their respective strengths in the electorate and to avoid the swamping of the elected body by the representatives of the party which is numerically strongest, to the exclusion of the representatives of the other groups or interests. R. N. Gilchrist says:[1] "The aim of proportional representation is to give every division of opinion among electors corresponding representation in national or local assemblies." The underlying principle has been expressed as being that the right of *decision* belongs to the majority, but the right of *representation* belongs to all. In the ordinary mode of election by what is known as the straight vote system it often happens that the number of seats in the elected body secured by the several groups of

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Article 55 — Note 3

[1] Principles of Political Science by R. N. Gilchrist, 2nd Edition, page 270.

opinion in the electorate do not reflect their relative strength in the electorate.

Thus, in the first general elections to the Delhi State Assembly we learn that the Congress polled 2,71,977 and the combined opposition polled 2,55,998. Thus, the Congress polled just about 51 per cent. of the votes cast. Yet the Congress secured 83 per cent. of the seats, while the combined opposition parties who had secured about 49 per cent. of the votes got only 17 per cent. of the seats. In the same election the Jan Sangh is said to have polled 1,14,525 or 21 per cent. of the total number of votes cast and the Socialists are said to have polled only 9695 or about 1.8 per cent. of the total valid votes cast. In spite of this vast difference in the number of votes secured by the Jan Sangh and the Socialists, the two parties got each 2 seats in the Assembly. In other words, in spite of a difference of 1,04,830 votes between the Jan Sangh and the Socialists, the two parties got the same number of seats.[2] This kind of anomaly is sought to be avoided by the system of proportional representation by the single transferable vote and it is claimed that if the system is followed, the different groups in the electorate will each secure in the elected body a number of seats which is proportionate to the relative strength of the group in the electorate.

The system was first proposed in 1851 by an Englishman named Thomas Hare in a book called THE ELECTION OF REPRESENTATIVES. It was strongly supported by John Stuart Mill, Lord Avebury, Lord Courtney, etc. There are many variations of the system but they are based on the same underlying principle. The scheme is also known as the preferential system or transferable vote system.

The best known form of proportional representation is that of the "single transferable vote." The meaning of this is that every voter has only one vote irrespective of the number of seats to be filled up. If, for instance, there are 5 seats to be filled up, the voter does not cast five votes but indicates five successive preferences, as first preference, second preference and so on, on his ballot paper on which the names of all the candidates are printed.

The total number of valid voting papers is then divided by a number which exceeds by one, the number of vacancies to be filled, and the resulting number increased by one, disregarding any fraction or remainder, is the number of votes that is sufficient to secure the return of a candidate. This number is known as the quota. Thus suppose, there are 100 valid voting papers and three seats to be filled up. 100 is divided by 3 plus 1 i. e., 4 and the quotient arrived at, namely, 25, is increased by 1, so that the quota is 26. After the quota is fixed, any candidate who secures a number of first preferences equal to the quota is forthwith declared elected. The surplus first preferences marked in his favour on the ballot papers cast for him are then distributed proportionately among the candidates who are marked as second preferences on the ballot papers in which he has been marked as first preference.

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[2] We are indebted to Shri Paras Diwan, Lecturer in Laws, Delhi University, for this information : See his Article published in AIR 1952 Jour 30 (30).

If on such distribution, it is found that the *aggregate* number of first preference votes (i. e., including the first preference votes originally obtained by him and the first preferences subsequently allotted by distribution as mentioned above) for any such candidate reaches the quota, he is declared elected.

If all the seats are not filled up by transferring the surplus first preference votes of the candidates who have received more than the quota, the candidate who has obtained the least number of first preferences is eliminated and the second preferences on the ballot papers in which he has been given the first preference are treated as first preferences in favour of candidates in whose favour such second preferences have been marked.

Thus, there is only one vote for each voter although there may be many seats to be filled. But this single vote is transferred to other candidates. That explains why the system is known as that of the single transferable vote.

The question of proportional representation, in one sense, really can arise only when there are *several* seats to be filled up from a constituency, so that there may be reflected in the *elected body* the different shades of opinion in the *electorate* in proportion to the number of adherants of each shade of opinion in the electorate.

But the idea of giving as much importance as possible to minority groups and points of view can be applied to the election of representatives for single vacancies also. And in this sense, the principle of proportional representation may play a part in such an election also. The object in such a case is that a candidate who is acceptable to as many groups of opinion as possible in the electorate may be elected, although he may not be the first choice of all the groups. In the ordinary mode of election what happens is that the candidate who gets the support of the *numerically largest group* is elected although the combined strength of the other groups may be really much greater so that in effect the candidate actually represents only a minority of the electorate. We give here two illustrations[3] to show this:

In Nandigram South (Midnapore) Constituency of the West Bengal State, the following is the ledger of polling:

P. C. Jana (Congress)	15320
Bhupal Panda (Communist Party) ...	14926
I. C. Mahapatra (Jan Sangh)	5201
K. L. Bera (K. M. P. P.)	3184
Total	38634

It could easily be observed that though 23314 people voted against the Congress and only 15320 in favour of it, yet the seat went to the Congress.

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[3] We are indebted to Shri Paras Diwan, Lecturer in Laws, Delhi University, for this information: See his Article published in AIR 1952 Jour 30 (30).

The voting ledger of the Katoria Constituency of the Bihar State is as undernoted:

S. P. Bhagat (Congress)	17615
S. Prasad (Socialist)	16200
T. Sinha (Independent)	12440
R. Soren (Jharkand)	12440
C. Baski (Independent)	2133
Total	60828

The Congress candidate polled 17615 votes, or 29 % of the total votes cast and secured the seat though 43213 votes or 71 % of the total votes were polled against him.

It is considered that such anomalous result will be avoided or at least mitigated by the adoption of the system of proportional representation by the single transferable vote.

In the case of an election for a single seat also, the voting is done by a single transferable vote and successive preferences are marked by the voter in favour of the several candidates. But there being only one seat to be filled up there is no question of fixing a quota and first declaring a candidate who gets the quota elected and dividing his surplus votes among those who have been given the next preference, to fill up further seats. When there is a clear majority of first preferences in favour of one of the candidates, that is, if a candidate receives more than 50 per cent of the first preferences, he is declared elected, inasmuch as the first preferences of all the other candidates put together will necessarily be less than 50 per cent. But where there is no absolute majority of first preferences in favour of any one candidate, then the question of transferring of votes comes in. Thus, suppose there are three candinates A, B, and C for a seat. The first preferences are cast as follows:

A	40
B	45
C	15

Though B has got the largest number of first preferences, they do not amount to an absolute majority. In such a case C, who has got the least number of first preferences, is eliminated and the first preferences marked in his favour are distributed between A and B in proportion to the number of second preferences which have been marked in favour of each of them on the 15 voting papers in which C has been given first preference. If on these 15 voting papers A has been given the second preference on 11 out of these 15 papers and B has been given the second preference on four of these 15 voting papers, these second preferences are to be treated as first preferences and are to be added to the first preferences already secured by A and B. The result would be that, *on the whole* at the second count A will get 51 first preferences and B will get 49, so that A will be entitled to be declared elected, although originally A had less number of first preferences in his favour than B. Under the normal system of voting B would have been entitled to be declared as elected as having secured the largest number of votes, if the first preferences are treated as votes.

The above method of election is the method contemplated by cl. (3) of this article for election to the office of President. The voting has to be by secret ballot.

Term of office of President.

56. (1) The President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

(a) the President may, by writing under his hand addressed to the Vice-President, resign his office;

(b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in Article 61;

(c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

COGNATE PROVISION

Office of President — Casual vacancy in—Term of office of person elected to fill—See ART. 62 (2).

1. Analogous provisions. — Under the Constitution of the United States, ART. 2, S. 1 (1), the term of Office of the President is four years.

Under the Constitution of Eire of 1937, ART. 12, S. 3 (i), the term of office of the President is seven years.

Under the Constitution of Burma, S. 48 (1), the term of office of the President is five years.

2. Impeachment. — Under cl. (1), Proviso (b), the President may be removed from office by impeachment for violation of the Constitution. Under the Constitution of America, ART. II, S. 4, the President shall be removed from office on impeachment and conviction for treason, bribery or other high crimes or misdemeanours. Under the Constitution of Eire, 1937, ART. 12 (3), the President is removable from office and under ART. 12 (10) (i), he may be impeached for stated misbehaviour. Under the Burmese Constitution, S. 54, the President may be impeached for high treason, violation of the Constitution or gross misconduct.

Eligibility for re-election.

57. A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.

1. **Analogous provisions.**— Under the American Constitution, there is no express provision on the question of the re-election of the same person as President for more than one term. But there is a constitutional convention that the same person should not be President for more than two terms. In the case of President Roosevelt, however, during the World War II, this convention was broken. Under the Irish Constitution, ART. 12 (3) (ii), the President is eligible for re-election once. Under the Constitution of Burma, S. 48 (2), the President is eligible for re-election once. It will be seen that, unlike the Irish and Burmese Constitutions, the Constitution of India does not impose any express restriction that a person can hold office as President only for two terms. Under those Constitutions, even if the terms are consecutive a person cannot hold office as President for more than two terms. Under the Indian Constitution there is express provision that a person can hold office as President for more than one term, but there is no restriction to the number of terms consecutive or otherwise for which a person can be elected President.

Qualifications for election as President.

58. (1) No person shall be eligible for election as President unless he—

(*a*) is a citizen of India,

(*b*) has completed the age of thirty-five years, and

(*c*) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation.—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or

Vice-President of the Union or the Governor or Rajpramukh or Uparajpramukh of any State or is a Minister either for the Union or for any State.

COGNATE PROVISION

Rajpramukh or Uparajpramukh — Interpretation of — See ART. 366 (21) and (30).

Synopsis

1. Qualification for election to House of People—Clause (1) (c). See Art. 84.
2. Office of profit—Clause (2).
    - (a) Meaning of "office of profit."
    - (b) Person holding contract.
    - (c) Actual receipt of profit unnecessary.
    - (d) Personal receipt of profit.
    - (e) Voluntary payment.
    - (f) Remuneration and testimonial—Distinction.
    - (g) Voluntary foregoing of remuneration.
    - (h) Payment for special services.

1. Qualification for election to House of People — Clause (1) (c) — See ART. 84.

(a) Meaning of "office of profit"

2. Office of profit — Clause (2). — This expression occurs in ARTS. 58 (2), 59 (2), 64, 66 (4), 102 (1) (a), 158 (2) and 191 (1) (a). There is no definition of the words "office of profit" in the Constitution or the General Clauses Act. In *Henry* v. *Galloway*,[1] Finlay, J., observed as follows :

> "Now 'office of profit' is not a thing particularly easy to define : everybody, I think, has a good idea of what it means, but certainly it is not easy of exact definition. I was referred to a case, and some assistance is to be got from it, of *Delane* v. *Hillcoat*[1a] but it is, I think, true to say that the exact definition is by no means easy. It is, of course, and must be an office, and no doubt it must be an office to which remuneration is in some way or other attached. You cannot have an office of profit unless you have got the remuneration attached to it. That does not, of course, mean that in any particular year there must necessarily be any remuneration. It is, I should think, clear beyond any controversy—indeed, it was not controverted—that if you take the case, the perfectly possible case, of a holder of an office remunerated by share of profits, and by reason of the fact that in difficult times there are no profits so that there is no remuneration, it is not questioned, I think, and could not be questioned, that that would none the less be an office of profit and would continue to be an office of profit even though for one year or for more than one year no remuneration accrued."

Thus, there must be an *office* and a remuneration attached to it. But the form of the remuneration or the question whether remuneration accrued every year is immaterial.

(b) Person holding contract

The holder of a *contract* or person enjoying benefit under a contract with the Government is not a person holding an *office* of profit under the Government and is not disqualified.

Article 58 — Note 2

[1] (1933) 148 L T 453 (455) : 49 T L R 191.

[1a] (1829) 109 E R 115 : 9 B and C 310.

(c) Actual receipt of profit unnecessary

Further, "office of profit" does not connote that its incumbent *actually* makes a profit from it; if it might reasonably be expected that a man would make a profit of it, it must be considered an office of profit.[1b] In *Delane* v. *Hillcoat*,[2] the question was whether the office of treasurer of a turnpike road was one of profit. It was held that if the average balances in the hands of the incumbent were such that it might be reasonably expected that a profit could be made out of them the office was one of profit. Littledale, J., observed as follows in this connection :

> "If the average balance was so small that a banker would not allow interest for it, an office in that case must not perhaps be considered an office of profit. But if it amounted to a sum for which a banker would allow interest it must be considered an office of profit."

(d) Personal receipt of profit

It is not necessary that the incumbent of the office must personally receive the profit. Even if he allows another to receive the profit if any, he would be the holder of office of profit.[3] In *Delane* v. *Hillcoat*,[4] the trustee of a turnpike road, who accepted the office of the treasurer of the road but who never himself received the rents of the tolls but allowed the clerk of the commissioners to receive all the rents and to make all payments on account of the trust, was held to be the holder of an 'office of profit' and to have incurred the statutory penalty for not having resigned his office of trustee on his being elected to the office of treasurer.

(e) Voluntary payment

The payment made to the holder of an office may be voluntary, still, so long as it is made to him in virtue of his office, it is a profit of the office, and he must be regarded as the holder of an office of profit.[5] In *Herbert* v. *McQuade*,[6] Collins, M. R., observed as follows with reference to *Inland Revenue* v. *Strang*[7]:

> "Now that judgment, whether or not the particular facts justified it, is certainly an affirmation of a principle of law that a payment may be liable to income-tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to

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[1b] (1829) 109 E R 115 (116, 117) : 9 B and C 310, *Delane* v. *Hillcoat.*

[2] (1829) 109 E R 115 (116, 117) : 9 B and C 310.

[3] (1829) 109 E R 115 (116, 117) : 9 B and C 310, *Delane* v. *Hillcoat.*

[4] (1829) 109 E R 115 (116, 117) : 9 B and C 310.

[5] (1930) 16 Tax Cas 505 (514), *Stedeford* v. *Beloe.*
(1919) 7 Tax Cas 372 (378, 379) : 89 L J K B 459, *Cowan* v. *Seymour.*
(1906) 5 Tax Cas 347 (355) : 53 Sol Jo 149, *Cooper* v. *Blackiston.*
(1905) 93 L T 367 (371) : 5 Tax Cas 145, *Paynting* v. *Faulkner.*
(1902) 4 Tax Cas 489 (500) : 2 K B 631 (649), *Herbart* v. *McQuade.*
(1878) 1 Tax Cas 207 : 15 S C L R 704, *Inland Revenue* v. *Strang.*

[6] (1902) 2 K B 631 (649) : 4 Tax Cas 489.

[7] (1878) 1 Tax Cas 207 : 15 S C L R 704.

this—that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income-tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it."

(f) Remuneration and testimonial — Distinction

But a distinction must be made between payment which is in the nature of remuneration and one which is in the nature of testimonial.[8] In *Mudd* v. *Collins*,[9] Rowlatt, J., observed as follows :

> "When a man is given a testimonial because of his work in the past, not directly remunerating him for that work, but recognising how high a regard has been held for him in the association of people with him arising out of the performance of those services, and people recognise the good qualities he has and how zealous and kind he has been and how eager to advance the interests of his employers or his parishioners or his constituents, or whatever they may be and they say 'we would like to give you something as a mark of our esteem and regard', that is a testimonial. But where a man does a business operation of this kind which he could not be called upon to do, but it is a business operation and would have to be paid for handsomely if done by somebody else, and it is said 'one of our directors did it for us and he ought to have something besides his fees as director because of this' that seems to me to be paying him for his services."

In *Cooper* v. *Blackiston*,[10] Lord Loreburn observed as follows :

> "In my opinion, where a sum of money is given to an Incumbent substantially in respect of his services as Incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

In *Cowan* v. *Seymour*,[11] *A* acted as secretary of a company without remuneration from the date of its incorporation until his appointment as liquidator of the company. After liquidation was completed there was a sum in hand after discharge of all liabilities, which according to the company's memorandum of association, was divisible among the ordinary share-holders of the company. By a unanimous resolution these share-holders voted the sum in question in equal shares to the chairman of the company and *A*. *A* contended that the payment was a voluntary gift and that the whole of his duties as secretary and liquidator had determined before the gift was made. It was held that the sum did not accrue to *A* in respect of an office or employment of profit and was not chargeable to income-tax, the ground of decision being that the payment was in the nature of testimonial rather than remuneration.

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[8] (1925) 9 Tax Cas 297 (300, 301) : 133 L T 186, *Mudd* v. *Collins*.
(1919) 7 Tax Cas 372 (378, 379) : 89 L J K B 459, *Cowan* v. *Seymour*.
(1906) 5 Tax Cas 347 (355) : 53 Sol Jo 149, *Cooper* v. *Blackiston*.

[9] (1925) 9 Tax Cas 297 (300, 301) : 133 L T 186.

[10] (1906) 5 Tax Cas 347 (355) : 53 Sol Jo 149.

[11] (1919) 7 Tax Cas 372 (378) : 89 L J K B 459.

In *Duncan's Executors* v. *Farmer*,[12] Lord Dunedin observed as follows :

(g) Voluntary foregoing of remuneration

> "My Lords, I confess I have never been able to see how it could possibly be said to be in respect of his office, when the whole reason it was given to him was that he was no longer in the office . . . . I do not think it can be said to be in respect of an office, because the moving consideration was that sometime previously as a historical fact he had held an office."

The voluntary foregoing of the remuneration of office does not make the office cease to be one of profit.[13] In *Reade* v. *Brearley*,[14] Finlay, J., observed as follows :

> "If a person holds an office and the office is an office of profit, it is perfectly clear that no application of the income, which he may think proper to make as between himself and other persons, can for a moment affect his liability as being the holder of an office of profit. It is, I think, equally clear that—I will not say in every case, because these cases, I think, have to be judged upon their own facts,—but, I think, it is clear that at least in a large number of cases the voluntary foregoing of a salary due to a person ought to be regarded by the Court, and would be regarded, simply as being an application of the income and that, in such circumstances, the office would not the less be an office of profit and the assessment would, therefore, not the less be made."

(h) Payment for special services

The payment made to an employee for special services falling outside the scope of the duties of his office is a profit of the office.[15]

Conditions of President's office.

59. (1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

(2) The President shall not hold any other office of profit.

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[12] (1909) 5 Tax Cas 417 (422).

[13] (1933) 17 Tax Cas 687 (693), *Reade* v. *Brearley*.

[14] (1933) 17 Tax Cas 687 (693).

[15] (1932) 16 Tax Cas 748 (754), *Shipway* v. *Skidmore*.
(1925) 9 Tax Cas 297 (300, 301) : 133 L T 186, *Mudd* v. *Collins*.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

1. Office of profit—See NOTE 2 on ART. 58.

Oath or affirmation by the President.

60. Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

> "I, A. B., do $\dfrac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India."

COGNATE PROVISION

Article 60 came into force on 26-11-1949 — See ART. 394.

Procedure for impeachment of the President.

61. (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

(2) No such charge shall be preferred unless—

(*a*) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(*b*) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

COGNATE PROVISIONS

President, removal from office by impeachment — See ART. 56 (1) (b).

Court, tribunal or body appointed by Parliament for investigation of charge under this article — Conduct of the President may be brought under review by— See ART. 361 (1), Proviso.

1. **Investigation of charge against President.**—Under cl. (3) of this article when a charge has been preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated. This provision is to be read with ART. 361(1), first proviso, under which the conduct of the President may be brought under review by any Court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under ART. 61.

Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.

62. (1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as

possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of Article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

The Vice-President of India.

63. There shall be a Vice-President of India.

The Vice-President to be *ex officio* Chairman of the Council of States.

64. The Vice-President shall be *ex officio* Chairman of the Council of States and shall not hold any other office of profit:

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under Article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under Article 97.

The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.

65. (1) In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law

and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

COGNATE PROVISION

Vice-President acting as President—Duties of—See ART. 64, proviso.

Election of Vice-President.

66. (1) The Vice-President shall be elected by the members of both Houses of Parliament assembled at a joint meeting in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

(2) The Vice-President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.

(3) No person shall be eligible for election as Vice-President unless he —

(a) is a citizen of India;

(b) has completed the age of thirty-five years; and

(c) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation. — For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor or

Rajpramukh or Uparajpramukh of any State or is a Minister either for the Union or for any State.

COGNATE PROVISIONS

Election Commission — Superintendence, direction and control of the preparation of the electoral rolls for election of Vice-President to vest in the Election Commission—See ART. 324 (1).

Rajpramukh or Uparajpramukh — Interpretation of — See ART. 366 (21) and (30).

1. Proportional representation. — See notes on ART. 55.
2. "Office of profit." — See ART. 58, NOTE 2.

Term of office of Vice-President.

67. The Vice-President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that —

(a) a Vice-President may, by writing under his hand addressed to the President, resign his office;

(b) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution;

(c) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

COGNATE PROVISION

Office of Vice-President — Casual vacancy in — Term of office of person elected to fill—See ART. 68 (2).

Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.

68. (1) An election to fill a vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as

soon as possible after the occurrence of the vacancy, and the person elected to fill the vacancy shall, subject to the provisions of Article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

Oath or affirmation by the Vice-President.

69. Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation in the following form, that is to say—

> swear in the name of God
> "I, A.B., do ——————————
> solemnly affirm
> that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

Discharge of President's functions in other contingencies.

70. Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.

Matters relating to or connected with the election of a President or Vice-President.

71. (1) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

(2) If the election of a person as President or Vice-President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.

(3) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating

to or connected with the election of a President or Vice-President.

1. Distinction between this article and Art. 329 (b). — Under this article, all doubts and disputes relating to the election of President or Vice-President are to be enquired into and decided by the Supreme Court, whose decision shall be final. In regard to elections to Legislatures, the authority to decide disputes is an Election Tribunal.

There is an important difference between ART. 71 (1) and ART. 329 (b). Article 71 (1) had to be in an affirmative form because it confers a special jurisdiction on the Supreme Court which that Court could not have exercised but for this article. Article 329 (b), on the other hand, was primarily intended to exclude or oust the jurisdiction of all Courts in regard to electoral matters and to lay down the only mode in which an election could be challenged. The negative form was therefore more appropriate in the case of ART. 329 (b).[1] But in spite of the difference in the form of the language, ART. 329 (b) is as wide as ART. 71 (1) in excluding from the jurisdiction of the ordinary Courts all disputes and doubts arising out of, or in connection with, an election. In using different forms of expression in the two provisions, the Constitution does not imply that in the case of ART. 329 (b) it is not all possible disputes or doubts connected with elections to the Legislatures, including disputes as to nominations, that should be regarded as covered by the provision. Hence, disputes as to nominations also are included within ART. 329 (b).[2]

Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases.

72. (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence —

(*a*) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(*c*) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the power conferred by law on any officer of

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Article 71 — Note 1

[1] 1952 S C 64 (Pr 25) [A I R V 39 C 16] : 1952 S C R 218 (SC), *N. P. Ponnuswami* v. *Returning Officer, Namakkal.*

[2] 1952 S C 64 (Pr 25) [A I R V 39 C 16] : 1952 S C R 218 (SC), *N. P. Ponnuswami* v. *Returning Officer, Namakkal.*

Article 72
Note 1

the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (*c*) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor or Rajpramukh of a State under any law for the time being in force.

GOVERNMENT OF INDIA ACT, 1935.

Note—For text of S. 295 of the Government of India Act, 1935, which corresponds with this article, *see* NOTE 1 on this article.

JAMMU AND KASHMIR

Article 72 cl. (1) sub-cl. (c) and cl. (3) do not apply to the State of Jammu and Kashmir—See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, Cl. 3, Sch. II.

COGNATE PROVISIONS

Clause (2) — "Conferred by law on any officer of the Armed Forces" — See Chap. XIV of the Air Force Act, 1950 (45 of 1950) and the Army Act, 1950 (46 of 1950).

Clause (3) — "Shall affect the power" — See ART. 161. See also S. 382 and Chap. XXIX (Ss. 401 to 402A) of the Criminal Procedure Code, 1898; Ss. 54 and 55 of the Penal Code, 1860.

Rajpramukh—Interpretation of—See ART. 366 (21).

Synopsis

1. Cognate and analogous law.
   - (a) United States of America.
   - (b) England.
   - (c) India.
2. Dispensation and pardon — Distinction.
   - (a) Licence for committing offence and pardon — Distinction.
   - (b) Pardon in advance unlawful.
3. Private right and the power of pardon.
4. Nolle prosequi.
5. Effect of pardon.
   - (a) Restoration of status quo ante.
   - (b) No amends for past.
   - (c) Bar of fresh trial.
6. Impeachment.
7. Legislature, power of.
8. Pardon and amnesty.
9. Conditional pardon.
10. Reprieves and respites.
11. Acceptance, whether necessary for pardon.
12. Commutation of sentence.
13. Object of pardoning power.
14. Applicability of English principles.
15. Contempt of Court, pardon for.

(a) United States of America

1. Cognate and analogous law.—Under Article II, Section 2, sub-s. (1), the President has power to grant reprieves and pardons for offences against the United States except in cases of impeachment.

(b) England

In England the Crown enjoys the exclusive and inseparable right of granting pardons and this power cannot be claimed by any other person either by grant or prescription.

(c) India

Under ART. 161 of this Constitution, the Governor of a State has the power to grant pardons, reprieves, etc., in regard to any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. Under Criminal Procedure

Code, S. 401, the appropriate Government may, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of the sentence or remit the whole or any part of the sentence to which he has been sentenced. Under S. 402, the appropriate Government may, without consent of the person sentenced, commute any one of the following sentences to any other mentioned after it : Death, transportation, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for like term, fine.

Under S. 402A, Criminal Procedure Code, the powers conferred by Ss. 401 and 402 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.

Under S. 382 of the Code, if a woman, sentenced to death, is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to transportation for life. Under S. 333 of the Code, at any stage of any trial before High Court under the Code, before return of the verdict, the Advocate-General may if he thinks fit inform the Court on behalf of Government that he will not further prosecute the defendant upon the charge and thereupon all proceedings on such charge shall be stayed and he shall be discharged. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs. The Advocate-General's action under S. 333 of the Code is known as entering a *nolle prosequi*. Under S. 494 of the Criminal Procedure Code, the Public Prosecutor may with the consent of the Court withdraw from the prosecution of any person. Under Section 54 of the Penal Code, in every case in which the sentence of death shall have been passed the appropriate Government may, without the consent of the offender, commute the sentence for any other sentence provided by the Code. Under S. 55 of the Penal Code, in every case in which a sentence of transportation for life may have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Section 295 of the Government of India Act, 1935, was as follows :

> "295. (1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province :
>
> Provided that nothing in this sub-section affects any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a Court-martial.
>
> (2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated

to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment."

2. Dispensation and pardon — Distinction. — Dispensation seeks to make the thing prohibited lawful. But a pardon frees from punishment due for a thing unlawfully done. Yet freedom from punishment is a consequence of dispensation though not its effect.[1]

In *Thomas* v. *Sorrell*,[2] it was observed as follows :

(a) Licence for committing offence and pardon — Distinction

> "The King may pardon killing a man; but if the King will give power to kill a man or to make a nuisance in the highway, it is void. And upon the same reason, a license to imprison a man, to take his land, his horse or anything that is his from him is void. For in life, liberty, and estate, every man who hath not forfeited them, hath a property and right which the law allows him to defend ; and if it be violated it gives an action to redress the wrong and to punish the wrong-doer. Therefore, dispensation, that is, to make lawful the taking from a man anything which he may lawfully defend from being taken, or lawfully punish if it be, must be void."

Similarly, in *Ex parte Wells*,[3] it was observed by the Supreme Court of the United States as follows :

> "But to the power of pardoning there are limitations. The King cannot, by any previous license, make an offence dispunishable which is *malum in se*, that is, unlawful in itself, as being against the law of nature or so far against the public good as to be indictable at Common Law. The grant of this kind would be against reason and the common good and therefore void."

In *Thomas* v. *Sorrell*,[4] it was observed as follows :

> "The King may pardon nuisances that are transient, and not continuing, as a nuisance in the highway, which still continues, and is not ended, until removed, cannot be pardoned ; so of a water-course diverted, or a bridge broken down, they cannot be pardoned so as to acquit the nuisance maker for committing them ; but the fine or punishment imposed for the doing may be pardoned.
>
> "But breaking the assise of bread and ale, forestalling the markets, ingrossing, regrating, or the like, which continue not, but which are over as soon as done, until done *de novo* again, may be pardoned, like other offences ; so as the offender shall not be impleaded for them, otherwise than by persons who have received particular damage, which the King cannot remit ; this difference holds in offences by penal laws.

Article 72 — Note 2

[1] *See* (1673) 124 E R 1098 (1100) : Vaugh 330, *Thomas* v. *Sorrell.* (But so it is also the consequence of repealing the law and a consequence of an exception at the making of the law of some particular person or persons from being bound by the law.)

[2] (1673) 124 E R 1098 (1102) : Vaugh 330.

[3] (1856) 15 Law Ed 421 (424) : 18 How 307.

[4] (1673) 124 E R 1098 (1100) : Vaugh 330.

"So a mayor or bayliff of a town, or other toll-taker, who is penally bound to provide true market measures and doth not, cannot be pardoned by the King because the fault still continues ; but the punishment inflicted the King may pardon. But by a law all these offences may be pardoned."

(b) Pardon in advance unlawful

The above quotations show that pardon cannot be granted in advance so as to permit the commission of an offence.

3. Private right and the power of pardon. — Under the English law, the right of pardon is confined to offences of a public nature where the Crown is the Prosecutor and has some vested interest either in fact or by implication; and where any right or benefit is vested in a subject by statute or otherwise, the Crown by a pardon cannot affect it or take it away.[1] The maxim of law applicable to such cases is *non potest rex gratiam facere cum injuria et damno aliorum* (the King cannot grant a favour on one subject to the injury or damage of others). See also NOTE 5.

4. Nolle prosequi.—Under English law, the Attorney-General has power to enter a *nolle prosequi* on an indictment without calling upon the prosecutor to show cause why that should not be done.[1] Under the Criminal P. C., S. 333, the Advocate-General has a similar power in regard to a trial before a High Court under the Code. The section specifically provides that the discharge of an accused under it on the Advocate-General entering a *nolle prosequi* shall not amount to an acquittal, unless the presiding Judge otherwise directs. Under S. 494, the Public Prosecutor has the power of withdrawing a prosecution. Under S. 333 of the Code the power of entering a *nolle prosequi* does not depend upon the consent of the Court, which the Public Prosecutor has to obtain when acting under S. 494 of the Code. Entering a *nolle prosequi* is one of the rights and privileges which an Advocate-General has by virtue of his appointment.[2]

(a) Restoration of status quo ante

5. Effect of pardon.—A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. And when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penal-

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Article 72 — Note 3

[1] (1615) 80 E R 231 (232) : Hob 67, *Cuddington* v. *Wilson*. (Pardon clears a person of the crime and felony wherein no private person is interested.)
Halsbury's Laws of England (2nd Edition), Vol. 6, p. 477.
[*See also* (1599) 77 E R 130 (131) : 5 Co Rep 50, *Biggin's Case*.
(1673) 124 E R 1098 (1100, 1101) : Vaugh 330, *Thomas* v. *Sorrell*.]

Article 72 — Note 4

[1] (1862) 121 E R 929 (931) : 1 B and S 850, *The Queen* v. *Allen*.

[2] 1932 Cal 699 (703) [AIR V 19], *Giribala Dasi* v. *Mader Gazi*.

ties and disabilities and restores him to all his civil rights. It makes him, as it were, a new man and gives him new credit and capacity.[1]

In *John Knote* v. *United States*,[2] Justice Field, delivering the opinion of the Supreme Court, observed as follows :

> "A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position."

Hence, all disabilities and disqualifications attaching to a convicted person are removed by pardon. Thus, under the Common Law of England, a person convicted of an infamous crime was disqualified to give evidence in a Court. But when such a person was granted a pardon, his disqualification would disappear and he would become competent as a witness.[3] Similarly, a pardon will take away the privilege (under English law)[4] of a witness in not answering incriminating questions where the pardon is in respect of the crime to which the apprehended incrimination relates.[5]

On the above principles, a person, convicted of felony for theft but afterwards pardoned by the King, can sue for defamation any

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Article 72 — Note 5

1. (1890) 24 Q B D 561 (564) : 62 L T 290, *Hay* v. *Justices of Tower Division of London.*
(1877) 24 Law Ed 442 (443) : 95 U S 149, *Knote* v. *United States.* (The proposition that amnesty operates as an extinction of the offence while pardon only removes the penalty of the offence is not recognised by our law.)
(1873) 21 Law Ed 426 (430) : 16 Wall 147, *Carlisle* v. *United States.* (The pardon and amnesty granted to persons participating in rebellion relieves them from all consequences of such participation and the necessity of establishing their loyalty which would otherwise be indispensable to recovery in the Court of claims for the proceeds of captured and abandoned property.)
(1872) 20 Law Ed 519 (526) : 13 Wall 128, *Unitea States* v. *Klein.*
(1868) 18 Law Ed 882 (882) : 6 Wall 766, *Armstrong's Foundry* v. *United States.*
(1866) 18 Law Ed 366 (371) : 4 Wall 333, *Ex parte Garland.*
(1615) 80 E R 231 (232) : Hob 67, *Cuddington* v. *Wilkins.* (The King's pardon doth not only clear the offence itself but all the dependencies, penalties and disabilities incident to it.)
2. (1877) 24 Law Ed 442 (443) : 95 U S 149.
3. (1892) 35 Law Ed 1077 (1078) : 142 U S 450, *Boyd* v. *United States.* (Under the Common Law of England persons guilty of infamous crimes were formerly inadmissible as witnesses. But this was altered by the Evidence Act, 1843 — Under the Indian law, conviction for a crime does not disqualify a person from giving evidence in a Court.)
4. This is the general rule under English law. The Indian Law is different. Under S. 132, Evidence Act, a witness cannot refuse to answer a relevant question simply on the ground that the answer will tend to criminate him.
5. (1861) 121 E R 730 (730) : 1 B & S 311 (311), *The Queen* v. *Boyes.*

person who calls him a thief after he has been so pardoned.[6]

Where a pardon has been granted, the person pardoned cannot afterwards be punished for the offence for which he has been pardoned. Even the Legislature cannot make a law which will have the effect of imposing a punishment upon such a person. Thus, where the President of the United States had granted a general pardon for all offences arising from participation, direct or indirect, in the Rebellion, (of the Southern States) it was held that an Act of the Congress subsequently passed, prescribing a test oath that the deponent had never voluntarily borne arms against the United States as a qualification for admission as an attorney, was unconstitutional and void.[7] The reason was that exclusion from any of the professions or any of the ordinary avocations of life for past misconduct can be regarded in no other light than as punishment for such conduct. All enactments of this kind were subject to the constitutional inhibition against passage of Bills of Attainder under which general designation they were included. It was not within the constitutional powers of the Congress thus to inflict punishment beyond the reach of executive clemency.

Where a certain enactment provides that a person convicted of a felony should be disqualified to sell liquor in retail and the person convicted for felony afterwards receives a free pardon, the disqualification is removed by the pardon and a license may be granted to him to sell liquor in retail.[8]

Under a certain statute of 1861 of the United States, the consent of the owner of property to its employment in aid of the Rebellion of the Southern States was regarded as an offence and was punishable with forfeiture as penalty. The general pardon of the President of the United States in 1863 extended amnesty and pardon for any offences committed in connection with the rebellion. It was contended that the pardon could not relieve the appellant from the forfeiture of his property under the above statute, because (it was contended) the liability to seizure arose, under the statute, from the mode in which the *property was employed*, and was not to be regarded as a penal consequence of the *act of the owner*. The contention was overruled and it was held that the forfeiture had been inflicted as a penalty for an offence in consenting to the employment of the property in aid of the

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[6] (1615) 80 E R 231 (232) : Hob 67, *Cuddington* v. *Wilkins*. (And it was held no great difference, though this had been a special pardon, and not known to the defendant, for he must take heed at his peril that he do no man wrong . . . . But it may well be, that if a man had committed felony, and got a secret pardon, yet another man not knowing of the pardon may justify the apprehending of him for felony, because it is advancement of justice; even as a common voice and fame is a sufficient warrant for arrest for felony, though the same be not true: but so it is not to call him thief, for that is neither necessary nor advanceth nor tends to justice.)

[7] (1866) 18 Law Ed 366 (371) : 4 Wall 333, *Ex parte Garland*.

[8] (1890) 24 Q B D 561 (566) : 62 L T 290, *Hay* v. *Justices of Tower Division of London*.

Article 72
Note 5

rebellion and hence the general pardon of the President relieved the appellant from the penalty.[9]

(b) No amends for past

Although a pardon releases the offender from all disabilities imposed by the offence and restores to him all his civil rights, it does not make amends for the past or affect any right vested in others.[10] In *John Knote* v. *United States*,[11] Justice Field of the Supreme Court of America observed as follows :

> "But it (pardon) does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment, a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an Act of Congress. Moneys once in the Treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers, it cannot touch moneys in the Treasury of the United States, except expressly authorized by Act of Congress. The Constitution places this restriction upon the pardoning power.
>
> "Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The

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9. (1868) 18 Law Ed 882 (884) : 6 Wall 766, *Armstrong's Foundry* v. *United States*.

10. (1877) 24 Law Ed 442 (443) : 95 U S 149, *Knote* v. *United States*.
'1866) 18 Law Ed 366 (371) : 4 Wall 333, *Ex parte Garland*.

11. (1877) 24 Law Ed 442 (443) : 95 U S 149.

proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the Treasury, in the other."

(c) Bar of fresh trial

A pardon with reference to one offence will not bar a trial for another offence.[12]

6. Impeachment. — Under the Constitution of the United States, the President's power of pardon does not extend to cases of impeachment. Under that Constitution, ART. II, S. 4, the President, Vice-President and all civil officers of the United States may be removed from office on impeachment for and conviction of treason, bribery or other high crimes or misdemeanours.

Under the English law also, the Royal pardon cannot be pleaded in bar of an impeachment. (Act of Settlement, 1701, S. 3). But the provision in the Act of Settlement does not negative the power of the Crown of pardoning after impeachment.[1]

Under the Constitution of India, impeachment is only provided for the President, and hence no question arises of making impeachment an exception to his power of granting pardon.

7. Legislature, power of.—Under the American Constitution, the Legislature cannot change the effect of a pardon by the President.[1] In *United States* v. *Klien*,[2] Chief Justice Chase of the Supreme Court of America observed as follows :

> "It is the intention of the Constitution that each of the great co-ordinate departments of the Government — the legislative, the executive and the judicial — shall be, in its sphere, independent of the others. To the Executive alone is entrusted the power of pardon ...... The Legislature cannot change the effect of such a pardon any more than the Executive can change a law."

On the above principle, where the President of the United States had granted a general pardon for offences committed by participation in the Rebellion of the Southern States it was held that the Legislature cannot make a law prescribing as a qualification for admission as an attorney that the candidate must take an oath that he had never taken up arms against the United States, the reason being that the effect of such a law would be to punish, by imposing a disqualification, persons who had participated in the Rebellion, and such punishment would negative the pardon granted by the President.[3]

Under the Indian Constitution also, although it may be that the theory of separation of powers has not been followed by the Constitution makers with the same thoroughness as under the Constitution of the United States, it is clear that the Legislature cannot, by law, undo the effect of a pardon granted by the President as that would be against the provisions of this article.

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[12] (1846) 175 E R 122 (122) : 2 Car & Kir 294, *Regina* v. *Harrod.*

Article 72 — Note 6

[1] (1861) 121 E R 730 (730) : 1 B & S 311 (311), *The Queen* v. *Boys.*

Article 72 — Note 7

[1] (1872) 20 Law Ed 519 (526) : 13 Wall 128, *United States* v. *Klein.*

[2] (1872) 20 Law Ed 519 (526) : 13 Wall 128.

[3] (1866) 18 Law Ed 366 (370) : 4 Wall 333, *Ex parte Garland.*

8. Pardon and amnesty. — The word "amnesty" is generally employed where pardon is extended to whole classes or communities instead of individuals. But the distinction between pardon and amnesty is one rather of philological interest than of legal importance.[1] It is sometimes said that an amnesty operates as an extinction of the offence causing it to be forgotten so far as the public interests are concerned, while a pardon only operates to remove the penalty of the offence. This distinction, however, is not recognized in law.[1a] The Constitution of the United States does not use the word 'amnesty'. It has been held under that Constitution that pardon includes amnesty.[2] It is conceived that the same view will hold good under the Indian Constitution, which also does not use the word 'amnesty'.

The pardon and amnesty, granted to *all* persons participating directly or indirectly in a rebellion, would include pardon and amnesty to aliens also.[3]

9. Conditional pardon.—Pardons may be either free or conditional, the latter being usually granted (in absence of express power of commutation of sentence) where a death sentence is commuted. The condition in such a case is the acceptance of the substituted penalty.[1] The principle is that the Sovereign may extend his mercy on what terms he pleases, and may annex any condition which he thinks fit, whether precedent or subsequent, on the performance of which the validity of the pardon will depend. If the condition is not performed, the prisoner remains in the same state in which he was at the time the pardon was granted. If the sentence had been passed and he is at large, he may be remanded under his former sentence, or the Court may proceed to pass sentence.[2] Pardon may be granted on condition, for instance, of taking and keeping a prescribed oath.[3] As a conditional pardon can be granted, it cannot be argued that the condition is void and that the pardon is absolute. If the condition is not satisfied, the pardon does not operate.[4]

In *Ex parte Wells*,[5] it was held that the phrase "grant pardon" itself necessarily implies the power to grant a conditional pardon. It

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Article 72 — Note 8

[1] (1877) 24 Law Ed 442 (443) : 95 U S 149, *Knote* v. *United States.*

[1a] (1877) 24 Law Ed 442 (443) : 95 U S 149, *Knote* v. *United States.*

[2] (1877) 24 Law Ed 442 (443) : 95 U S 149, *Knote* v. *United States.*
(1872) 20 Law Ed 519 (526) : 13 Wall 128, *United States* v. *Klein.*

[3] (1873) 21 Law Ed 426 (430) : 16 Wall 147, *Carlisle* v. *United States.*

Article 72 — Note 9

[1] Halsbury's Laws of England, 2nd Edition, Vol. 6, p. 477.
(1856) 15 Law Ed 421 (424) : 18 How 307 (311), *Ex parte Wells.*

[2] (1872) 20 Law Ed 519 (524) : 13 Wall 128, *United States* v. *Klein.*
(1856) 15 Law Ed 421 (421) : 18 How 307, *Ex parte Wells.*
(1833) 8 Law Ed 640 (644) : 7 Peters 150, *The United States* v. *Wilson.*

[3] (1872) 20 Law Ed 519 (526) : 13 Wall 128, *United States* v. *Klein.*

[4] (1856) 15 Law Ed 421 (423, 424) : 18 How 307, *Ex parte Wells.*

[5] (1856) 15 Law Ed 421 (424) : 18 How 307 (311).

was explained in that case that it would be a mistake to suppose that the word "pardon" was meant to be used exclusively with reference to an absolute pardon. As to the meaning in law, of the word 'pardon', Mr. Justice Wayne delivering opinion of the Supreme Court observed at page 423 of 15 Law. Edn. as follows :

> "In the law it has different meanings. . . . . Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English Law, every pardon has its particular denomination. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

Later on the learned Judge observed (at page 425 of 15 Law. Ed.) as follows:

> "The power as given is not to reprieve and pardon, but that the President shall have power to grant reprieves and pardons. . . . The difference between the real language (grant reprieves and pardons) and that used in the argument ('reprieve and pardon') is material. The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the Constitution is general; that is, common to the class of pardons or extending the power to pardon, to all kinds of pardons, known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them. . . . . In this view of the Constitution by giving to the words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms. The mistake in the argument is that in considering an incident of the power to pardon, the exercise of a new power, instead of its being part of the power to pardon. We use the word 'incident' as a legal term, meaning something appertaining to and necessarily depending upon another, which is termed the principle."

The expressions used in the Indian Constitution also are not the verbal forms 'pardon, reprieve' etc., but 'grant pardons, reprieves', etc. Hence, it is clear that the power includes the power to grant conditional pardons. But under the American Constitution the power to *commute* sentences has not been expressly conferred, and the commutation of a sentence, as for instance of a sentence of death into one of transportation for life, is treated as a form of conditional pardon, under which the pardon is granted on condition that a lower punishment is accepted. The same is the view under the English law also.[6] But the power of commutation of sentences has been conferred expressly under this Constitution, both under this article and under ART. 161, which refers to the Governor of a State. Hence, the question whether the power to grant pardon includes the power to commute the sentence will not arise under the Constitution.

10. Reprieves and respites. — In Wharton's LAW LEXICON, the word 'reprieve' has been explained as follows:

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[6] See Halsbury's Laws of England, 2nd Edition, Vol. 6, p. 477.

Article 72
Note 10

"REPRIEVE, the suspension of the execution of a criminal's sentence. It may take place:

(1) *Ex mandato regis*, at the mere pleasure of the Crown.

Or (2) *ex arbitrio judicis*, either before or after judgment; as, where the Judge is not satisfied with the verdict, or the indictment is insufficient, or any favourable circumstances appear in the criminal's character, in order to give time to apply to the Crown for either an absolute or conditional pardon.

Or (3) *ex necessitate legis*; as where a woman is capitally convicted and pleads her pregnancy.

Or (4) if the criminal become *non compos*—4 Steph. Com."

The word 'respite' has been explained as follows:

"RESPITE, to postpone—thus, to enter and respite an appeal is to enter the same, and postpone the hearing to a future day.

Also, interval, reprieve, suspension of a capital sentence, a delay, forbearance, or continuation of time.

There are respite of execution, of debt, of homage, and of a jury."

Thus, the two words seem to be interchangeable, but as this article uses both the words, it is necessary to understand the meaning of each separately, and avoid imputation of redundancy to the Constitution if possible. The word 'reprieve' seems primarily to connote the *suspension* of execution of a sentence, while respite conveys primarily the idea of *postponement* of execution of sentence.

In *Ex parte Wells*,[1] Mr. Justice Wayne of the Supreme Court of America observed as follows about the power to grant reprieves:

> "That is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis*, as where a female after conviction is found to be *enceinte*, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used to determine either of the two just mentioned, are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve."

Under Criminal Procedure Code, S. 401, the appropriate Government has the power to suspend the execution of the sentence. This power may also be exercised by the Central Government: S. 402A of the Code. Under S. 382 of the Code, if a woman, sentenced to death, is found to be pregnant the High Court shall order the execution of the sentence to be postponed. The power of suspending the execution of the sentence under S. 401 of the Code is the power of granting a

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Article 72 — Note 10

[1] (1856) 15 Law.Ed 421 (425) : 18 How 307.

reprieve, while the power of postponing the execution of a sentence under S. 382 of the Code is a power of granting respite.

11. Acceptance, whether necessary for pardon.—There has been some discussion in American decisions whether acceptance by the person pardoned is necessary to make a pardon complete. In *United States* v. *George Wilson*,[1] it was held that acceptance was necessary for the validity of a pardon. Chief Justice Marshall observed as follows in that case :

> "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him".

This decision was followed in *Burdick* v. *United States*,[2] in which it was held that a pardon from the President to be effective must be accepted by the person to whom it is tendered. In that case it was held that the tender of a pardon from the President does not destroy the privilege of a witness against self-crimination, and he may reject the pardon and refuse to testify, on the ground that his testimony may have an incriminating effect. But in *Biddle* v. *Perovich*,[3] it was held that the consent of the convicted person is not necessary for the commutation of his sentence into a less severe punishment. In that case it was held that the rule in *Burdick* v. *United States*[4] was not to be extended to it. Mr. Justice Holmes observed as follows in the course of his opinion:

> "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed . . . . . . Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done. So far as a pardon legitimately cuts down a penalty, it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave

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Article 72 — Note 11

[1] (1833) 8 Law Ed 640 (644) : 7 Peters 150.
[2] (1915) 59 Law Ed 476 (480) : 236 U S 79.
[3] (1927) 71 Law Ed 1161 (1163) : 274 U S 480.
[4] (1927) 71 Law Ed 1161 : 274 U S 480.

the reduced term or fine valid and to be enforced, and that the convict's consent is not required.

> "When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the executive order. Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will. The only question is whether the substituted punishment was authorized by law. . . . . . We cannot doubt that the power extends to this case. By common understanding imprisonment for life is a less penalty than death."

Under Arts. 72 and 161 of this Constitution, the power of commutation of sentences has been specifically conferred and there is no need, as under the American Constitution, Art. II, S. 2, sub-s. (1), to spell it out of the power to grant pardons, by holding that the power to grant pardons includes necessarily the power to impose such conditions as the President may deem fit. Hence, the question whether the acceptance of the person sentenced is necessary to commute a sentence of death into one of transportation or imprisonment for life cannot arise under this Constitution.

In this connection it may be noted that under the Criminal Procedure Code, S. 402, the consent of the person sentenced is not necessary for the *commutation* of sentence by the appropriate Government to a less severe punishment, while such consent is necessary under S. 401 for the conditions subject to which the execution of a sentence is suspended or a sentence is remitted.

It seems that it may be stated that the question of consent of the person sentenced only arises when a condition is attached to the pardon, reprieve, respite, remission or commutation that is granted. When no condition is attached, the consent of the person sentenced is not necessary for the validity of the pardon, etc. It will be seen from the above discussion that though the earlier American decisions adopted the view that acceptance by the person sentenced was necessary for the validity of a pardon, this view was reversed in the later decision of *Biddle* v. *Perovich*.[5]

12. **Commutation of sentence.**—Under the American Constitution, Art. II, S. 2, sub-s. (1), the President has the power to grant reprieves and pardons and this power has been held to include the power to grant commutation of sentence although such power has not been specifically conferred. Thus, the Presiden[illegible]as power to commute a sentence of death for murder into one of imprisonment for life.[1] Under this Article the power of commuting the sentence passed on any

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[5] **(1927) 71 Law Ed 1161 (1164) : 274 U S 480.**

Article 72 — Note 12

[1] **(1927) 71 Law Ed 1161 (1164) : 274 U S 480, *Biddle* v. *Perovich*.**
(1856) 15 Law Ed 421 (424) : 18 How 307 (311), *Ex parte Wells*.

person convicted of an offence has been expressly conferred on the President.

13. Object of pardoning power — The object of vesting a pardoning power in the highest authority in the State is to afford relief from undue harshness or evident mistakes in the operation or enforcement of the criminal law.[1] In *Ex parte Grossman*,[2] Chief Justice Taft of the Supreme Court of America, in delivering the opinion of the Court, observed as follows :

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the Courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the Courts power to ameliorate or avoid particular criminal judgments. It is a check intrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."

In *Ex parte Wells*,[3] Mr. Justice Wayne of the Supreme Court of America observed as follows with reference to the power of the American President to grant pardons and reprieves :

> "It meant that the power was to be used according to law; that is, as it had been used in England, and these States when they were colonies, not because it was a prerogative power, but as incidents of the power to pardon, particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy."

Further on, the learned Judge observed as follows :

> "A pardon is said by Lord Coke to be a work of mercy, whereby the King, either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical (3 Inst. 233). And the King's coronation oath is, 'that he will cause justice to be executed in mercy'."

Article 72 — Note 13

[1] (1925) 69 Law Ed 527 (535, 536) : 267 U S 87, *Ex parte Grossman.*
(1856) 15 Law Ed 421 (424) : 18 How 307, *Ex parte Wells.*

[2] (1925) 69 Law Ed 527 (535, 536) : 267 U S 87.

[3] (1856) 15 Law Ed 421 (423, 424) : 18 How 307.

Article 72
Note 14

14. Applicability of English principles. — Although under the American Constitution the pardoning power has been expressly made part of the written Constitution, the Supreme Court of America has laid down that the exercise of the power should be governed by the same principles as are applicable to the exercise of the King's power of mercy under the English Constitution. Thus, in *United States* v. *Wilson*,[1] Chief Justice Marshall observed as follows with reference to the power of the American President :

> "As this power had been exercised from time immemorial by the Executive of that nation whose language is our language and to whose judicial institutions ours bears a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it".

In *Ex parte Wells*,[2] Justice Wayne of the Supreme Court of America reiterated the same view and observed as follows :

> "The language used in the Constitution conferring a power to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain that power had been exercised by the King as the Chief Executive. Prior to the revolution the colonies being in effect under the laws of England, were accustomed to the exercise of it in the various forms as they may be found in the English law books. They were of course to be applied as occasions occurred and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England and familiar with the prerogatives exercised by the Crown. Hence, when the words 'to grant pardons' were used in the Constitution, they conveyed to the mind the authority as exercised by the English Crown or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word 'Pardon'. In the Convention which framed the Constitution no effort was made to define or change its meaning, although it was limited in cases of impeachment. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution."

In *Ex parte Grossman*,[3] Chief Justice Taft observed as follows :

> "The language of the Constitution cannot be interpreted safely except by reference to the Common Law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen States, were born and brought up in the atmosphere of the Common Law and thought and spoke in its vocabulary. They were familiar with other forms of

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Article 72 — Note 14

[1] (1833) 8 Law Ed 640 (643) : 7 Peters 150.

[2] (1856) 15 Law Ed 421 (424) : 18 How 307 (311).

[3] (1925) 69 Law Ed 527 (530, 531) : 267 U S 87.

Government, recent and ancient, and indicated in their discussions earnest study and consideration, of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the Common Law confident that they could be shortly and easily understood."

In view of the above quotations, it seems Indian Courts can legitimately draw on English law for guidance in interpreting the Constitution of India including the power of the President under this article. The leaders and statesmen who were responsible for the framing of the Constitution were also, like the founders of the American Constitution, persons trained in British jurisprudence and were also using the English language for expressing their ideas.

15. **Contempt of Court, pardon for.** — The pardoning power of the President of the United States of America extends to criminal contempts of Court. The words "Offences against the United States" in ART. II, S. 2, sub-s. (1) of the Constitution of the United States include criminal contempt. That which violates the dignity and authority of Federal Courts, such as an intentional effort to defeat their decrees, justifying punishment, violates a law of the United States and so must be an offence against the United States.[1] It is conceived that under this Constitution also, the pardoning power of the President will extend to criminal contempt of Court, in so far as it may be an offence falling under sub-cl. (b) of cl. (1) of the article. Criminal contempts were always within the understood scope of the pardoning power of the Executive.[2]

Extent of executive power of the Union.

73. (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (*a*) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State specified in Part A or Part B of the First Schedule to matters with respect to which

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Article 72 — Note 15

[1] (1925) 69 Law Ed 527 (532, 533) : 267 U S 87, *Ex parte Grossman.*

[2] (1925) 69 Law Ed 527 (532) : 267 U S 87, *Ex parte Grossman.*

the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

GOVERNMENT OF INDIA ACT, 1935

"8. (1) Subject to the provisions of this Act, the executive authotity of the Federation extends—

(a) to the matters with respect to which the Federal Legislature has power to make laws;

(b) to the raising in British India on behalf of His Majesty of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment;

(c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas:

Provided that—

(i) the said authority does not, save as expressly provided in this Act, extend in any Province to matters with respect to which the Provincial Legislature has power to make laws;

(ii) the said authority does not, save as expressly provided in this Act, extend in any Federated State, save to matters with respect to which the Federal Legislature has power to make laws for that State, and the exercise thereof in each State shall be subject to such limitations, if any, as may be specified in the Instrument of Accession of the State;

* * * *"

COGNATE PROVISION

Amendment seeking to make change in ART. 73—Procedure for such amendment — See ART. 368.

Synopsis

1. Scope of the article.
   - (a) Distribution of executive power follows that of legislative power.
   - (b) 'Executive power' not confined to carrying out laws.
   - (c) Limit of executive power — Extensible and not maximum.
   - (d) Implementation of treaties and agreements.
   - (e) Matters in Concurrent List.
   - (f) Power to give directions to State Government.
   - (g) Executive power of Union in State subjects in certain cases.
2. Theory of separation of powers—See Notes on Art. 245.

1. Scope of the article.—This article corresponds to S. 8 of the Government of India Act, 1935, which provided *inter alia* as follows :

> "Subject to the provisions of this Act, the executive authority of the Federation extends—(a) to the matters with respect to which the Federal Legislature has power to make laws."

(a) Distribution of executive power follows that of legislative power

The corresponding provision in relation to the executive power of a State is contained in ART. 162 of the Constitution which provides that the executive power of the State shall extend to matters with respect to which the Legislature of the State has power to make laws. The provision in the Government of India Act, 1935, corresponding to ART. 162 of this Constitution was contained in S. 49 (2) of the Act under which subject to the provisions of the Act the executive authority of each Province extended to matters with respect to which the Legislature of the Province had power to make laws. Thus, both under this Constitution and the Government of India Act, 1935, the distribution of executive power follows that of the legislative power.[1]

Under the British North America Act, 1867, also the distribution of executive authority follows in substance the distribution of legislative powers.[1a] In *Bonanza Creek Gold Mining Co., Ltd.* v. *Rex*,[2] Viscount Haldane in dealing with the Constitution of Canada observed as follows :

> "Executive power is in many situations which arise under the statutory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative."

(b) 'Executive power' not confined to carrying out laws

The meaning of the expression "executive power" has been considered in the notes on ART. 53. It has been submitted there that executive power is not confined to the execution or carrying out of the laws passed by the Legislature. This view finds support from the language used in this article, sub-cl. (a) of cl. (1). It says that the executive power of the Union shall extend to the matters with respect to which Parliament *has power to make laws.* The sub-clause does not say that the executive power is to extend to matters with respect to which Parliament *has made* laws. Similar is the wording, in this respect, of ART. 162 and the provisions in the Government of India Act, 1935. But, as pointed out in the notes on ART. 53, this does not mean that the Executive can flout the will of the Legislature. When the Legislature has made a valid law on a particular subject, the Executive is bound to act according to such law. This is because the Executive is not above the law any more than any ordinary subject.

Article 73 — Note 1

[1] 1953 Bom 337 (337) (Prs 2, 3) [AIR V 40 C 106] : I L R (1953) Bom 789 (DB), *Ali Gulshan* v. *State of Bombay*. (All executive functions relating to diplomatic, consular and trade representation can only be undertaken by the Union Government — State Government has no power to requisition property for housing a member of the staff of a foreign consulate.)

[1a] 1916 P C 193 (202) [A I R V 3] : (1916) 1 App Cas 566 (580) : 85 L J P C 114 (PC), *Bonanza Creek Gold Mining Company, Ltd.* v. *Rex*.

[2] 1916 P C 193 (202) [AIR V 3]: (1916) 1 App Cas 566 (587): 85 L J P C 114 (PC).

Subject to the valid laws made by the Legislature and to the provisions of the Constitution, the Government of India has power to pass orders of an executive character in relation to any subject which falls within the legislative jurisdiction of the Central Legislature.

In *In re Antonius Raab*,[3] the position was that the Indian Legislature had, in virtue of the Instrument of Accession which had been signed by the Maharaja of Baroda and which had been accepted by the Governor-General of India after the Indian Independence Act came into force, power to legislate on the subject of naturalisation in regard to persons in Baroda. It was pointed out by Bavdekar, J., that this meant that the executive authority of the Dominion of India, i.e., the Government of India, had power to pass orders in regard to naturalisation with reference to such persons.

(c) Limit of executive power—Extensible and not maximum

In *Emperor* v. *Sib Nath Bannerji*,[4] it was held by the Privy Council that the words of S. 49 (2) of the Government of India Act, 1935 (see *ante*), provided an *extensible* limit and not a maximum limit and that S. 124 (2) of the Act (corresponding to Art. 258 (2)) afforded a means of such extension. It may be noted that the word "extend" in itself does not imply that the provision lays down the maximum limit, inasmuch as the expression "extend to" does not mean "extend only to". The question whether other powers are included, therefore, cannot be answered conclusively only on the basis of this article to the exclusion of other considerations.

(d) Implementation of treaties and agreements

The executive power of the Union extends under sub-cl. (b) of cl. (1) to exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. The phraseology of this provision resembles that of S. 8 (1) (c) of the Government of India Act, 1935, under which the executive authority of the Federation extended to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance or otherwise in and in relation to tribal areas.

(e) Matters in concurrent list

With regard to "matters with respect to which Parliament has power to make laws" (cl. 1 (a)), such matters are enumerated in SCH. VII, LIST 1 (Union List), and LIST 3 (Concurrent List). In regard to the former, the Parliament has *exclusive* power to make laws, while in regard to the latter, both the Parliament and the State Legislatures have concurrent power of legislation. Under the proviso to cl. (1) of this article the executive power of the Union does not, as a general rule, extend to matters in the Concurrent List in regard to Part A and Part B States. In regard to such matters the executive power will normally vest in the respective States (see ART. 162). But this rule is subject to exceptions. Where it is expressly provided by the Constitution or in any law made by Parliament that the executive power in any matter covered by the Concurrent List should be vested in the Union, then the Union shall have executive power in regard to such matter. Otherwise, even though the Parliament may have legislative power concurrently with the State Legislature with regard to the matter in the Concurrent List, the executive power with regard to such matter shall be only in the State Government. See in this connection ART. 162, Proviso and ART. 353 (b). Under ART. 162, Proviso, where Union authorities have been given, by the Constitution or by any law made by Parliament, powers in regard to matters in the Concurrent List, State authorities shall not have executive powers in regard to such matters. Under ART. 353 (b) while a Proclamation of Emergency is in operation, Parliament can confer power and impose duties by law on Union authorities in regard to matters as to which Parliament can legislate although such matters may not be covered by the Union List. See also ART. 356.

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[3] 1950 Bom 101 (105) [A I R V 37 C 28] : I L R (1949) Bom 537 : 51 Cri L Jour 558 (DB).

[4] 1945 P C 156 (162) [AIR V 32] : 72 Ind App 241 : (1945) 7 F C R 195 : I L R (1945) Kar (PC) 371 (PC).

Under the Government of India Act, 1935, the rule on this subject was different, namely, that in regard to matters over which both the Central and Provincial Legislatures had legislative jurisdiction, the executive power was only vested in the Provincial Government and there was no provision for making an exception to the rule through legislation by the Central Legislature. So in all matters covered by the Concurrent List in the Legislative Lists (SCH. VII) of the Government of India Act, 1935, the executive power was exclusively vested in the Provincial Government. It was pointed out by Dr. Ambedkar in the course of the discussions in the Constituent Assembly on this article that this feature of the Government of India Act was a concession to the Muslim demand for extreme Provincial autonomy. Under the Government of India Act, 1935, however, the Central Government had power under S. 126 to give directions to the Provincial Governments in regard to the exercise of their executive power in respect of matters covered by Part II of the Concurrent List.

(f) Power to give directions to State Government

Under ART. 353 (a) of this Constitution, the Union Government has power to give directions to the State Government as to the exercise of its executive power when a Proclamation of Emergency is in operation.

(g) Executive power of Union in State subjects in certain cases

Clause (2) of this article provides for another exception to the rule enacted in cl. (1), sub-cl. (a), namely, that the executive power of the Union shall extend to all matters in respect of which the Union Parliament has power to make laws. Clause (2) applies both to matters in the Union List and the Concurrent List. Under the clause, even in regard to matters covered by the Union List, that is within the exclusive legislative jurisdiction of Parliament, the executive power will vest not in the Union but in the States in certain cases, namely, those in which immediately before the Constitution the executive authority was vested in the Provincial Government. The object of this clause is to ensure continuity of administration and not to allow such continuity to be disturbed by reason of the fact that some of the matters which were in the Concurrent or in the Provincial List under the Government of India Act, were transferred to the Union List under this Constitution. But it is open to the Parliament to provide otherwise. And when the Parliament does so, the executive authority of the State Government in regard to the matter will cease, even though such executive authority was vested in the Provincial Government immediately before the coming into force of the Constitution.

Some examples of the effect of cl. (2) may be given here. Under the Government of India Act, 1935, SCH. VII, LIST 2 (Provincial List), Item 9, the exclusive power of making laws in respect of "compulsory acquisition of lands" was vested in the Provincial Legislature. Under this Constitution, SCH. VII, LIST 2, Entry 36, the State Legislature has been given power to make laws with reference to "acquisition or requisitioning of property except for the purposes of the Union." Thus, the State Legislature has no power under the present Constitution in regard to the acquisition or requisitioning of property for the purposes of the Union, while under the Government of India Act the legislative power of the Provincial Legislature extended to the compulsory acquisition of land for all purposes including the purposes of the Central Government. The legislative power with regard to acquisition or requisitioning of property for the purposes of the Union has now been exclusively bestowed upon the Parliament under SCH. VII, LIST I, Entry 33. The effect of this change would have meant, in the absence of cl. (2), that the State Executive will have no authority to administer and to operate any law for the compulsory acquisition or requisitioning of land for the purposes of the Union. And this power would have been transferred automatically to the Union, although such law may be a pre-Constitution State law within the administrative jurisdiction of the Provincial Government immediately before the coming into force of the Constitution. This result has been avoided by the enactment of cl. (2). Hence, although a State Legislature may have no power now to enact a law relating to the compulsory acquisition or requisitioning of property for the purposes of the Union, yet under cl. (2) of this article, the State Government may administer any pre-Constitution State law which may be in force regarding the compulsory acquisition of land, even if the object of the acquisition is to benefit the Union.

Similarly, under the present Constitution, the exclusive jurisdiction of legislating with reference to railways has been vested in the Parliament (SCH. VII, LIST 1, Entry 22). But under the Government of India Act, minor railways came under the Provincial legislative jurisdiction. (SCH. VII, LIST 2, Entry 18). So also, under this Constitution, SCH. VII, LIST 1, Entry 23, highways declared by or under law made by Parliament to be national highways are within the exclusive legislative jurisdiction of the Parliament while under the Government of India Act, 1935, SCH. VII, LIST 2, Entry 18, all roads came under the Provincial List.

2. Theory of separation of powers.—See notes on Art. 245.

Council of Ministers

Council of Ministers to aid and advise President.

74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

Government of India Act, 1935

"9. (1) There shall be a Council of Ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise ot his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion :

Provided that nothing in this sub-section shall be construed as preventing the Governor-General from exercising his individual judgment in any case where by or under this Act he is required so to do . . ."

"10. (4) The question whether any and, if so, what advice was tendered by Ministers to the Governor-General shall not be enquired into in any Court."

Other provisions as to Ministers.

75. (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by

law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

GOVERNMENT OF INDIA ACT, 1935

"10. (1) The Governor-General's Ministers shall be chosen and summoned by him, shall be sworn as members of the Council, and shall hold office during his pleasure.

(2) A Minister who for any period of six consecutive months is not a member of either Chamber of the Federal Legislature shall at the expiration of that period cease to be a Minister. . . . "

COGNATE PROVISION

Clause (5)—"Not a member of either House"—Vacation of seat of a member of either House of Parliament—See ART. 101.

Synopsis of Arts. 74 and 75

1. Council of Ministers.
   - (a) Introductory.
   - (b) "Aid and advise."
   - (c) Comparison with American Constitution.
   - (d) Parliamentary and non-Parliamentary systems of Executive.
2. The Prime Minister.

(a) Introductory

1. Council of Ministers. — Under ART. 53 (1), the executive power of the Union is vested in the President and is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under ART. 77 (1), all executive action of the Government of India must be expressed to be taken in the name of the President. Under ART. 74, cl. (1), it is provided that there shall be a Council of Ministers with the Prime Minister at the head, to aid and advise the President in the exercise of his functions. Clause (2) provides that the question whether any, and if so what, advice was tendered by the Ministers to the President shall not be enquired into in any Court.

(b) "Aid and advise"

The question arises as to the force of the expression "aid and advise" in cl. (1) of ART. 74. Is the advice tendered by the Ministers binding on the President? If the words are taken alone, they only can mean that the function of the Ministers is only to advise and it is for the President to accept the advice or not. In other words, the words standing alone would mean that the decision in all matters is to be that of the President. But if cl. (1) of ART. 74 is taken along with other provisions of the Constitution, and also in the background of the Government of India Act, 1935, in which also similar expressions occur, the clause seems to imply *even as a matter of construction of the Constitution* that the President is *bound* to act according to the advice of his Ministers. The following considerations are relevant in this connection: under ART. 75 (3), the Council of Ministers shall be collectively responsible to the House of the People. There is no provision in the Constitution making the President responsible for the acts of the Government although under ART. 53 the executive power of the Union is stated to be vested in the President. It seems that there would be no meaning in saying that the Council of Ministers shall be responsible to the House of the People if the final authority of deciding matters is not conferred by the Constitution on them.

Similarly, under ART. 78, cl. (a) it is provided that the Prime Minister should communicate to the President all *decisions* of the Council of Ministers. Under cl. (c) of the same article, it is the duty of the Prime Minister, if the President so requires, to submit to the consideration of the Council of Ministers any matter on which a *decision* has been taken by a Minister but which has not been considered by the Council. The use of the expression 'decision' in ART. 78, cls. (a) and (c) clearly shows that *decisions* are taken by Ministers or Council of Ministers and that their function under the Constitution is not purely advisory.

Article 78 clearly shows that it is the *decision* of the Council of Ministers and not their *advice* that is communicated to the President.

Under ART. 163, cl. (1) which is the corresponding provision relating to States, there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. This provision seems clearly to show that where the Constitution contemplates that the advise of Ministers may be rejected by the executive head, it is expressly provided that there should be an exception to the rule of aid and advice by the Council of Ministers.

The Government of India Act, 1935, S. 9, sub-section (1) ran as follows:

> "There shall be a Council of Ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise of his functions except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion : Provided that nothing in this sub-section shall be construed as preventing the Governor-General from exercising his individual judgment in any case where by or under this Act he is required so to do."

Similarly, S. 17 (5) of the Government of India Act, 1935, ran: ". . . . The Governor-General shall act in his discretion after consultation with his Ministers."

These provisions also show that when the executive authority is to be entitled to reject the advise of his Ministers, an exception is expressly created to the rule of Ministerial advice.

It is also well known that under the British Constitution, it is unconstitutional for the Crown to reject the advice of the Ministry and seek advice elsewhere. Under that Constitution, most executive authority is legally vested in the King and is exercised in his name. But every official act of the King is done on the responsibility of a Minister. On this is based the doctrine that the King can do no wrong.

The words "aid and advise" in cl. (1) of ART. 74, therefore, seem to imply, in the context of the Constitution, power to give *binding* advice, which it would be unconstitutional for the President to reject.

Arts. 74-75 Note 1

Under cl. (2) of Art. 74 it is not open to any Court to enquire into the question whether any and what advice was given by the Minister to the President in any matter. But a President can be impeached for violation of the Constitution and it would appear to be unconstitutional for him to refuse to accept the advice of a Ministry which enjoys the confidence of the majority of members of the House of the People. Thus, it is only in *form* that the Council of Ministers *advises* the President, while in *substance* the Constitution vests them with the power of making *decisions*, although these decisions are enforced in the name of the President under Art. 77 (1). The words "aid and advise" have evidently been used, more to maintain the dignity of the office of President than to suggest that the advice of the Council of Ministers is binding on the President.

(c) Comparison with American Constitution

Under the Constitution of the United States, there is no provision that there shall be a Council of Ministers responsible to the Congress to aid and advise the President in the exercise of his functions. Under Art. II, S. 1 of the United States Constitution, the executive power is vested in the President. Under Art. II, S. 2 (1), the President may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices.

Under Art. II, S. 2, sub-s. (2) the President has the power to appoint with the advice and consent of the Senate, *inter alia*, public Ministers. In the exercise of this power, the President of United States chooses a Cabinet of ten to assist him in the administration. Any member of the Cabinet may be removed by the President. None of these Ministers can sit or vote in the Congress. The Ministers are not responsible to anybody except the President. The Ministers' acts are legally the acts of the President. It is a group of persons, each individually dependent on and answerable to the President, but with no joint policy and no collective responsibility except such as results from their common subordination to the President. The President is personally responsible for his acts not to the Congress but to the people by whom he is chosen. He cannot avoid responsibility by alleging the advice of his Ministers. For he need not follow it and they are bound to obey him or retire. The adverse vote of the Congress does not affect his position. The President and his Cabinet have no recognized spokesmen in either House. The Executive has no opportunity of leading and guiding the Legislature and of justifying in debates its administrative acts. Either House of the Congress or both Houses jointly can pass resolutions calling on the President or his Ministers to take certain steps or disapproving steps they have already taken. The President need not object to such resolutions, need not even notice them. They do not shorten his term or limit his discretion. Either House of the Congress can direct a committee to summon and examine a Minister. The committee can do nothing more than question him. He may evade their questions and with impunity tell them that he means to take his own course.

(d) Parliamentary and non-Parliamentary systems of Executive

The American President is said to provide a perfect illustration of a *non-Parliamentary* or fixed executive. Comparing his position with that of the President under the Indian Constitution, it would be seen that the position of the Indian President is quite different. Although under ART. 53 the executive power of the Union is vested in the President, as the executive power is vested in the President of the United States, and although all executive action of the Government of India is required to be taken in the name of the President under ART. 77 (1), yet the provision that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions and that this Council of Ministers shall be responsible to the House of the People, has assimilated the supreme executive under the Indian Constitution to the Parliamentary type on the model of the British executive. In this connection it may also be noted that although Ministers hold office during the pleasure of the President, the provision that the Council of Ministers shall be responsible to the House of the People involves the practical consequence that the President cannot choose anybody and everybody to run the Government but that he can only look to persons who enjoy the confidence of the majority in the House of the People for this purpose. Reference may also be made to the provisions of ART. 75, cl. (5) under which a Minister who for any period of six consecutive months is not a member of either House of Parliament shall, at the expiration of that period, cease to be a Minister. Thus, the Indian Constitution makes the executive responsible to the Legislature and furnishes an example of the Parliamentary type of the executive,[1] while under the American Constitution, the supreme executive, namely, the President, is responsible not to the Legislature but to the electorate and thus constitutes an example of a fixed executive, which is known as the Presidential type as distinguished from the Parliamentary one.

2. **The Prime Minister.**—Though the Prime Minister is at the head of the Council of Ministers and is charged with the duty to aid and advise the President in the exercise of his functions, the Prime Minister is not directly responsible to the *public.* The Council of Ministers, of which the Prime Minister is the head, is collectively responsible to the House of the People.[1]

The Attorney-General for India

Attorney-General for India.

76. (1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

Articles 74 and 75 — Note 1

[1] 1951 All 257 (307) [A I R V 38 C 51] : I L R (1951) 1 All 269 (FB), *Motilal* v. *Uttar Pradesh Govt.*

Articles 74 and 75 — Note 2

[1] 1952 Nag 301 (302) [AIR V 39] : I L R (1952) Nag 331 (DB), *Dr. N. B. Khare* v. *Jawaharlal Nehru.*

(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

GOVERNMENT OF INDIA ACT, 1935

"16. (1) The Governor-General shall appoint a person, being a person qualified to be appointed a judge of the Federal Court, to be Advocate-General for the Federation.

(2) It shall be the duty of the Advocate-General to give advice to the Federal Government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Governor-General, and in the performance of his duties he shall have right of audience in all courts in British India and, in a case in which federal interests are concerned, in all courts in any Federated State.

(3) The Advocate-General shall hold office during the pleasure of the Governor-General, and shall receive such remuneration as the Governor-General may determine.

(4) In exercising his powers with respect to the appointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor-General shall exercise his individual judgment."

COGNATE PROVISIONS

Clause (1). — "Qualified to be appointed a Judge of the Supreme Court" —For qualification for appointment as a Judge of the Supreme Court, see ART. 124 (3).

Clause (2).—"Discharge the functions"—For right of the Attorney-General to speak in either House, any joint sitting of the Houses and any Committee of Parliament, see ART. 88.

Synopsis

1. Scope of the article.
2. Qualifications for Attorney-General.
3. Remuneration, duties, etc., of Attorney-General—Clauses (2) to (4).
4. Position of Attorney-General.

1. Scope of the article. — The Attorney-General is the highest law officer of the Crown in England. The Constitution of India has in this article made provision for a similar appointment in India. As regards the States, Article 165 provides for the appointment of an Advocate-General. The provisions of that article are similar to those of this article.

Under the Government of India Act, 1935, S. 16, there was provision for the appointment of an Advocate-General for India. That section ran as follows:

> "16. (1) The Governor-General shall appoint a person, being a person qualified to be appointed a Judge of the Federal Court, to be Advocate-General for the Federation.
>
> *Advocate-General for Federation.*
>
> (2) It shall be the duty of the Advocate-General to give advice to the Federal Government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Governor-General, and in the performance of his duties he shall have right of audience in all courts in British India and, in a case in which federal interests are concerned, in all courts in any Federated State.
>
> (3) The Advocate-General shall hold office during the pleasure of the Governor-General, and shall receive such remuneration as the Governor-General may determine.
>
> (4) In exercising his powers with respect to the appointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor-General shall exercise his individual judgment."

It will be seen that except for the change of name from Advocate-General to Attorney-General and for the omission of sub-section (4) of S. 16, providing that in exercising his powers in regard to the appointment and dismissal of the Advocate-General and the determination of his remuneration the Governor-General should act in the exercise of his individual judgment, the provisions of ART. 76 substantially follow the provisions of S. 16 of the Government of India Act, 1935. Under the Government of India Act, 1919, there was no Advocate-General for the whole of India. But His Majesty appointed an Advocate-General for each of the Presidencies of Bengal, Madras and Bombay.

2. Qualifications for Attorney-General. — Clause (1) of this article requires that the person appointed as Attorney-General should be qualified to be appointed as a Judge of the Supreme Court. As to the qualifications required for appointment as Judge of the Supreme Court, see ART. 124 (3).

3. Remuneration, duties, etc., of Attorney-General — Clauses (2) to (4). — The President has made the following rules[1]

Article 76 — Note 3

[1] Gazette of India (Extraordinary), January 28, 1950, Page 737, No. F. 43/50-C. D/- 28-1-1950.

regulating the remuneration and duties of the Attorney-General for India :

"1. In these rules, 'Attorney-General' means the person appointed under cl. (1) of ART. 76 of the Constitution to be the Attorney-General of India, and includes any person appointed to act as the Attorney-General of India during the absence on leave or deputation, of the permanent incumbent of the office.

2. (1) The Attorney-General shall, except during any period of absence on leave or deputation, be paid a retainer of rupees four thousand per month and an office allowance of rupees thirty-five per month.

(2) The services of a personal assistant and of a jemadar, office accommodation and telephones at his office and residence shall be provided free of cost by Government.

3. The Attorney-General will normally reside at New Delhi.

4. It shall be the duty of the Attorney-General:

(a) to advise the Government of India on such legal matters as are referred to him by the Government of India and to perform such other duties of a legal character as are assigned to him from time to time by the Government of India ;

(b) to appear on behalf of the Government of India in all cases (including suits, appeals and other proceedings) in the Supreme Court in which the Government of India is concerned ;

(c) to represent the Government of India in any reference made by the President to the Supreme Court under ART. 143 of the Constitution ; and

(d) to discharge the functions conferred on the Attorney-General by or under the Constitution or under any other law for the time being in force.

5. For the performance of the duties mentioned in paragraph 4, the Attorney-General shall not be paid any fees other than the retainer payable under paragraph 2 :

Provided that, if any costs are awarded or allowed to the Government of India in any such case, as is referred to in paragraph 4, such part of the costs as is recovered in respect of fees payable to the Attorney-General, shall be paid to the Attorney-General.

6. The Government of India may require the Attorney-General to appear in any High Court in any case in which the Government of India is concerned ; and a daily fee of sixty gold mohurs shall be payable to the Attorney-General for the days of his absence from headquarters in connection with such appearance, including the days of departure from and arrival back at headquarters.

7. Where the Attorney-General is required, otherwise than under paragraph 6, to leave headquarters in the performance of his official duties, travelling and other allowances on the scale admis-

sible to a Judge of the Supreme Court on tour shall be paid to the Attorney-General for journeys necessarily performed in the course of those duties.

8. The Attorney-General shall not—
   (a) advise or hold briefs against the Government of India :
   (b) advise or hold briefs in cases in which he is likely to be called upon to advise, or appear for, the Government of India :
   (c) defend accused persons in criminal prosecutions without the permission of the Government of India : or
   (d) accept appointment as a Director in any company without the permission of the Government of India."

In England, the Attorney-General is not entitled to have private practice. But R. 8 of the Rules, quoted above, shows that this is not the case in India although the Attorney-General is not allowed to appear against the Government of India or do the other acts enumerated in R. 8.

Under ART. 88, the Attorney-General has the right to speak in and otherwise take part in the proceedings of either House of Parliament, although he cannot vote. Under ART. 105 (4) he is entitled to the privileges and immunities of members of Parliament. The Attorney-General is not a member of Parliament or of the Council of Ministers. Under O. 4 R. 15 of the Supreme Court Rules, the Attorney-General for India, after him the Solicitor-General of India, and after him the Advocate-General of a State appearing as such, shall have precedence over all other Advocates in the Court. Order 41 of the Supreme Court Rules runs as follows :

> "R. 1. The Court may direct notice of any proceedings to be given to the Attorney-General for India or to the Advocate-General of any State, and the Attorney-General for India or the Advocate-General to whom such notice is given may appear and take such part in the proceedings as he may be advised.
>
> "R. 2. The Attorney-General for India or the Advocate-General of any State may apply to be heard in any proceedings before the Court, and the Court may, if in its opinion the justice of the case so requires, permit the Attorney-General for India or the Advocate-General so applying to appear and be heard, subject to such terms as to costs or otherwise as the Court may think fit."

Order 27-A of the Civil Procedure Code, provides as follows :

Notice to the Advocate-General.

> "Rule 1. In any suit in which it appears to the Court that any such question as is referred to in cl. (1) of ART. 132 read with ART. 147 of the Constitution is involved, the Court shall not proceed to determine that question until after notice has been given to the Attorney-General for India, if the question of law concerns the Central Government and to the Advocate-General of the State if the question of law concerns a State Government.

"Rule 2. The Court may at any stage of the proceedings order that the Central Government or a State Government shall be added as a defendant in any suit involving any such question as is referred to in cl. (1) of ART. 132 read with ART. 147 of the Constitution if the Attorney-General for India or the Advocate-General of the State as the case may be, whether upon receipt of notice under R. 1, or otherwise, applies for such addition and the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question of law involved.

Court may add Government as party.

"Rule 3. Where under R. 2 Government is added as a defendant in a suit, the Attorney-General, the Advocate-General or the Government shall not be entitled to or liable for costs in the Court which ordered the addition unless the Court having regard to all the circumstances of the case for any special reason otherwise orders.

Costs.

"Rule 4. In the application of this Order to appeals the word 'defendant' shall be held to include a respondent and the word 'suit' an appeal."

Application of Order to appeals.

4. Position of Attorney-General. — The Attorney-General of England is the Chief Law Officer of the Crown. His functions are summed up in Wharton's LAW LEXICON as follows :

"Attorney-General, a great officer of state appointed by Letters Patent, and the legal representative of the Crown in the Supreme Court. He is also *ex officio* head of the bar for the time being. He exhibits informations, prosecutes for the Crown in criminal matters and in revenue causes, and used to grant fiats for writs of error until they were abolished by S. 20 of the Criminal Appeal Act, 1907. His fiat or consent is required before certain proceedings or prosecutions can be commenced (see e. g., Public Bodies Corrupt Practices Act, 1889, and Prevention of Corruption Act, (1906). In many cases also (see e. g., Lunacy Act, 1890, S. 325; Public Health Act, 1936, S. 298; Public Health (Officers) Act, 1884; Public Health (Members and Officers) Act, 1885; Official Secrets Act, 1911, S. 8), his consent is necessary before penalties can be recovered. His fiat is necessary for certain appeals to the House of Lords. See Appellate Jurisdiction Act, 1876 (c. 59), S. 10. When the House of Lords sits in a committee of privileges, it is the duty of the Attorney-General to attend at the bar in a judicial capacity and report on the claim. As a law officer he can hear applications for and make grants of patents on appeal from the Comptroller, though in practice this work is more usually undertaken by the Solicitor-General. See Letters Patent. The Attorney-General is almost invariably a member of the House of Commons, and is appointed on the advice of the Government, with which he goes out of office. He has charge in the 'House' of Government legal measures, and deals with legal questions there on behalf of the Government."

The Solicitor-General is the second Law Officer of the Crown and comes next to the Attorney-General as regards precedence. The duties of the Attorney-General devolve on him in the absence or incapacity of the Attorney-General.

The Attorney-General is an Officer of the Crown and in that sense only, the Officer of the public.[1] Although the Attorney-General is the official leader of the Bar, his opinion as such has no effect in Court and cannot be cited as an authority on a proposition of law.[2]

In *R.* v. *Hunt*,[3] the defendant was being prosecuted for conspiring to disturb the peace, excite discontent, disaffection, etc., contempt of Government and Constitution and of unlawfully assembling. Evidence was given that he marched with others in military formation to a place of assembly for the purpose of obtaining reform of the House of Commons and that he presided over other meetings held for a like purpose. The defendant contended that the opinion of the Attorney-General regarding the legality of other previous meetings should be used in evidence on his behalf. It was held that such evidence could not be admitted. Bailey, J., observed, "the opinion of the Attorney-General has no effect here. You must take the law from me".

It is for the officers of the Crown to make out clearly the prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation.[4]

Courts exercise over the Attorney-General same authority which they exercise over every other suitor and the Attorney-General would not, any more than any other suitor, be permitted to prosecute any proceeding which was merely vexatious or had no legal objects.[5]

Conduct of Government Business

Conduct of business of the Government of India.

77. (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules[a] to be made by the President, and the validity of an order or instrument which is so authenticated shall not be

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Article 76 — Note 4

[1] (1818) 36 E R 384 (396) : 1 Swan 265 (294), *Attorney-General* v. *Brown.*

[2] *See* (1820) 1 State Tr (N S) 171, *R.* v. *Hunt.*

[3] (1820) 1 State Tr (N S) 171.

[4] (1866) L R 1 Ex 381 (386), *Attorney General to the Prince of Wales* v. *Crossman.*

[5] (1848) 50 E R 834 (837) : 11 Beav 306 (314), *R.* v. *Prosser.*

called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

a. For the rule regarding the authentication by officers of orders and other instruments made and executed in the name of the President under Art. 77 (2), see Ministry of Home Affairs Notifn. No. S. R. O. 167 dated 19-6-1950 published in the Gazette of India, 1950, Part II-Sec. 3, page 174.

GOVERNMENT OF INDIA ACT, 1935.

Note.—For text of S. 17 of the Government of India Act, 1935, which corresponds with this article, see NOTE 1 on this article.

Synopsis

1. Cognate and analogous law.
    - (a) Government of India Act, 1935.
    - (b) Constitution of Burma.
2. Scope of the article.
3. Authentication of Government orders—Clause (2).
    - (a) Publication of Order in Government Gazette — Effect.

1. Cognate and analogous law. — Article 166 of the Constitution is the corresponding provision in regard to States and is similar to this article.

(a) Government of India Act, 1935

Section 17 of the Government of India Act, 1935, corresponded to this article. The section ran as follows :

Conduct of business of Federal Government.

"17. (1) All executive action of the Federal Government shall he expressed to be taken in the name of the Governor-General.

(2) Orders and other instruments made and executed in the name of the Governor-General shall be authenticated in such manner as may be specified in rules to be made by the Governor-General, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor-General.

(3) The Governor-General shall make rules for the more convenient transaction of the business of the Federal Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor-General is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring Ministers and Secretaries to Government to transmit to the Governor-General all such information with respect to the business of the Federal Government as may be specified in the rules or as the Governor-General may otherwise require to be so transmitted, and in particular requiring a Minister to bring to the notice of the Governor-General, and the

Article 77
Note 1

> appropriate Secretary to bring to the notice of the Minister concerned and of the Governor-General, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor-General.
>
> (5) In the discharge of his functions under sub-sections (2), (3) and (4) of this section the Governor-General shall act in his discretion after consultation with his Ministers."

The similarity between S. 17 and this article is clear on the face of it. Sub-sections (4) and (5) of S. 17, however, have been omitted. But the duty of communicating information to the Governor-General under sub-section (4) of S. 17 has its prototype in ART. 78, cl. (a) relating to the duty of the Prime Minister to communicate to the President all the decisions of the Council of Ministers. No doubt, there are material differences between the two provisions.

Sub-section (5) of S. 17 clearly points to a class of cases in which the Governor-General was to act in his discretion after consultation with his Ministers. As under S. 9 of the Act corresponding to ART. 74 of this Constitution, the expression used to denote the function of the Council of Ministers is "to aid and advise the Governor-General", the phraseology of sub-section (5) of S. 17 indicates that the normal meaning of the expression "aid and advise" in S. 9, sub-section (1) is something different from merely giving advice or being consulted by the Governor-General. Thus, S. 17, sub-section (5) also supports the view submitted in the notes on ARTS. 74 and 75 that the words "aid and advice" of the Council of Ministers to the President have acquired, in the context of the constitutional law, a technical connotation and mean much more than a mere right to advise and to be consulted.

Section 59 of the Government of India Act, 1935, relates to Provincial Government and is similar to S. 17.

Under the Government of India Act, 1919, also, there was a provision similar to this article. This was S. 49 which ran as follows:

> "49. (1) All orders and other proceedings of the Government of a Governor's Province shall be expressed to be made by the Government of the Province, and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders, and other proceedings relating to transferred subjects from other orders and proceedings.
>
> Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the Province.
>
> (2) The Governor may make rules and orders for the more convenient transaction of business in his Executive Council and with his Ministers, and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the Government of the Province.
>
> The Governor may also make rules and orders for regulating the relations between his Executive Council and his Ministers for

the purpose of the transaction of the business of the local Government :

Provided that any rules or orders made for the purposes specified in this section which are repugnant to the provisions of any other rules made under this Act shall, to the extent of that repugnancy, but not otherwise, be void."

(b) Constitution of Burma

The corresponding provision in the Constitution of Burma is S. 121 which runs as follows :

"121. (1) All executive action of the Union Government shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the transaction of the business of the Union Government, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the President is by or under this Constitution required to act in his discretion.

Without prejudice to the generality of the foregoing provisions the allocation of business may be regionwise as well as subjectwise."

2. **Scope of the article.** — As seen in NOTE 1, this article has its prototypes in the Government of India Act, 1935. It is the logical sequel to ART. 53 which vests the executive power of the Union in the President. Although this power has to be exercised in accordance with the advice of the Council of Ministers (see notes on ARTS. 74 and 75), still in the eye of the law the active agent in the Constitution on its executive side is the President. Clause (2) of the article is intended to obviate disputes about the question whether a certain order is that of the President or not. Clause (3) is also in accordance with the theory of the Constitution under which the President is the supreme Executive and the whole Government on the executive side is carried on under his direction.

3. **Authentication of Government orders — Clause (2).** — This clause contains two parts: (i) All orders and instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in the rules to be made by the President. (ii) Where an order or instrument is so authenticated, its validity cannot be questioned on the ground that it is not an order or instrument made or executed by the President.

As regards the rules for authentication of Government orders, the following rule has now been made by the President[1]:

Article 77 — Note 3

[1] Notification No. S. R. O. 167 dated 19-6-1950, Gaz. of India, Part II, Sec. 3 dated 24-6-1950, p. 174.

"Orders and other instruments made and executed in the name of the President shall be authenticated by the signature of a Secretary, Joint Secretary, Deputy Secretary, Under Secretary or Assistant Secretary to the Government of India, or

(1) in the case of orders in Ministry of Railways, by a Secretary, Deputy Secretary or Assistant Secretary to, or by a Director or Deputy Director or Assistant Director of, or by the Controller or the Deputy Controller of Railway Accounts in, the Raliway Board; or

(2) in the case of orders in the Ministry of Defence, by the Director, Military Lands and Cantonments, the Director, Military Regulations and Forms, the Chief Administrative Officer, an Assistant or a Deputy Assistant Chief Administrative Officer: or

(3) in the case of orders relating to the Ministry of Finance (Defence) or to the Military Accounts Department, by a Financial Adviser, Additional Financial Adviser, Joint Financial Adviser, Deputy Financial Adviser, Additional Deputy Financial Adviser, or Assistant Financial Adviser, Ministry of Finance (Defence); or

(4) in the case of orders relating to the Posts and Telegraphs Department, by the Director-General or the Senior Deputy Director-General or the Chief Engineer or a Deputy Director-General, Posts and Telegraphs, or a Director of Postal Services or Controller of Telegraph Traffic, or a Deputy Chief Engineer, or Assistant Chief Engineer or Assistant Director-General, Posts and Telegraphs; or

(5) in the case of orders in the Ministry of Finance, by a Finance Officer, or the Controller or the Deputy Controller of Capital Issues; or

(6) in the case of orders relating to the Department of Scientific Research, by the Secretary, Department of Scientific Research."

(a) Publication of order in Government Gazette—Effect

Under S. 78 of the Evidence Act, it is not necessary to prove a Government order that the original paper on which the order was written should be produced in Court. It is enough under sub-sect. (1) of that section if a document purporting to be printed by order of the Government is produced. Thus, the production of the Government Gazette is enough for the purpose.[1a] But, this by itself, will not prove that the order has been authenticated in a manner required by the rules made by the President. It will be open to a person to contend that the order as published in the Gazette has not been authenticated in the manner specified in the rules.[2] But, in such cases, the presumption under S. 114, Illustration (e) of the Evidence Act (that judicial and official acts have been regularly performed) may be applied, and the publication in the official Gazette of an order purporting to be a Government order, may be presumed to be validly authenticated according to the rules and the burden is *not* on the party relying on the order to prove the rules and show that the order has been authenticated in accordance with the rules.[3] But the presumption under S. 114 of the Evidence Act is only a rebuttable presumption and it would be open to a party, by proving the rules in Court, to show that the order published in the Gazette has not been authenticated in the manner specified in the rules.

[1a] 1927 Mad 980 (981) [AIR V 14] (SB), *Commr., Madras Corpn.* v. *Ekambara Naicker.*

[2] 1927 Mad 22 (31) [AIR V 14], *Ekambara* v. *Madras Corporation.*

Where a Government order is authenticated according to the rules, it cannot be questioned on the ground that it is not the order of the proper authority under the law.[4] This is the principle embodied in the latter part of cl. (2). But the due authentication of an order under cl. (2) only precludes its being called in question on the ground that it is not an order made by the President. The clause does not shut out other questions bearing on the validity of the order, as, for instance, the correctness of the recitals in the order as to the facts which are essential for its validity.[5] Thus, in *Emperor* v. *Sibnath Bannerji*,[6] their Lordships of the Privy Council pointed out, with reference to S. 59 (2) of the Government of India Act, 1935, that it only excluded one ground of challenge. Their Lordships observed as follows :

> " In the opinion of their Lordships, the contention of the Crown goes too far, as the sub-section only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor. Their Lordships agree with the statement by the learned Chief Justice of the Federal Court, namely, 'It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid-making of that order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a prima facie case that the recital is not accurate'."

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[3] 1927 Mad 980 (981) [AIR V 14] (SB), *Commr., Madras Corpn.* v. *Ekambara Naicker*. (Further in this case there was a duly authenticated Government order directing the publication of the notification in question in the Gazette: AIR 1927 Mad 22, Reversed on this point.)

[4] 1926 Mad 297 (304) [AIR V 13] (DB), *Md. Raza Saheb* v. *Sadasiva Rao*. (Case under S. 49 (1) of Government of India Act (1919).)

[5] 1945 P C 156 (161) [AIR V 32] : 72 Ind App 241 : (1945) 7 F C R 195 : I L R (1945) Kar (PC) 371 (PC), *Emperor* v. *Sibnath Banerji*.

[6] 1945 P C 156 (161) [AIR V 32] : 72 Ind App 241 : (1945) 7 F C R 195 : I L R (1945) Kar (PC) 371 (PC).

Thus, even in regard to such a question, the maxim *omnia praesumuntur rite et esse acta* (Evidence Act, S. 114, Illustration (e)) will apply and the Court is entitled to presume, until the contrary is proved, the correctness of the recitals in the order.[7]

See also notes on ART. 166.

Duties of Prime Minister as respects the furnishing of information to the President, etc.

78. It shall be the duty of the Prime Minister—

(*a*) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;

(*b*) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and

(*c*) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

GOVERNMENT OF INDIA ACT, 1935

"17. (4) The rules shall include provisions requiring Ministers and Secretaries to Government to transmit to the Governor-General all such information with respect to the business of the Federal Government as may be specified in the rules, or as the Governor-General may otherwise require to be so transmitted, and in particular requiring a Minister to bring to the notice of the Governor-General and the appropriate Secretary to bring to the notice of the Minister concerned and of the Governor-General, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor-General."

(a) Government of India Act, 1935, S. 17 (4)

1. Cognate and analogous provisions. — Section 17, sub-sect. (4) of the Government of India Act, 1935, provided that the rules made by the Governor-General for the more convenient transaction of the business of the Government shall include provisions requiring Ministers and Secretaries to Government to transmit to the Governor-General all such information with respect to the business of the Federal Government as may be specified in the rules, or as the Governor-General may require to be so transmitted.

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[7] ('35) ILR 62 Cal 1041 (1044) (DB), *Ananta Kumar Chakrabarti* v. *Emperor.*

Article 167 of the Constitution imposes on the Chief Minister of a State duties analogous to those of the Prime Minister under this article.

(b) Constitution of Burma

Section 124 of the Burmese Constitution requires the Prime Minister to keep the President generally informed on all matters of domestic and international policy.

2. Scope of the article. — This is one of the articles in the Constitution embodying some of the vital conventions of the British Constitution. The object of the provision is to allow the fullest opportunity to the President to influence the policy and the decisions of the Government, and to ensure a harmonious working between the President and the Cabinet as regards the administration of the country. It has been seen in the notes on ARTS. 74 and 75 that the President has to act according to the advice of the Council of Ministers. But this does not take away from him the right and privilege of being informed of the policies of Government and to exert what influence he can on such policies by expressing his own views thereon. What the influence the President is able to exercise in actual practice will depend to a great extent on his personality and ability. It is a truism under British constitutional law that the Crown, although it has lost its political power, has the right to be consulted, the right to warn and the right to encourage. A similar position is vouchsafed to the President under this article. But the President is only entitled to be in contact with the Prime Minister and other Ministers. It is not contemplated that he should be able to *directly* influence the administration. This is also the position of the Crown in England.

CHAPTER II.—PARLIAMENT

General

Constitution of Parliament.

79. There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

GOVERNMENT OF INDIA ACT, 1935.

"18. (1) There shall be a Federal Legislature which shall consist of His Majesty, represented by the Governor-General, and two Chambers, to be known respectively as the Council of State and the House of Assembly (in this Act referred to as "the Federal Assembly")."

1. Scope of the article.— The corresponding provision with regard to States is contained in ART. 168.

The President is a constituent part of the Parliament just as the King is in England. But under the Constitution of the United States, the President is not a constituent part of the Congress. Article I, S. 1

of the Constitution of the United States runs as follows: "All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives."

This article must be read with ART. 379, which makes provision for the Constituent Assembly functioning as the Parliament till both Houses of Parliament are duly constituted.

Composition of the Council of States.

80. (1) The Council of States shall consist of—

(*a*) twelve members to be nominated by the President in accordance with the provisions of clause (3); and

(*b*) not more than two hundred and thirty-eight representatives of the States.

(2) The allocation of seats in the Council of States to be filled by representatives of the States shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (*a*) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art and social service.

(4) The representatives of each State specified in Part A or Part B of the First Schedule in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the States specified in Part C of the First Schedule in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

GOVERNMENT OF INDIA ACT, 1935

"18. (2) The Council of State shall consist of one hundred and fifty-six representatives of British India and not more than one hundred and four representatives of the Indian States, . . .

Article 80
Notes 1–2

(3) The said representatives shall be chosen in accordance with the provisions in that behalf contained in the First Schedule to this Act."

JAMMU AND KASHMIR

Article 80 shall apply to the State of Jammu and Kashmir subject to the modification that the representatives of the State in the Council of States shall be chosen by the President in consultation with the Government of the State—See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, Cl. 3 and Sch. II.

COGNATE PROVISION.

Clause (3) — "Practical experience in respect of such matters"—Compare with ART. 171 (5).

1. **Allocation of seats.** — Under cl. (2) the allocation of seats in the Council of States to be filled by representatives of the States is required to be in accordance with the provisions of the Fourth Schedule. It will be seen that the total number of seats allocated in the Fourth Schedule is 207, while cl. (1) (b) of this article makes it possible to have 238 representatives of the States. This extra number of 31 seats is intended to be availed of, when Parliament by law admits into the Union or establishes new States. (See ART. 2.) Further, under ART. 3, the Parliament may by law form new States out of the existing States. Under ART. 4, when a law is passed under ART. 2 or ART. 3, the First and the Fourth Schedules to the Constitution are required to be suitably amended so as to give effect to such a law.

2. **Proportional representation.** — See notes on ART. 55.

Composition of the House of the People.

81. (1) *(a)* Subject to the provisions of clause (2) and of Articles 82 and 331, the House of the People shall consist of not more than five hundred members directly elected by the voters in the States.

(b) For the purpose of sub-clause *(a)*, the States shall be divided, grouped or formed into territorial constituencies and the number of members to be allotted to each such constituency shall be so determined as to ensure that there shall be [a][* * *] not more than one member for every 500,000 of the population.

(c) The ratio between the number of members allotted to each territorial constituency and the population of that constituency as ascertained at the last preceding census of which the relevant figures have

been published shall, so far as practicable, be the same throughout the territory of India.

(2) The representation in the House of the People of the territories comprised within the territory of India but not included within any State shall be such as Parliament may by law provide.

(3) Upon the completion of each census, the representation of the several territorial constituencies in the House of the People shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.

a. The words "not less than one member for every 750,000 of the population and" were omitted by the Constitution (Second Amendment) Act, 1952, S. 2 [2-5-1953].

GOVERNMENT OF INDIA ACT, 1935

"18. (2) . . . the Federal Assembly shall consist of two hundred and fifty representatives of British India and not more than one hundred and twenty-five representatives of the Indian States.

(3) The said representatives shall be chosen in accordance with the provisions in that behalf contained in the First Schedule to this Act."

JAMMU AND KASHMIR

Article 81 shall apply to the State of Jammu and Kashmir subject to the modification that the representatives of the State in the House of the People shall be chosen by the President in consultation with the Government of the State—See ART. 370 (1) read with the Constitution (Application to Jammu and Kashmir) Order, 1950, Cl. 3 and SCH. II.

COGNATE PROVISIONS

Article 82 deals with special provision as to representation of States in Part C and territories other than States.

Article 331 deals with representation of the Anglo-Indian community in the House of the People.

Election Commission—Superintendence, direction and control of the preparation of the electoral rolls for election to Parliament to vest in the Election Commission—See ART. 324 (1).

Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People—See ART. 330.

Anglo-Indian community—Inadequate representation in the House of the People—Power of the President to nominate members of that community notwithstanding anything in ART. 81—See ART. 331.

1. Scope of the article.—This article deals with the composition of the House of the People and lays down how its members are to

Article 81
Note 1

be chosen. Article 80, which deals with the composition of the Council of States may be compared with this article. The comparison shows the following points of difference :

(1) The election to the House of the People is direct and not indirect as in the case of the Council of States, the members of which are elected not directly by the voters in the States but by elected members of Legislative Assembly of the particular State.

(2) The election to the Council of States is by a system of proportional representation by means of the single transferable vote, while election to the House of the People is by the ordinary method.

(3) Even territories which are not included in any State have representatives in the House of the People. Thus, territories included in Part D of SCH. I, namely, the Andaman and Nicobar Islands, are entitled to have representatives in the House of the People. But representation in the Council of States is confined to the States.

It may also be noted that under ART. 83, the House of the People is elected once in five years. But the members of the Council of the States retire by rotation every two years. Further, the House of the People can be dissolved by the President (ART. 85) but the Council of States is not subject to dissolution (ART. 83).

Clause (1), sub-cls. (b) and (c) deal with (i) the creation of territorial constituencies for election to the House of the People and (ii) for the allotment of seats for each constituency. Clause (1) (b) fixes the upper limit of representation as not more than one member for every five lakhs of population. Each constituency may have one or more members. Clause (1) (c) seeks to ensure that as far as practicable there is uniformity in the scale of representation throughout India, by providing that the ratio between the population of the constituency and the number of seats allotted to it should, as far as possible, be the same throughout India. The Representation of the People Act, (43 of 1950), gives effect to provisions of cl. (1) (b) and (c). Under S. 3 of the Act, seats in the House of the People have been allotted to different States and the number of seats allotted to each State is shown in the First Schedule to the Act, which is reproduced below :

THE FIRST SCHEDULE.

Allocation of seats in the House of the People.

	Name of State or "Areas." (1)	Total Number of Seats. (2)
	Part A States	
1.	Andhra	28
2.	Assam	12
3.	Bihar	55
4.	Bombay	45

	Name of State or "Areas." (1)	Total Number of Seats. (2)
	Part A States—(continued)	
5.	Madhya Pradesh	29
6.	Madras	46
7.	Orissa	20
8.	Punjab	18
9.	Uttar Pradesh	86
10.	West Bengal	34
	Part B States	
1.	Hyderabad	25
2.	Jammu and Kashmir	6
3.	Madhya Bharat	11
4.	Mysore	12
5.	Patiala and East Punjab States Union ...	5
6.	Rajasthan	20
7.	Saurashtra	6
8.	Travancore-Cochin	12
	Part C States	
1.	Ajmer	2
2.	Bhopal	2
3.	Bilaspur	1
4.	Coorg	1
5.	Delhi	4
6.	Himachal Pradesh	3
7.	Kutch	2
8.	Manipur	2
9.	Tripura	2
10.	Vindhya Pradesh	6
11.	Andaman and Nicobar Islands ...	1
	Areas	
12.	Part B Tribal Areas	1
	Total	497

Section 6 of the Act provides for the delimitation of the Constituencies. It will be seen that while cl. (1) (a) of this article has fixed the maximum number of five hundred members for the House of the People, the Representation of the People Act (43 of 1950) has allocated a total of 497 seats among all the States of India.

Under Art. 329 (a), the validity of any law relating to the delimitation of constituencies or allotment of seats to such constituencies, cannot be called in question in any Court. Hence, it is conceived that the validity of the Representation of the People Act (43 of 1950), cannot be called in question on the ground that its provisions as to delimitation of constituencies or the allocation of seats are not in accordance with this article.

As to who are entitled to vote at the elections, see ART. 326. The election to the House of the People and also the Legislative Assembly of every State is on the basis of adult suffrage. The system of Communal electorates has also been given up under this Constitution and under ART. 325 there is to be only one general electoral roll for every territorial constituency for election to the Legislatures.

As to the reservation of seats for Scheduled Castes and Tribes, see ART. 330, and S. 6 of the Representation of the People Act (43 of 1950).

Special provision as to representation of States in Part C and territories other than States.

82. Notwithstanding anything in clause (1) of Article 81, Parliament may by law provide for the representation in the House of the People of any State specified in Part C of the First Schedule or of any territories comprised within the territory of India but not included within any State on a basis or in a manner other than that provided in that clause.

Duration of Houses of Parliament.

83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House :

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

GOVERNMENT OF INDIA ACT, 1935

"18. (4) The Council of State shall be a permanent body not subject to dissolution, but as near as may be one-third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the said First Schedule.

(5) Every Federal Assembly, unless sooner dissolved, shall continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly."

COGNATE PROVISIONS

"Provisions made in that behalf" — See the provisions made in Part III and S. 154 of the Representation of the People Act, 1951 (43 of 1951).

Proclamation of Emergency — For interpretation of, see ART. 366 (18).

Effect of dissolution of the House of People on pending Bills—See ART. 107.

Qualification for membership of Parliament.

84. A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

(*a*) is a citizen of India;

(*b*) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and

(*c*) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

COGNATE PROVISIONS

Clause (c)—"Qualifications as may be prescribed" — Power of Parliament to make provision with respect to elections to Legislatures, see ART. 327. For qualifications and disqualifications for membership, see Part II of the Representation of the People Act, 1951 (43 of 1951).

Penalty for sitting and voting when person is not qualified for membership — See ART. 104.

1. Scope of the article.—This article deals with the qualifications for membership of Parliament. The corresponding article with regard to qualifications for membership of the State Legislatures is ART. 173. Articles 101 and 102 deal with the disqualification of members of Parliament. The corresponding articles with regard to disqualification for membership of the State Legislatures are ARTS. 190, 191 and 192. In addition to the qualifications and disqualifications specified directly by the Constitution, the Constitution also provides that the Parliament may by law prescribe further qualifications and lay down further disqualifications. Accordingly, the Representation of the People Act (43 of 1951), contains the further qualifications and disqualifications for membership of the Parliament and State Legislatures. See Ss. 3 to 11 of the Act.

Both this article and ART. 173 prescribe an age qualification for membership of the Parliament and State Legislatures. This qualification is higher than that for a voter under ART. 326, under which the age limit is fixed as 21 years for a voter.

Article 105 deals with the question of privileges and immunities of Parliament and its members. Similarly, ART. 194 deals with the question of privileges and immunities of State Legislatures and their members. The Constitution draws a sharp line of distinction between the matter of qualifications and disqualifications of legislators and that of their privileges and immunities. When a citizen has the required qualifications for membership of a Legislature and is not subject to any of the disqualifications for such membership, it only means that he is entitled to be elected, and if elected, to continue as a member of the Legislature. The provisions relating to qualifications and disqualifications cannot be regarded as creating by implication anv privilege or immunity. Thus, for instance, under S. 7 (b) of the Representation of the People Act (43 of 1951), conviction for an offence and sentence to transportation or imprisonment for not less than 2 years would be a disqualification for membership of a Legislature. A member of a Legislature convicted of an offence and sentenced to a term of imprisonment for less than 2 years, would not be disqualified under the above section to be a member of the Legislature. It cannot be implied from the section that inasmuch as there is no disqualification in such circumstances and the member is entitled to continue as a member of the Legislature in spite of such conviction and sentence, he cannot be imprisoned in execution of the sentence so long as he continues as member, inasmuch as that would prevent him from attending the meetings of the Legislature and discharging his duties as a member thereof and would virtually amount to his being disqualified. Similarly, the disqualifications mentioned in the Constitution or in the Representation of the People Act, 1951, do not include being imprisoned under the Preventive Detention Act. It cannot be implied from this that an immunity from being imprisoned under the Preventive Detention Act has been conferred upon every member of the Legislature so long as he continues as such member.[1] Thus, the existence of a required qualification and the absence of any disqualifications for the membership of a Legislature only entitle a person to get elected as a member and if he has been elected, to continue as such member. But there is a difference between *being* a member of a Legislature and *discharging* the functions of a member. If a member by reason of imprisonment is prevented from discharging his duties as a member, he is not thereby being prevented from *being* a member and his imprisonment does not amount to imposing on him any *disqualification* not recognized by or under the Constitution.

The qualifications prescribed by this article are qualifications for being "chosen to fill a seat in Parliament". These words are wide enough to cover both election and nomination, so that, for instance,

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Article 84 — Note 1

[1] **1952 Cal 632 (636) [AIR V 39] : 1952 Cri L Jour 1454 (SB),** ***Ansumali* v. *State of West Bengal.***

the President cannot nominate, under ART. 80, as a member of the Council of States, a person who is less than thirty years of age.

Sessions of Parliament, prorogation and dissolution.

[a][**85.** (1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The President may from time to time —

(a) prorogue the Houses or either House;

(b) dissolve the House of the People.]

a. Substituted by the Constitution (First Amendment) Act, 1951, Section 6 [18-6-1951]. The old article was as follows :

"85. (1) The Houses of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of clause (1), the President may from time to time—

(a) summon the Houses or either House to meet at such time and place as he thinks fit;

(b) prorogue the Houses;

(c) dissolve the House of the People."

GOVERNMENT OF INDIA ACT, 1935.

"19. (1) The Chambers of the Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this section, the Governor-General may in his discretion from time to time —

(a) summon the Chambers or either Chamber to meet at such time and place as he thinks fit;

(b) prorogue the Chambers;

(c) dissolve the Federal Assembly.

* * * * *"

1. **Scope of the article.** — The Houses of Parliament meet on being summoned by the President. They do not meet of their own accord. Once they meet, the session continues indefinitely subject to the power of the President to prorogue or dissolve. Each "session" covers the period between the first meeting of the Parliament till the prorogation or dissolution.

Article 85
Notes 1-2

The power of proroguing the Parliament or of dissolving the House of the People before the expiry of its term of five years under Art. 83 is vested in the President like the power of summoning the Houses of Parliament. Thus, the power of summoning the Houses of Parliament and of proroguing the Houses as well as of dissolving the House of the People is vested in the President. The power of adjournment, however, belongs to either House of Parliament. In other words, the Houses may adjourn their business of their own accord without the intervention of the President.

The Court *ex officio* ought to take notice of the beginning and end of prorogations and sessions of Parliament[1] (Evidence Act, S. 57 (4)).

2. Dissolution, prorogation and adjournment — Distinction.—The 'dissolution' of a Legislature puts an end to the life of the Legislature. Under this Constitution, it is only the House of the People that is subject to dissolution. The Council of States is not subject to dissolution. The members of the Council of States retire by rotation once in two years. (See Art. 83). But the House of the People is only elected for five years and is automatically dissolved at the end of five years. Until fresh elections are held there will be no House of the People. The House of the People can also be dissolved by the President under Art. 85 (2) before the expiration of the period of five years. This power of the President to dissolve only applies to the House of the People and not to the Council of States, so that the Council of States is a permanent body not subject to dissolution by efflux of time or by the President. Thus, the entire Parliament is never dissolved and never ceases to exist under the Indian Constitution. But under the English Constitution it is the Parliament as a whole that is dissolved and not the House of Commons alone. When Parliament is dissolved in England the House of Lords also ceases to exist.

Under cl. (2) of this article, the President may, from time to time, prorogue the Houses of Parliament or either of them. Prorogation means the adjournment of the House for an indefinite period, that is, without fixing a date for its next meeting, but at the same time, without dissolving the House. In the case of an ordinary adjournment, a date is fixed for resumption of the sitting of the House. As no date is fixed for the next meeting of the House when it is prorogued, it has to be summoned if it has to meet again. But in the case of an ordinary adjournment, as the date is fixed, there is no necessity for summoning the House for the next meeting. When a House is prorogued, its session comes to an end and when it meets on being summoned afresh, a fresh session begins. Thus, there will be several sessions in the life of the House.

Thus, the word "session", in respect of the meetings of a Legislature, refers to the period commencing with the first meeting of the

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Article 85 — Note 1

[1] **(1671) 83 E R 415 (415) : 1 Lev 296,** ***King* v. *Wilde*.**

Legislature duly summoned by the proper authority and ending with its prorogation.[1]

In this connection, the following passage from May's PARLIAMENTARY PRACTICE[2] may be quoted :

"A session is the period of time between the meeting of a Parliament, whether after the prorogation or dissolution, and its prorogation ....During the course of a session, either House may adjourn itself of its own motion to such date as it pleases. The period between the prorogation of Parliament and its re-assembly in a new session is termed a 'recess'; while the period between the adjournment of either House and the resumption of its sitting is generally called an 'adjournment'.

A prorogation terminates a session; an adjournment is an interruption in the course of one and the same session".

Under cl. (1) of this article, there is no limit of time for the duration of a session of the Parliament, although the dissolution of the House of the People will automatically put an end to the session. But the interval of time between two sessions, that is, the end of one session and the beginning of the next, shall not exceed six months. The period of 6 months is the maximum and there is no minimum limit of time for the interval between two successive sessions of Parliament.

Parliament may *adjourn sine die.*[3] Parliament can be prorogued only by the *President.* But Parliament can adjourn of its own volition.

See also NOTE 3 under ART. 123.

Right of President to address and send messages to Houses.

86. (1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

(2) The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

GOVERNMENT OF INDIA ACT, 1935

"20. (1) The Governor-General may in his discretion address either Chamber of the Federal Legislature or both Chambers assembled together, and for that purpose require the attendance of members.

Article 85 — Note 2

[1] 1950 Pat 19 (20) [A I R V 37 C 6] : I L R 28 Pat 775 : 51 Cri L Jour 256 (DB), *Bidya Chaudhary* v. *Province of Bihar.*

[2] May's Parliamentary Practice (14th Edn.) quoted in 1950 Pat 19 (20) [AIR V 37 C 6] : ILR 28 Pat 775 : 51 Cri L Jour 256 (DB), *Bidya Chaudhary* v. *Province of Bihar.*

[3] *See* 1949 Mad 307 (310) (Pr 3) [AIR V 36 C 146] : I L R (1949) Mad 377 : 50 Cri L Jour 405 (SB), *Narayanaswamy* v. *Inspector of Police.*

(2) The Governor-General may in his discretion send messages to either Chamber of the Federal Legislature, whether with respect to a Bill then pending in the Legislature or otherwise, and a Chamber to whom any message is so sent shall with all covenient dispatch consider any matter which they are required by the message to take into consideration."

Special address by the President at the commencement of every session.

87. (1) At the commencement of [a][the first session after each general election to the House of the People and at the commencement of the first session of each year] the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address [b][* * * *].

a. These words were substituted for the words "every session" by the Constitution (First Amendment) Act, 1951, S. 7 [18-6-1951].

b. The words "and for the precedence of such discussion over other business of the House" were omitted, *ibid.*

Rights of Ministers and Attorney-General as respects Houses.

88. Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.

GOVERNMENT OF INDIA ACT, 1935

"21. Every Minister, every counsellor and the Advocate-General shall have the right to speak in, and otherwise to take part in the proceedings of, either Chamber, any joint sitting of the Chambers, and any committee of the Legislature of which he may be named a member, but shall not by virtue of this section be entitled to vote."

COGNATE PROVISION

Powers, privileges and immunities of the Minister and the Attorney-General while exercising the right conferred by Art. 88 — See ART. 105 (4).

Officers of Parliament

The Chairman and Deputy Chairman of the Council of States.

89. (1) The Vice-President of India shall be *ex officio* Chairman of the Council of States.

(2) The Council of States shall, as soon as may be, choose a member of the Council to be Deputy Chairman thereof and, so often as the office of Deputy Chairman becomes vacant, the Council shall choose another member to be Deputy Chairman thereof.

GOVERNMENT OF INDIA ACT, 1935

"22. (1) The Council of State shall, as soon as may be, choose two members of the Council to be respectively President and Deputy President thereof and, so often as the office of President or Deputy President becomes vacant, the Council shall choose another member to be President or Deputy President as the case may be."

Vacation and resignation of, and removal from, the office of Deputy Chairman.

90. A member holding office as Deputy Chairman of the Council of States—

(*a*) shall vacate his office if he ceases to be a member of the Council;

(*b*) may at any time, by writing under his hand addressed to the Chairman, resign his office; and

(*c*) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (*c*) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

GOVERNMENT OF INDIA ACT, 1935

"22. (2) A member holding office as President or Deputy President of the Council of State shall vacate his office if he ceases to be a member of the Council, may at any time resign his office by writing under his hand addressed to the Governor-General, and may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council; but no resolution for the purpose of this sub-section shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution."

Articles 91, 92

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.

91. (1) While the office of Chairman is vacant, or during any period when the Vice-President is acting as, or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant, by such member of the Council of States as the President may appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council of States the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

GOVERNMENT OF INDIA ACT, 1935

"22. (3) While the office of President is vacant, the duties of the office shall be performed by the Deputy President or, if the office of the Deputy President is also vacant, by such member of the Council as the Governor-General may in his discretion appoint for the purpose, and during any absence of the President from any sitting of the Council the Deputy President or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as President."

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

92. (1) At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of Article 91 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman, or, as the case may be, the Deputy Chairman, is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice-President from his office is under consideration in the Council, but, notwithstand-

ing anything in Article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

COGNATE PROVISION

Article 100 deals with the occasion when the Chairman or Speaker shall have and exercise a casting vote.

The Speaker and Deputy Speaker of the House of the People.

93. The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.

GOVERNMENT OF INDIA ACT, 1935

Sub-section (1) of S. 22 as adapted by sub-section (5) thereof is as follows:

"The Federal Assembly shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker as the case may be."

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

94. A member holding office as Speaker or Deputy Speaker of the House of the People—

(*a*) shall vacate his office if he ceases to be a member of the House of the People;

(*b*) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

(*c*) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House:

Provided that no resolution for the purpose of clause (*c*) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

GOVERNMENT OF INDIA ACT, 1935

Sub-section (2) of S. 22 as adapted by sub-section (5) thereof is as follows:

"(2) A member holding office as Speaker or Deputy Speaker of the Assembly shall vacate his office if he ceases to be a member of the Assembly, may at any time resign his office by writing under his hand addressed to the Governor-General, and may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly; but no resolution for the purpose of this sub-section shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

(5) . . . . Provided that, without prejudice to the provisions of sub-section (2) of this section as applied by this sub-section, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution."

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

95. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker.

GOVERNMENT OF INDIA ACT, 1935

Sub-section (3) of S. 22 as adapted by sub-section (5) thereof is as follows:

"While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of the Deputy Speaker is also vacant, by such member of the Assembly as the Governor-General may in his discretion appoint for the purpose, and during any absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker."

The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration

96. (1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of Article 95 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in Article 100, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

COGNATE PROVISION

Article 100 deals with the occasion when the Chairman or Speaker shall have and exercise a casting vote.

Salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker

97. There shall be paid to the Chairman and the Deputy Chairman of the Council of States, and to the Speaker and the Deputy Speaker of the House of the People, such salaries and allowances as may be respectively fixed by Parliament by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

GOVERNMENT OF INDIA ACT, 1935

Sub-section (4) of S. 22 and that sub-section as adapted by sub-section (5) thereof is as follows:

"There shall be paid to the President [Speaker] and the Deputy President [Deputy Speaker] of the Council of State [Federal Assembly] such salaries as may be respectively fixed by Act of the Federal

Legislature, and, until provision in that behalf is so made, such salaries as the Governor-General may determine."

COGNATE PROVISION.

Chairman of the Council of States acting as President whether is entitled to any salary or allowance payable to the Chairman — See ART. 64, Proviso.

Secretariat of Parliament.

98. (1) Each House of Parliament shall have a separate secretarial staff:

Provided that nothing in this clause shall be construed as preventing the creation of posts common to both Houses of Parliament.

(2) Parliament may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of either House of Parliament.

(3) Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

Conduct of Business

Oath or affirmation by members.

99. Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

GOVERNMENT OF INDIA ACT, 1935.

"24. Every member of either Chamber shall, before taking his seat, make and subscribe before the Governor-General, or some person appointed by him, an oath according to that one of the forms set out in the Fourth Schedule to this Act which the member accepts as appropriate in his case."

GOGNATE PROVISION

Penalty for sitting and voting before making oath or affirmation under Art. 99 —See ART. 104.

Article 100

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

100. (1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

GOVERNMENT OF INDIA ACT, 1935

"23. (1) Save as provided in the last preceding section, all questions at any sitting or joint sitting of the Chambers shall be determined by a majority of votes of the members present and voting, other than the President or Speaker or person acting as such.

The President or Speaker or person acting as such shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A Chamber of the Federal Legislature shall have power to act notwithstanding any vacancy in the membership thereof and any proceedings in the Legislature shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

Article 100
Note 1

(3) If at any time during a meeting of a Chamber less than one-sixth of the total number of members of the Chamber are present, it shall be the duty of the President or Speaker or person acting as such either to adjourn the Chamber, or to suspend the meeting until at least one-sixth of the members are present."

COGNATE PROVISIONS

Chairman when is not entitled to cast his vote at all—See ART. 92 (2).

Speaker when is entitled to vote and when not—See ART. 96 (2).

1. **Vacancy in membership.**—Clause (2) of this article provides that either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof. The principle of this clause accords with the decision of the late Federal Court of India in *Umayal Achi* v. *Lakshmi Achi*,[1] in which it was held that the vacation of seats in the Indian Legislature by the representatives of Burma, consequent on the separation of Burma under the Government of India Act, 1935, S. 46 (2) did not affect the composition of the Legislature so radically as to make the Legislature a different body altogether. In this connection Spens, C. J., of the Federal Court observed as follows :

> "I turn now to the question whether by reason of Clause 8, Government of India (Commencement and Transitory Provisions) Order, 1936, the Indian Legislature, after the vacation of their seats under that clause by the members elected or nominated to represent Burma or Burma constituencies, was so radically different in composition as no longer to be the same Legislature as prior to 1st April 1937. It is obviously clear that by absence voluntary or through illness of members, or by vacancy of seats owing to death the Indian Legislature constantly and continuously varies in composition from day to day. Neither before nor after 1st April 1937, was it a requirement of the continuity of existence of the Indian Legislature that there should be elected or nominated members for all seats, still less that all elected and nominated members should be present. It follows, in my opinion, that by a proper enactment binding upon the Legislature, the compulsory vacation of some members of their seats does not and cannot *ipso facto* cause the continuing Legislature, less those members, to be a different Legislature in law. Indeed, the very opposite deduction, namely, that it is the same Legislature carrying on without the excluded members, seems to me to be the proper one to be drawn from the provisions in question."

Disqualifications of members

Vacation of seats.

101. (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person

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Article 100 — Note 1

[1] 1945 F C 25 (39) [AIR V 32] : 1945 F C R 1 : ILR (1945) Kar (FC) 39 (FC).

who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State specified in Part A or Part B of the First Schedule, and if a person is chosen a member both of Parliament and of a House of the Legislature of such a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—

(*a*) becomes subject to any of the disqualifications mentioned in clause (1) of Article 102, or

(*b*) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

GOVERNMENT OF INDIA ACT, 1935

"25. (1) No person shall be a member of both Chambers, and rules made by the Governor-General exercising his individual judgment shall provide for the vacation by a person who is chosen a member of both Chambers of his seat in one Chamber or the other.

(2) If a member of either Chamber—

(a) becomes subject to any of the disqualifications mentioned in sub-section (1) of the next succeeding section; or

(b) by writing under his hand addressed to the Governor-General resigns his seat,

his seat shall thereupon become vacant.

(3) If for sixty days a member of either Chamber is without permission of the Chamber absent from all meetings thereof, the Chamber may declare his seat vacant :

Provided that in computing the said period of sixty days no account shall be taken of any period during which the Chamber is prorogued, or is adjourned for more than four consecutive days."

COGNATE PROVISIONS.

Penalty for sitting and voting where the person is prohibited from so doing by the provisions of any law—See ART. 104.

Clause (1)—"Provision shall be made"—See Part V, Chap. VI dealing with multiple elections in the Representation of the People Act, 1951 (43 of 1951).

Clause (2)—"Rules made by the President"—See the Prohibition of Simultaneous Membership Rules, 1950, published under Notfn. No. F. 46/-50-C, dated 26-1-1950 in Gazette of India, 26-1-1950, Extra., page 678.

Synopsis

1. Simultaneous membership of both Houses of Parliament.
2. Simultaneous membership of Parliament and State Legislature.
3. Election to more than one seat.
4. Vacation of seat by absence for 60 days—Clause (4).
5. Effect of vacation of seats.

1. Simultaneous membership of both Houses of Parliament.—Clause (1) prohibits the simultaneous membership of a person of both Houses of Parliament and the Parliament is required to provide by law for the vacation by a person who is chosen a member of both Houses, of his seat in one House or the other. Accordingly Ss. 68 and 69 of the Representation of the People Act, (43 of 1951) have been enacted. These sections are as follows :

Vacation of seats when elected to both Houses of Parliament.

"68. (1) Any person who is chosen a member of both the House of the People and the Council of States and who has not taken his seat in either House may, by notice in writing signed by him and delivered to the Secretary to the Election Commission within ten days from the date of publication in the Gazette of India of the declarations that he has been so chosen or, if such publications have been made on different dates, within ten days from the later of such dates, intimate in which of the Houses he wishes to serve, and thereupon, his seat in the House in which he does not wish to serve shall become vacant.

(2) In default of such intimation within the aforesaid period, his seat in the Council of States shall, at the expiration of that period, become vacant.

(3) Any intimation given under sub-section (1) shall be final and irrevocable.

Vacation of seats by persons already members of one House on election to other House of Parliament.

69. (1) If a person who is already a member of the House of the People and has taken his seat in such House is chosen a member of the Council of States, his seat in the House of the People shall, on the publication in the Gazette of India of the declaration that he has been so chosen, become vacant.

(2) If a person who is already a member of the Council of States and has taken his seat in such Council is chosen a member of the House of the People, his seat in the Council of States shall, on the publication in the Gazette of India of the declaration that he has been so chosen, become vacant."

2. Simultaneous membership of Parliament and State Legislature. — Clause (2) deals with this question and provides that no person shall be a member both of the Parliament and a House of the Legislature of a State specified in Part A or Part B of the First Schedule. If a person is chosen a member both of Parliament and of a State Legislature and he does not resign his seat in the State Legislature, he will forfeit his seat in the Parliament at the end of the period that may be specified in the rules made by the President in that behalf. These Rules[1] are reproduced below :

PROHIBITION OF SIMULTANEOUS MEMBERSHIP RULES, 1950

"In exercise of the powers conferred by clause (2) of Article 101 and clause (2) of Article 190 of the Constitution of India, the President is pleased to make the following rules, namely :

"1. These rules may be called the Prohibition of Simultaneous Membership Rules, 1950.

"2. The period at the expiration of which the seat in Parliament of a person who is chosen a member both of Parliament and of a House of the Legislature of a State specified in Part A or Part B of the First Schedule to the Constitution of India (hereinafter referred to as 'the Constitution') shall become vacant, unless he has previously resigned his seat in the Legislature of such State, shall be fourteen days from the date of publication in the Gazette of India or in the Official Gazette of the State, whichever is later, of the declaration that he has been so chosen :

Provided that in the case where a person who is a member of a House of the Legislature of any such State has been chosen to fill any seat in Parliament under the provisions of clause (3) of Article 379 of the Constitution and the declaration that he has been so chosen has been published in the Gazette of India on any date

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Article 101 — Note 2

[1] *See* Gazette of India (Extraordinary) — No. F. 46/50-C, dated January 26, 1950, Page 678.

earlier than the twenty-sixth day of January, 1950, the said period shall be the period expiring on the tenth day of February, 1950.

"3. The period at the expiration of which the seat of a person who is chosen a member of the Legislatures of two or more States specified in the First Schedule to the Constitution in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States, shall be ten days from the later or, as the case may be, the latest of the dates of publication in the Official Gazettes of such States of the declarations that he has been so chosen."

3. Election to more than one seat. — Under S. 70 of the Representation of the People Act, 1951, if a person is elected to more than one seat in either House of Parliament or in the House or either House of the Legislature of a State, then, unless within the time prescribed by rules made under the Act he resigns all but one of the seats, all the seats shall become vacant. Under Rule 120 of the Rules made under S. 169 of the Representation of the People Act, 1951, a period of 10 days is prescribed for this purpose and this period is to be calculated from the date of the publication in the official gazette of the result of the election. The Constitution does not contain any specific provision in regard to the election of a person to more than one seat in the same House of the Legislature and S. 70 of the Representation of the People Act seems to be based on ARTS. 102 (1) (e) and ART. 191 (1) (e), providing that a person shall be disqualified for being a member of the Parliament or of the State Legislature if he is so disqualified by or under any law made by Parliament.

4. Vacation of seat by absence for 60 days—Clause (4).— Under cl. (4) if a member of either House of Parliament is, for a period of 60 days, absent from all the meetings of the House without the permission of the House, the House may declare his seat vacant. It will be noted that the absence of a member for 60 days without permission of the House does not automatically lead to a vacation of the seat. The House in such a case may declare the seat vacant. But it may *not* also declare the seat vacant and the House is not likely to declare a seat vacant by reason of absence of a member, where the cause of absence was his detention or imprisonment unless the House thought that his conduct was such as really to make him unfit to be a member of the House. There is no provision in England similar to cl. (4). But the House of Commons may expel a member for reasons which do not disqualify him. Declaring a seat vacant under ART. 101 (4) is action very similar to expulsion and therefore, action under cl. (4) of this article may never be taken except for good cause. Hence, the existence of cl. (4) of ART. 101 does not really make the position in India materially different from that obtaining in England.[1]

Article 101 — Note 4

1. **1952 Cal 632 (Pr 37) [A I R V 39] : 1952 Cri L Jour 1454 (SB),** ***Ansumali* v. *State of West Bengal.***

5. Effect of vacation of seats. — Under ART. 100 cl. (2), either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof. Hence, the compulsory vacation by some members of their seats does not and cannot *ipso facto* cause the continuing Legislature, less those members, to be a different Legislature in law. It is the same Legislature carrying on without the excluded members.[1]

Disqualifications for membership.

102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(*a*) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(*b*) if he is of unsound mind and stands so declared by a competent court;

(*c*) if he is an undischarged insolvent;

(*d*) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(*e*) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

GOVERNMENT OF INDIA ACT, 1935

"26. (1) A person shall be disqualified for being chosen as, and for being, a member of either Chamber —

(a) if he holds any office of profit under the Crown in India, other than an office declared by Act of the Federal Legislature not to disqualify its holder;

Article 101 — Note 5

[1] 1945 F C 25 (38, 39) [A I R V 32] : 1945 F C R 1 : I L R (1945) Kar (FC) 39 (FC), *Umayal Achi* v. *Lakshmi Achi*.

Article 102

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if, whether before or after the establishment of the Federation, he has been convicted, or has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty, of any offence or corrupt or illegal practice relating to elections which has been declared by Order in Council or by an Act of the Federal Legislature to be an offence or practice entailing disqualification for membership of the Legislature, unless such period has elapsed as may be specified in that behalf by the provisions of that Order or Act;

(e) if, whether before or after the establishment of the Federation, he has been convicted of any other offence by a Court in British India or in a State which is a Federated State and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years, or such less period as the Governor-General, acting in his discretion, may allow in any particular case, has elapsed since his release;

(f) if, having been nominated as a candidate for the Federal or any Provincial Legislature or having acted as an election agent of any person so nominated, he has failed to lodge a return of election expenses within the time and in the manner required by any Order in Council made under this Act or by any Act of the Federal or Provincial Legislature, unless five years have elapsed from the date by which the return ought to have been lodged or the Governor-General, acting in his discretion, has removed the disqualification:

Provided that a disqualification under paragraph (f) of this sub-section shall not take effect until the expiration of one month from the date by which the return ought to have been lodged or of such longer period as the Governor-General, acting in his discretion, may in any particular case allow.

(2) A person shall not be capable of being chosen a member of either Chamber while he is serving a sentence of transportation or of imprisonment for a criminal offence.

(3) Where a person who, by virtue of a conviction or a conviction and a sentence, becomes disqualified by virtue of paragraph (d) or paragraph (e) of sub-section (1) of this section is at the date of the disqualification a member of the Legislature, his seat shall, notwithstanding anything in this or the last preceding section, not become vacant by reason of the disqualification until three months have elapsed from the date thereof or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any

period during which his membership is preserved by this sub-section he shall not sit or vote.

(4) For the purposes of this section a person shall not be deemed to hold an office of profit under the Crown in India by reason only that —

(a) he is a minister either for the Federation or for a Province; or

(b) while serving a State, he remains a member of one of the services of the Crown in India and retains all or any of his rights as such."

COGNATE PROVISIONS

Penalty for sitting and voting when person is disqualified for membership — See ART. 104.

Clause (1) — Consequence resulting from the disqualifications mentioned in Art. 102 (1) — See ART. 101 (3).

Clause (1) — Member becoming subject to any of the disqualifications mentioned in ART. 102 (1) — Question as to — Decision of the President on— See ART. 103 (1).

Clause (1) (a)— "Other than an office"—For the offices declared by Parliament not to disqualify its holder see the Parliament (Prevention of Disqualification) Act, 1950 (19 of 1950) and the Parliament Prevention of Disqualification Act, 1951 (68 of 1951).

Clause (1) (d) — "Citizen of India" — For provisions relating to citizenship see Part II.

Clause (1) (e) — "Law made by Parliament"—See Part II, Chs. III and IV of the Representation of the People Act, 1951 (43 of 1951).

Synopsis

1. Scope of the article.
2. Effect of disqualification.
3. Office of profit. See ART. 58, Note 2.
4. Preventive detention.
5. Immunity from imprisonment. See Notes under ART. 84.

1. Scope of the article.—Article 84 prescribes the qualification for membership of either House of Parliament. It must be noted that the qualification is for being "chosen to fill a seat" in the Parliament. These words are wide enough to include both election and nomination, so that the qualifications would also apply to the twelve members of Council of States nominated by the President under ART. 80. Thus, for example, the President would not be entitled to nominate to the Council of States under ART. 80 a person who is not a citizen of India or who is less than 30 years of age.

Article 84 deals with the membership of both the Houses of Parliament. The present article also applies to both the Houses of Parliament and lays down the disqualification for membership of either House of Parliament. The difference between ART. 84 and this article is that ART. 84 relates to the qualifications for being *chosen* as a member of either House of Parliament, while this article mentions the grounds of disqualification of a person to be chosen as a member or to remain a member if he has already been chosen. If a person has not the necessary qualification he cannot be chosen as a member at all and if he is actually chosen, his being so chosen will be void. Thus, qualification relates to the point of time at which the person is chosen as a member. But disqualification for membership relates both to the time at which a person is chosen as a member of Parliament and to the subsequent period. If he is disqualified at the time of his being chosen, the choice will be void. But if at such time he is qualified under ART. 84 and also free from any disqualifications under this article, but becomes subsequently affected by any of the disqualifications mentioned in this article, he will *cease* to be a member of Parliament.

The grounds of disqualification are enumerated in cl. (1), sub-cls. (a) to (e) of this article. It will be noted that after certain grounds have been mentioned in sub-cls (a) to (d), sub-cl. (e) leaves it to the Parliament to enact further grounds of disqualification. Further grounds of disqualification have accordingly been enacted under the Representation of the People Act (43 of 1951). See for instance, Ss. 7 and 8 of the Act, which are reproduced below :

> "7. *Disqualifications for membership of Parliament or of a State Legislature.*—A person shall be disqualified for being chosen as and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State—
>
> (a) if, whether before or after the commencement of the Constitution, he has been convicted, or has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty, of any offence or corrupt or illegal practice which has been declared by S. 139 or S. 140 to be an offence or practice entailing disqualification for membership of Parliament and of the Legislature of every State, unless such period has elapsed as has been provided in that behalf in the said S. 139 or S. 140, as the case may be;
>
> (b) if, whether before or after the commencement of the Constitution, he has been convicted by a Court in India of any offence and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release;
>
> (c) if, having been nominated as a candidate for Parliament or the Legislature of any State or having acted as an election agent of any person so nominated, he has failed to lodge a return of election expenses within the time and in the manner required by or under this Act, unless five years have elapsed from the date by which the return ought to have been lodged or the Election Commission has removed the disqualification;
>
> (d) if, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share or interest in a contract for the supply of goods to, or for the

execution of any works or the performance of any services undertaken by, the appropriate Government;

(e) if he is a director or managing agent of, or holds any office of profit under, any corporation in which the appropriate Government has any share or financial interest;

(f) if, having held any office under the Government of India or the Government of any State or under the Crown in India or under the Government of an Indian State, he has, whether before or after the commencement of the Constitution, been dismissed for corruption or disloyalty to the State, unless a period of five years has elapsed since his dismissal."

"8. *Savings.*—(1) Notwithstanding anything in S. 7—

(a) a disqualification under cl. (a) or cl. (b) of that section shall not, in the case of a person who becomes so disqualified by virtue of a conviction or a conviction and a sentence and is at the date of the disqualification a member of Parliament or of the Legislature of a State, take effect until three months have elapsed from the date of such disqualification, or if within these three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of:

(b) a disqualification under cl. (c) of that section shall not take effect until the expiration of two months from the date by which the return of election expenses ought to have been lodged or of such longer period as the Election Commission may in any particular case allow;

(c) a disqualification under cl. (d) of that section shall not, where the share or interest in the contract devolves on a person by inheritance or succession or as a legatee, executor or administrator, take effect until the expiration of six months after it has so devolved on him or of such longer period as the Election Commission may in any particular case allow;

(d) a person shall not be disqualified under cl. (d) of that section by reason of his having a share or interest in a contract entered into between a public company of which he is a shareholder but is neither a director holding an office of profit under the company nor a managing agent and the appropriate Government;

(e) a person shall not be disqualified under cl. (e) of that section by reason of his being a director unless the office of such director is declared by Parliament by law to so disqualify its holder;

(f) a disqualification under cl. (e) of that section shall not, in the case of a director, take effect where the law making any such declaration as is referred to in cl. (e) of this section in respect of the office of such director has come into force after the director has been chosen a member of Parliament or of the Legislature of a State, as the case may be, until the expiration of six months after the date on which such law comes into force or of such longer period as the Election Commission may in any particular case allow;

(g) a disqualification under cl. (f) of that section may, in the case of any of the candidates for the first elections under this Act, be removed by the Election Commission for reasons to be recorded by it in writing.

(2) Nothing in cl. (d) of S. 7 shall extend to a contract entered into between a co-operative society and the appropriate Government."

2. **Effect of disqualification.**—If a person is disqualified under this article at the time of his election, his election will be void. If he becomes disqualified subsequently, he will cease to be a member of Parliament and his seat will become vacant. It will not be necessary for the Parliament to declare his seat to be vacant. Compare in this connection the provisions of ART. 104 under which the absence of a member without permission for 60 days from the meetings of the House, will entitle the House to declare his seat vacant but will not cause the seat to become vacant automatically. Under ART. 100 cl. (2) any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do, sat or voted or otherwise took part in the proceedings. Hence, the proceedings of a House will not be invalidated by the fact that it is discovered subsequently that the person who was disqualified to be a member of the House under ART. 102, took part in such proceedings. But under ART. 104, such a person would be liable to a penalty of Rs. 500 per day on which he attended a session of the House with the knowledge of his disqualification.

3. **Office of profit.** — See ART. 58 NOTE 2.

4. **Preventive detention.**—Imprisonment under any law relating to preventive detention is not a disqualification for membership of Parliament under this article or under the Representation of the People Act, 1951, or any other law.[1]

5. **Immunity from imprisonment.** — See notes under ART. 84.

Decision on questions as to disqualifications of members.

103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final.

Article 102 — Note 4

[1] 1952 Cal 632 (Pr 18) [A I R V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali v. State of West Bengal.*

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

1. Analogous and cognate provisions. — Article 192 is an analogous provision relating to State Legislatures. Under that article the power of determining the question whether a member of a State Legislature has become affected with a disqualification is to be determined by the Governor of the State.

Under ART. 329 (b), an election to a Legislature can only be called in question by an election petition. But questions relating to the disqualifications of members must be determined only by the President under this article. The President is required to take the opinion of the Election Commission and to act according to such opinion, when determining the question of disqualification of a member of Parliament. As to the constitution of Election Commission, see ART. 324.

Penalty for sitting and voting before making oath or affirmation under Article 99 or when not qualified or when disqualified.

104. If a person sits or votes as a member of either House of Parliament before he has complied with the requirements of Article 99, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union.

GOVERNMENT OF INDIA ACT, 1935

"27. If a person sits or votes as a member of either Chamber, when he is not qualified or is disqualified for membership thereof, or when he is prohibited from so doing by the provisions of sub-sect. (3) of the last preceding section, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Federation."

COGNATE PROVISION

Article 99 deals with oath or affirmation by members.

1. Scope. — Under ART. 100 cl. (2), any proceedings in Parliament shall be valid, notwithstanding that it is discovered subsequently that some person who was not entitled so to do, sat or voted or otherwise took part in the proceedings. Under this article, a penalty is provided for sitting and voting before making oath or affirmation under ART. 99 or when not qualified or when disqualified. Thus,

Article 104
Note 1

although the proceedings are not rendered invalid by the fact that a member who was disqualified took part in such proceedings, the member is made liable to a penalty for taking part in the proceedings. The corresponding provision relating to State Legislatures is contained in ART. 193.

Powers, Privileges and Immunities of Parliament and its Members

Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof.

105. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

GOVERNMENT OF INDIA ACT, 1935

"28. (1) Subject to the provisions of this Act and to the rules and standing orders regulating the procedure of the Federal Legislature, there shall be freedom of speech in the Legislature, and no member of the Legislature shall be liable to any proceedings in any

Court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either Chamber of the Legislature of any report, paper, votes or proceedings.

(2) In other respects, the privileges of members of the Chambers shall be such as may from time to time be defined by Act of the Federal Legislature and, until so defined, shall be such as were immediately before the establishment of the Federation enjoyed by members of the Indian Legislature. . . . . .

(5) The provisions of sub-sections (1) and (2) of this section shall apply in relation to persons who by virtue of this Act have the right to speak in, and otherwise take part in the proceedings of, a Chamber as they apply in relation to members of the Legislature."

Synopsis

1. Scope of the article.
2. Freedom of speech inside Parliament.
3. Rules and Standing Orders of Parliament—See ART. 118.
4. Immunity of members of Parliment from legal proceedings — Clause (2).
5. Publication of Parliamentary proceedings — Clause (2).
    - (a) Publication under authority of the House.
    - (b) Publication otherwise than under authority.
6. Petition to Parliament — Privilege as to.
7. Privileges of Parliament (General) — Clause (3).
    - (a) Introductory.
    - (b) Representation of the People Acts, 1950, and 1951.
    - (c) Disqualification and privilege.
    - (d) House of Commons, privileges of.
    - (e) Resolution of either House.
    - (f) Legal proceedings against House.
    - (g) Habeas corpus.
    - (h) Commitment for contempt.
    - (i) Rules of procedure.
    - (j) Committee of privileges.
8. Freedom from arrest.
    - (a) Basis of privilege.
    - (b) Civil Procedure Code, S. 135A.
    - (c) Election of person under detention.
    - (d) Arrest under criminal law.
    - (e) Duration of privilege.
    - (f) Remedies.
    - (g) Revival of liability to arrest.
    - (h) Bail.
    - (i) Preventive detention.
9. Exemption from service on juries.
10. Power to commit for contempt.
    - (a) General.
    - (b) Basis of power.
    - (c) Contempt committed outside the House.
    - (d) Warrant for commitment.
    - (e) Execution of warrant for arrest.
    - (f) What will amount to contempt.
11. Power to institute enquiries and examine witnesses.
12. Election disputes.
13. Denial of right to vote—Remedy.
14. Expulsion of member.
15. Declaring seat vacant — See ART. 101, NOTE 4.
16. Proof of proceedings of Parliament.

1. Scope of the article. — This article deals with the powers, privileges and immunities of Parliament and its members. The corresponding article about State Legislatures is ART. 194.

Clauses (1) and (2) relate to the freedom of speech and expression of members of Parliament in Parliament, and the right of publication of Parliamentary proceedings. With regard to other matters there is no specific provision in the article, but it is provided that provision may be made by law by Parliament and until then the privileges of the House of Commons in the United Kingdom should be the privileges of the Houses of Parliament here also.[1] As to privileges of the English Parliament, see May's PARLIAMENTARY PRACTICE and Halsbury's LAWS OF ENGLAND, 2nd Edition, Vol. 24, pages 344-359.

2. **Freedom of speech inside Parliament.** — Clauses (1) and (2) of this article make it clear that members of Parliament are entitled to speak freely in the House or in any committee of the House and they cannot be proceeded against in respect of any utterance made in the proceedings of the House.[1] Under English law also, words spoken by a member of Parliament in Parliament are absolutely privileged and the Court has no jurisdiction to entertain an action in respect of them. When Parliament is sitting and statements are made in either House the member making them is not amenable to the civil or criminal law, though the statements be false to his knowledge. A conspiracy among members to make such false statements would not make them liable under the criminal law. This privilege, however, does not extend to a statement published by a member outside the House, though it is a reproduction of what was said in the House and made in consequence of an incorrect publication in the newspaper.[2] In *Stockdale* v. *Hansard*,[3] Lord Denman, C. J., observed as follows :

> "For speeches made in Parliament by a member to the prejudice of any other person or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a Court of justice."

Under ART. 19 (1), all citizens have the right to freedom of speech and expression. But the right conferred by ART. 19 (1) is subject to reasonable restrictions that may be imposed by law on the exercise of the right for the purposes mentioned in cl. (2) of ART. 19. Thus, for instance, the right of freedom of speech and expression conferred by ART. 19 (1) is subject to the law of defamation. But the right of freedom of speech within the Parliament conferred by ART. 105, cls. (1) and (2) is not subject to the restrictions mentioned in ART. 19 (2). This is the object of this article. This object would not have been served by the general provision as to freedom of speech and expression in ART. 19.

But the freedom of speech of members of Parliament within the Parliament is subject to the "provisions of this Constitution" and to

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Article 105 — Note 1

1. 1952 Cal 632 (636) (Pr 27) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*

Article 105 — Note 2

1. 1952 Cal 632 (636) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*

2. (1839) 112 E R 1112 (1156) : 9 Ad and E 1, *Stockdale* v. *Hansard.* Halsbury's Laws of England, 2nd Edn. Vol. 20, p. 466.

3. (1839) 112 E R 1112 (1156) : 9 Ad and E 1.

the rules and standing orders for regulating the procedure of Parliament. The expression "the provisions of this Constitution" obviously does not refer to the provisions of ART. 19 (2), as they refer only to the right conferred by ART. 19 (1) (a). Under ART. 121, no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties, except upon a motion for presenting an address to the President praying for the removal of the Judge. This is a provision of the Constitution restricting the freedom of speech conferred by cl. (1) of this article. As to Rules and Standing Orders regulating the procedure of Parliament, see ART. 118. The Rules of Procedure and Conduct of Business in Parliament (adapted and adopted under ART. 118 (2)) have been published in the Gazette of India, Extra-ordinary in its issue dated February 14th, 1950, pages 775-806. Rule 159 runs as follows :

> "159. *Rules to be observed while speaking*—A member while speaking shall not :
>
> (i) refer to any matter of fact on which a judicial decision is pending ;
>
> (ii) make a personal charge against a member ;
>
> (iii) use offensive expressions about the conduct or proceedings of Parliament or any State Legislature ;
>
> (iv) reflect on any determination of the House except on a motion for rescinding it ;
>
> (v) reflect upon the conduct of persons in high authority unless the discussion is based on a substantive motion drawn in proper terms;
>
> *Explanation.* — The words "persons in high authority" mean persons whose conduct can only be discussed on a substantive motion drawn in proper terms under the Constitution or such other persons whose conduct, in the opinion of the Speaker, should be discussed on a substantive motion drawn in terms to be approved by him ;
>
> (vi) use the President's name for the purpose of influencing the debate ;
>
> (vii) utter treasonable, seditious or defamatory words ;
>
> (viii) use his right of speech for the purpose of obstructing the business of the House."

3. Rules and Standing Orders of Parliament. — See ART. 118.

4. Immunity of members of Parliament from legal proceedings—Clause (2). — Under cl. (2), members of Parliament are granted complete immunity from legal proceedings in a Court in respect of anything said or any vote given by them in Parliament or any committee thereof. The clause also confers exemption from legal liability in regard to the publication of Parliamentary proceedings under the authority of the Parliament. This exemption is not confined to members of Parliament but applies to all persons.

As already seen in NOTE 2, there is complete freedom of speech in Parliament by virtue of cl. (1) of this article. This carries with it the immunity from legal proceedings for things said in Parliament by members. This immunity is specifically expressed in cl. (2). The clause also enacts that no member of Parliament shall be liable in any Court in respect of any vote given by him in Parliament or any committee thereof. Thus, Courts have no jurisdiction over members of Parliament in regard to words spoken by them in Parliament or the votes that they may have cast there. In *Kilbourn* v. *Thompson*,[1] the Supreme Court of America held that the House of Representatives of the United States had no *general* power of committing persons for contempt and that a person, who was committed for contempt by the House in excess of the powers of the House, might maintain an action for damages for false imprisonment. But the Supreme Court held that the members of the House of Representatives who did not personally assist in the arrest of the plaintiff or his imprisonment nor order or direct the same except by their votes and by their participation as members in the official acts and proceedings of the House, could not be held liable.

Under ART. 361, the President or the Governor or Rajpramukh of a State shall not be answerable to any Court for his official conduct. Clause (2) of this article is a similar provision with regard to members of Parliament.

Under this clause, the exemption that is given is in respect of proceedings in a court. But members and others, who may be exempt from legal proceedings in a Court by virtue of cl. (2), may yet be subject to the jurisdiction of the House of Parliament to punish for contempt or breach of privilege.

5. Publication of Parliamentary proceedings—Clause (2).

(a) Publication under authority of the House

—The latter part of cl. (2) confers an absolute privilege in regard to the publication of Parliamentary proceedings by any person under the authority of the House. The clause provides that no person shall be liable to any proceedings in any Court in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings. In England also, there is a similar provision contained in the Parliamentary Papers Act, 1840 (3 & 4 Vict. Ch. 9). Before that Act was passed it had been held in *Stockdale* v. *Hansard*[1] that even though a Parliamentary paper was published under the authority of the House of Commons, the publisher would be liable for libel if the paper contained any defamatory matter. The Parliamentary Papers Act, 1840, was passed to get over this decision.

(b) Publication otherwise than under authority

With regard to reports of Parliamentary proceedings not published under the direct authority of the House, a faithful newspaper report of a debate in Parliament is privileged though containing defamatory matter.[2] The publication is privileged on the same principle as an

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Article 105 — Note 4

[1] (1881) 26 Law Ed 377 (391) : 103 U S 168.

Article 105 — Note 5

[1] (1839) 112 E R 1112 (1173) : 9 Ad and E 1.

[2] (1868) L R 4 Q B 73 (89, 93) : 8 B and S 671, *Wason* v. *Walter*.
[*See also* (1857) 119 E R 1233 (1234) : 7 El and Bl 229, *Davison* v. *Duncan*. (Per *Wightman J.* — Principle of balance of convenience on which privilege

accurate report of proceedings in a Court of justice is privileged, namely, that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.[3] In *Wason* v. *Walter*,[4] Cockburn, C. J., observed as follows :

> "It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the Government of the country or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the Constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in Parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations subsisting between the Government, the Legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of Parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the State,—no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it."

Even should either House of Parliament decide to prevent its proceedings from being made known to the country, any publication of its debates made in contravention of its order would be a matter between the House and the public, and would not affect the question of privilege in respect of the publication in a Court of justice.[5] An honest

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applies to publication of proceedings in Court may also apply to Parliamentary proceedings.)]

[3] (1868) L R 4 Q B 73 (83, 87) : 8 B and S 671, *Wason* v. *Walter*.

[4] (1868) L R 4 Q B 73 (89, 90) : 8 B and S 671.

[5] (1868) L R 4 Q B 73 (95) : 8 B and S 671, *Wason* v. *Walter*.

and fair comment in a public newspaper on a debate in a House of Parliament would also be privileged.[6] Thus, where a debate took place in the House of Lords on a petition charging a high judicial officer with grave misconduct and praying for his removal, it was held that this was a subject of great public concern, on which a writer in a public newspaper had full right to comment, and therefore so far privileged that the comments would not be actionable so long as the jury should think them honest and made in a fair spirit and such as was justified by the circumstances as disclosed in an accurate report of the debate.[7]

A person, who *bona fide* and without malice prints and publishes an extract from or an abstract of a Parliamentary paper, is protected, under the English law, by S. 3 of the Parliamentary Papers Act, 1840, although he does not act by or under the authority of either House of Parliament.[8]

If a member of Parliament published in a newspaper his speech as delivered in Parliament and it contains charges of a slanderous nature against an individual, an information will lie for a libel, though had the words been merely delivered in Parliament, they will be dispunishable in the Courts.[9] The privilege of exemption from legal liability does not extend to such a case, although the publication is made in consequence of the appearance of an incorrect report in a newspaper.[10]

• The publication of the report of his speech by a member of the House of Commons *bona fide* addressed to his client would be privileged.[11]

The publication of a matter defamatory of an individual is not privileged because the libel is contained in a fair report in a newspaper of what passed at a public meeting.[12]

Under the English law, it is within the power of either House of Parliament, should it deem it expedient to do so, to prohibit the publication of its proceedings.[13] Each House regards a report from any one of its committees as being strictly privileged and will punish any person who publishes or causes to be published any such report before it has been presented to the House.[14]

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[6] (1868) L R 4 Q B 73 (96) : 8 B and S 671, *Wasan* v. *Walter*.

[7] (1868) L R 4 Q B 73 (96) : 8 B and S 671, *Wason* v. *Walter*.

[8] (1909) 2 K B 958 (976) : 78 L J K B 879, *Mangena* v. *Wright*. (*Mangena* v. *Edward Lloyd Ltd.* (1908) 98 L T 640, Foll.)

[9] (1857) 119 E R 1233 (1234) : 7 El and Bl 229, *Davison* v. *Duncan*.
(1813) 105 E R 102 (104) : 1 M and S 273, *The King* v. *Creevey*.
(1793) 170 E R 337 (338) : 1 Esp 226, *The King* v. *Lord Abingdon*.

[10] (1793) 170 E R 337 (338) : 1 Esp 226, *The King* v. *Lord Abingdon*.

[11] (1857) 119 E R 1233 (1234): 7 El and Bl 229, *Davison* v. *Duncan*. (*Crompton, J.* — The privilege in such a case would arise because the publication was as a communication between a member and his constituents and not because it was a true report of what took place in Parliament.)

[12] (1857) 119 E R 1233 (1233) : 7 El and Bl 229 (231), *Davison* v. *Duncan*.

[13] Halsbury's Laws of England, 2nd Edition, Vol. 24, p. 350.

[14] Halsbury's Laws of England, 2nd Edition, Vol. 24, p. 351.

6. Petition to Parliament—Privilege as to.—The printing of a false and scandalous petition to a Committee of the House of Commons and delivering copies thereof to the members of the Committee is not actionable, because it is in a summary course of justice and before those who have power to examine whether it be true or false.[1]

(a) Introductory

7. Privileges of Parliament (General)—Clause (3). — After dealing specifically with the right to free speech within Parliament and the immunity from legal liability in a Court of law in respect of words spoken or votes given inside the Parliament by members of Parliament and in respect of the authorised publication of Parliamentary proceedings, cl. (3) proceeds to deal with the powers, privileges and immunities of Parliament and its members "in other respects." The clause provides that such powers, privileges and immunities of each House of Parliament and of its members and the committees of each House shall be such as may be defined by Parliament by law. Until such definition by Parliament, such powers, privileges and immunities should be similar to those of the House of Commons in the United Kingdom and its members and committees at the commencement of the Constitution. If there is any rule of law which is contrary to the rule obtaining in England regarding the privileges of the House of Commons at the date of the coming into force of the Constitution, such rule will be void (See NOTE 8.)

(b) Representation of the People Acts, 1950 and 1951

The clause envisages express legislation on these questions of privileges and immunities and mere legislation on qualifications and disqualifications will not touch the question. The Representation of the People Acts of 1950 and 1951 do not deal with the question of privilege and they were not passed to give effect to cl. (3).[1]

(c) Disqualification and privilege

Disqualification is a very different matter from any particular immunities claimed by members. If a member is not disqualified it only means that he remains a member and not that he can claim any particular immunity as such member. Whether as such member he can claim any particular immunity must depend upon express law relating to such immunities or in the absence of such law, on the question whether the immunity was one which could be claimed by members of the House of Commons in England at the commencement of the Constitution. Thus, the mere fact that imprisonment under the law relating to preventive detention is not a disqualification for membership of Parliament, does not mean that a member can claim immunity from such imprisonment so long as he continues as a member.[2]

Article 105 — Note 6

[1] (1667) 85 E R 137 (141) : 1 Saund 131, *Lake* v. *King*.

Article 105 — Note 7

[1] 1952 Cal 632 (635) (Pr 26) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal*.

[2] 1952 Cal 632 (636) (Prs 26, 29, 48) [A I R V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal*.

(d) House of Commons—Privileges of

In the absence of provision by Parliament relating to certain matter, the question of privilege with reference to it will have to be decided in accordance with the privileges of the House of Commons in the United Kingdom.[3] For this purpose, only the existing privileges of the House of Commons at the time of the coming into force of the Constitution can be taken into account.[4]

Under cl. (3), therefore, the question as to what are the privileges of the House of Commons is material in determining the privileges of the Houses of Parliament in India. Under ART. 194 relating to the privileges of State Legislatures, there is a similar provision under which the privileges of State Legislatures shall be those of the English House of Commons till the State Legislature defines by law the privileges of either House of Legislature.

The English Parliament enjoys privileges of a most important character. Some are common to both the Houses, some peculiar to each. All are essential to the proper discharge of their functions.[5] In one sense the privilege of each House is the privilege of the whole Parliament, because whatever impedes the proper action of either, impedes those functions which are necessary for the performance of their joint duties.[6] The House of Commons has the exclusive privilege in respect to grants of money and imposition of taxes.[7]

However extensive the privileges of Parliament, neither House of Parliament, in order to assert its privileges, has the right to do anything or cause anything to be done, which is in contravention of the law of the land.[8] Hence, the Court is entitled to examine whether a privilege claimed by a House of Parliament is sustainable in law.[9] In other words, each House of Parliament is not the sole judge of its own privileges.[10]

(e) Resolution of either House

A resolution of either House of Parliament does not amount to law. Such resolution cannot alter the law of the land or place any one beyond its pale.[11] But so far as the internal affairs of each House are concerned, it is supreme. The jurisdiction of the Houses over their own members and their right to impose discipline within their walls is absolute and exclusive.[12] To use the words of Lord Ellenborough in *Burdett* v. *Abbot*,[13] the Houses "would sink into utter contempt and inefficiency without it" (such jurisdiction). Thus, the House of Commons is at least for certain purposes and in relation to certain persons the absolute judge of its own privileges and so in regard to such purposes and persons, it can practically change or supersede the law of the land, though otherwise the resolution of either House of Parliament cannot change the law of the land.[14] Blackstone says that the whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates and not elsewhere."[15] Hence, a Court of law has no right to enquire into the propriety of the resolution of the House of Commons restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do, namely, take the oath prescribed by the Parliamentary Oaths Act, 1866 (29 & 30 Vict., Ch 19).[16] If in such a case injustice has been done to the member, it is injustice for which the Courts of law afford no remedy. Remedy, if remedy it be, lies not in actions in the Courts of law, but by an appeal to the constituencies, whom the House of Commons represents.[17]

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[3] 1951 Mad 269 (Pr 4) [A I R V 38 C 62] : I L R (1952) Mad 135 (DB), *In the matter of Venkateswarlu.*

[4] 1952 Cal 632 (637) (Pr 35) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*

[5] (1839) 112 E R 1112 (1155) : 9 Ad & El 1, *Stockdale* v. *Hansard.*

[6] (1839) 112 E R 1112 (1154) : 9 Ad & El 1, *Stockdale* v. *Hansard.*

[7] (1839) 112 E R 1112 (1156) : 9 Ad & El 1, *Stockdale* v. *Hansard.*

[8] (1839) 112 E R 1112 (1168) : 9 Ad & El 1, *Stockdale* v. *Hansard.*
(1705) 14 St Tr 695, *Ashby* v. *White.*

[9] (1839) 112 E R 1112 (1168) : 9 Ad & El 1, *Stockdale* v. *Hansard.*

[10] (1839) 112 E R 1112 (1168) : 9 Ad & El 1, *Stockdale* v. *Hansard.*

[11] (1884) 12 Q B D 271 (274) : 53 L J Q B 209, *Bradlaugh* v. *Gossett.* (In an action between party and party brought in a Court of law, if the legality of a resolution of the House of Commons arises incidentally, and it becomes necessary to determine whether it be legal or no for the purpose of doing justice between the parties to the action, in such a case the Courts must entertain and determine that question.)
(1839) 112 E R 1112 (1153, 1154) : 9 Ad & El 1, *Stockdale* v. *Hansard.*

(f) Legal proceedings against House

An action will not lie against the Sergeant at Arms of the House of Commons for excluding a member from the House in obedience to the resolution of the House directing him to do so. Nor will the Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House. The Houses of Parliament cannot act by themselves in a body. They must act by officers and the Sergeant at Arms is the legal and recognized officer of the House of Commons to execute its orders. He is protected by their decision.[18] In *R.* v. *Graham-Campbell*,[19] an application was made for summons to members of the Kitchen Committee of the House of Commons and the Refreshment Department of the House for sale within the House of Commons of intoxicating liquor without licence contrary to the law. It was held that as the House in the matters, of which complaint was made, was acting collectively in a matter falling within the ambit of its internal affairs, the Magistrate was justified in refusing summons.

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[12] (1884) 12 Q B D 271 (275, 278) : 53 L J Q B 209, *Bradlaugh* v. *Gossett*.

[13] (1811) 104 E R 501 (559) : 14 East 1 (152).

[14] (1884) 12 Q B D 271 (274) : 53 L J Q B 209, *Bradlaugh* v. *Gossett*.

[15] (1884) 12 Q B D 271 (278) : 53 L J Q B 209, *Bradlaugh* v. *Gossett*. (Blackstone (1 Com 163) quoted by *Stephen, J.*)

[16] (1884) 12 Q B D 271 (277, 278) : 53 L J Q B 209, *Bradlaugh* v. *Gossett*.

[17] (1884) 12 Q B D 271 (277):53 L J Q B 209, *Bradlaugh* v. *Gossett*. (Per *Lord Coleridge J.*)

[18] (1884) 12 Q B D 271 (276):53 L J Q B 209, *Bradlaugh* v. *Gossett*. ((1811) 104 E R 501 : 14 East 1, *Burdett* v. *Abbot* and (1839) 112 E R 1112 : 9 Ad & El 1, *Stockdale* v. *Hansard*, commented upon and approved.)

[19] (1935) 104 L J K B 244 (247):(1935) 1 K B 594. (*Bradlaugh* v. *Gossett*, (1884) 53 L J Q B 209 : 12 Q B D 271, Foll.—Observations of *Lord Denman, C. J.*, in (1839) 112 E R 1112 : 9 Ad & El 1, *Stockdale* v. *Hansard* quoted and followed.)

No writ or direction under ART. 32 or ART. 226 can be issued to a Legislature in respect of its functions. Although there is no provision in the Constitution similar to ART. 361 (which relates to the President, Governors and Rajpramukhs) expressly exempting the Parliament or State Legislatures from legal proceedings in a Court of law, such exemption arises from the provisions of ARTS. 105 and 194 of the Constitution and from the inherent powers possessed by the Legislature to prevent outside interference with the exercise of its functions. Hence, a Court cannot issue a direction to a Legislature not to proceed with a Bill on the ground that it infringes the Fundamental Rights guaranteed by the Constitution. Article 13 (2) merely declares what the Legislature shall not do. If the Legislature does what it is directed by the Constitution not to do, its Acts may be declared void. But no direction can be issued by the Court not to proceed with a Bill.[20]

(g) Habeas Corpus

Where a person is entitled to the privilege of exemption from arrest on the ground of his being a member of the House of Commons or of his being elected such a member, and he is arrested contrary to such privilege, he is entitled to be set at liberty by a Court of law in Habeas Corpus proceedings and not only by the Speaker of the House.[21]

(h) Commitment for contempt

If a person is committed for contempt by a House of the Legislature when such House has no power to so commit him, he can sue for damages for false imprisonment.[22] But members of the House, who did not personally assist in his arrest or imprisonment nor order or direct the same except by their votes and by their participation as members in the official acts and proceedings of the House, cannot be held liable in such action.[23]

(i) Rules of Procedure

In considering the privileges and powers of either House of Parliament regard should also be had to the Rules of Procedure and Conduct of Business in Parliament (See ART. 118).

(j) Committee of Privileges

Rules 181 to 196 of the Rules of Procedure and Conduct of Business in Parliament[24] deal with questions of privilege in Parliament. They provide as to how such questions can be raised and disposed of. Provision is made for the constitution of a Committee of Privileges and for the consideration by such Committee of questions of privilege referred to it. Questions of privilege may be referred to the Committee by the Speaker *suo motu* (Rule 196) or on being raised by a member of the House and leave being granted by the House for its reference (Rule 185).

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[20] 1951 All 228 (Pr 32) [AIR V 38 C 25] : I L R (1951) 2 All 505 (DB), *Chotey Lal* v. *The State of Uttar Pradesh.*

[21] (1830) 9 L J (O S) K B 6 (9) : 1 Dowl 9, *Phillips* v. *Wellesley.*

[22] (1881) 26 Law Ed 377 (391) : 103 U S 168, *Kilbourn* v. *Thompson.*
(1866) L R 1 P C 328 (339) : 36 L J P C 34, *Doyle* v. *Falconer.*

[23] (1881) 26 Law Ed 377 (391) : 103 U S 168, *Kilbourn* v. *Thompson.*

[24] Notfn. No. 30 II/50A—Gazette of India Extraordinary, March 10, 1950, pp. 1055-1057.

8. Freedom from arrest. — In the absence of statutory provisions made by Parliament, the privileges of the House of Commons in the United Kingdom are to be applicable to Parliament under this Constitution also. One of the important privileges of the English Parliament is the exemption of its members from the liability to arrest under civil process during the session of Parliament and for a period of 40 days before and after.[1] This privilege applies also to members of the Indian Parliament.[2] This privilege is based on grounds of public policy to enable members of the Legislatures to discharge their public duties without interruption. In *Stockdale* v. *Hansard*,[3] Lord Denman, C. J., observed as follows :

(a) Basis of privilege

> "I will speak but of one other privilege, the privilege from personal arrest, which is both undoubted and indispensable. A distinction has been sometimes taken, but, in my opinion, does not exist in law, between one class of privileges as necessary for performing the functions of Parliament, and another as a personal boon; both classes are, as I apprehend, conferred on grounds of public policy alone. The proceedings of Parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor, could restrain the liberty of the members."

(b) Civil. Procedure Code, S. 135A

Under S. 135A of the Civil Procedure Code, exemption is conferred on members of legislative bodies from arrest and detention under civil process. The section was inserted in the Code by Act 23 of 1925. The section runs as follows :

Exemption of members of legislative bodies from arrest and detention under civil process.

"135-A. (1) No person shall be liable to arrest or detention in prison under civil process :

(a) if he is a member of unicameral Legislature or of either House of a bicameral Legislature continued or constituted under the Constitution, during the continuance of any meeting of such Legislature or House ;

(b) if he is a member of any committee of such Legislature or House, during the continuance of any meeting of such committee ;

(c) if he is a member of either House of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference or joint committee of the Houses of that Legislature ; and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1), shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1)."

Article 105 — Note 8

[1] (1839) 112 E R 1112 (1156) : 9 Ad and El 1, *Stockdale* v. *Hansard*. Halsbury's Laws of England, 2nd Edition, Vol 24. pp. 346, 347.

[2] 1951 Mad 269 (Pr 7) [AIR V 38 C 62]: ILR (1951) Mad 135 (DB), *In the matter of Venkateswarlu.*

[3] (1839) 112 E R 1112 (1156) : 9 Ad and El 1 (115).

Article 105
Note 8

It will be seen that under the above section exemption from arrest only applies during the meeting of the Legislature and a period of 14 days before and after. In this respect, the section is at variance with the Rule applicable to the House of Commons in England, under which the privilege from freedom from arrest under civil process extends to a period of 40 days, before and after a session of the House. Under cl. (3) of this article, until Parliament defines by law the powers, privileges and immunities of each house and its members the privileges of the House of Commons in England should apply. Hence, the rule contained in S. 135A of the Civil Procedure Code limiting the period of exemption to 14 days before and after a meeting of the Legislature should be regarded as void as being opposed to the provisions of the Constitution.

(c) Election of person under detention

Where a person in custody is elected a member of Parliament, he is entitled to be discharged on such election, unless the imprisonment is of such a nature as to disqualify him to be a member of Parliament.[4] (See Representation of the People Act, 1951, S. 7.)

(d) Arrest under criminal law

Under English law, the privilege of freedom from arrest of members of Parliament applies only to arrest under civil process and not to arrest under process of criminal law.[5] The same rule applies in India also.[6]

(e) Duration of privilege

As stated already, the privilege of a member of Parliament from arrest exists for 40 days before and after a meeting of the Parliament.[7] Where the Legislative Assembly of a State has been prorogued and has not yet been summoned for the next session and there is no knowing when it will be summoned, it would be premature to claim the privilege from arrest.[8] The rule of privilege of a member of Parliament from arrest is the same in the case of a dissolution as in that of a prorogation.[9] Hence, even where the House has been dissolved and not merely prorogued, the privilege will apply for a period of 40 days on the date of dissolution.

(f) Remedies

Where a member of Parliament in England is arrested or detained in custody contrary to his privilege as such member, he is entitled to be discharged by the Court and not only by warrant of the Speaker of the House of Commons.[10] Under this Constitution also, the High Court has power to issue appropriate writs under ART. 226 such as Habeas Corpus, in the case of contravention of the rights, privileges and immunities of members of Parliament or State Legislatures.[11]

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[4] (1830) 9 L J (O S) K B 6 (9) : 1 Dowl 9, *Phillips* v. *Wellesley*.

[5] 1952 Cal 632 (636) (Pr 29) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*
Halsbury's Laws of England, 2nd Edition, p. 347.

[6] 1952 Cal 632 (636) (Pr 29) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*
1951 Mad 269 (Prs 11, 12) [AIR V 38 C 62] : ILR (1951) Mad 135 (DB), *In the matter of Venkateswarlu.*

[7] 1952 Cal 632 (Pr 38) [AIR V 39]: 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*
1951 Mad 269 (Pr 7) [AIR V 38 C 62] : ILR (1951) Mad 135 (DB), *In the matter of Venkateswarlu.*
(1847) 154 E R 183 (185) : 1 Exch 430 (435), *Goudy* v. *Duncombe.*

[8] 1952 Cal 632 (Pr 38) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*

[9] (1847) 154 E R 183 (185) : 1 Exch 430 (434), *Goudy* v. *Duncombe.*

(g) Revival of liability to arrest

The privilege from arrest of members of Parliament only suspends the liability to arrest. The liability is automatically revived on the cessation of the privilege.[12] See also S. 135-A (2) of the Code of Civil Procedure quoted above.

(h) Bail

Where a person stands bail for another, who is entitled to the privilege from personal arrest as a member of Parliament, the bail is entitled to be relieved on motion.[13]

(i) Preventive detention

As stated already, the privilege from personal arrest of members of Parliament only applies to arrest under civil process. Arrest under the law relating to preventive detention is not arrest under civil process. Preventive detention partakes more of criminal than of a civil character, as an order for preventive detention is based on a suspicion of nefarious and criminal or treasonable activities.[14] It should also be remembered that the privilege of Parliament is granted on grounds of public policy and is not to be used to the detriment of the public.[15] And, hence, the privilege from arrest does not apply to such cases.[16] In such a case, there is no question of any infringement of the freedom of speech of the member.[17]

In this connection, reference may be made to the case of Captain Ramsay, a member of the House of Commons in England, who was detained without trial by executive order under Reg. 18B of the Defence (General) Regulations, 1939, during the last war. His case was referred to the Committee of Privileges of the House of Commons. The Committee did not recognize the privilege claimed by Captain Ramsay against such arrest. The Committee in its report to the House[18] came to the following conclusion :

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[10] (1830) 9 L J (O S) K B 6 (9) : 1 Dowl 9, *Phillips* v. *Wellesley*.

[11] 1951 Mad 269 (Prs 4, 7, 11, 12, 14, 15, 16) [AIR V 38 C 62]: ILR (1951) Mad 135 (DB), *In the matter of Venkateswarlu*.

[12] (1830) 9 L J (O S) K B 6 (9) : 1 Dowl 9, *Phillips* v. *Wellesley*.

[13] *See* (1830) 9 L J (O S) K B 6 (9) : 1 Dowl 9, *Phillips* v. *Wellesley*. (Where defendant who has perfected bail is elected a member of Parliament : *Semble*, that his liability to arrest being only suspended while he is in Parliament, his bail would be liable, if he lost his privilege before they were called upon to surrender him — Bail is entitled in all cases to be relieved upon motion where the principal if surrendered would be entitled to be discharged.)

[14] 1952 Cal 632 (636) (Pr 30a) [AIR V 39]: 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal*.

[15] *See* 1952 Cal 632 (636) (Pr 30) [AIR V 39]: 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal*.

[16] 1952 Cal 632 (636) (Pr 30) [AIR V 39] : 1952 Cri L Jour 1454 (S B), *Ansumali* v. *State of West Bengal*.
1951 Mad 269 (Prs 14, 15) [AIR V 38 C 62] : ILR (1951) Mad 135 (DB), *In the matter of Venkateswarlu*. (Member of Madras Legislature not immune from being detained under the Madras Maintenance of Public Order Act 23 of 1949.)

[17] 1951 Mad 269 (Prs 14, 15) [AIR V 38 C 62] : ILR (1951) Mad 135 (DB), *In the matter af Venkateswarlu*.

> "The precedents lend no support to the view that members of the Parliament are exempted by privilege of Parliament from detention under Regulation 18B of the Defence (General) Regulations, 1939. Preventive arrest under statutory authority by executive power is not within the principle of the cases to which privilege from arrest has been decided to extend. To claim that the privilege extends to such cases would be either the assertion of a new Parliamentary privilege or an unjustified extension of the existing one. No question of any infringement of freedom of speech arises."

9. Exemption from service on juries. — Under the English law, members of either House of Parliament are exempt from serving on juries.[1] Under S. 320 (aa) of the Criminal Procedure Code members of Parliament or of any State Legislature are exempt from liability to serve as jurors and assessors. This provision is in accordance with the privileges of the House of Commons in England, which under cl. (3) of this article are applicable to members of Parliament in India.

(a) General

10. Power to commit for contempt.—Under cl. (3), the privileges and powers of the House of Commons of the United Kingdom are to be applicable to the Parliament in India until Parliament by law defines such powers and privileges. Among the most important powers of the House of Commons in England is its power to commit a person for contempt or breach of its privileges.[1] The House of Commons can commit a member for publishing libellous and scandalous matter reflecting on the rights and privileges of the House[2] or for disorderly behaviour inside the House.[3] But the commitment can only be till the end of the session.[4] In *Stockdale* v. *Hansard*,[4a] Lord Denman, C. J., observed as follows :

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[18] Quoted in 1952 Cal 632 (639) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*

Article 105 — Note 9

[1] Halsbury's Laws of England, 2nd Edition, Vol. 24, p. 348.

Article 105 — Note 10

[1] (1840) 113 E R 419 (426): 11 Ad and El 273, *Case of the Sheriff of Middlesex.*
(1811) 104 E R 501 (561) : 14 East 1, *Burdett* v. *Abbott.*
(1842) 66 R R 871 (876) : (1842) Car and M 380, *Howard* v. *Gossett.* (Speaker of House of Commons may issue warrant for arrest of person, who violates the privileges of the House.)
(1839) 112 E R 1112 (1156) : 9 Ad and El 1, *Stockdale* v. *Hansard.*
(1817) 3 E R 1289 (1301) : 5 Dow 165, *Burdett* v. *Abbott.*
[*See* 14 Howell, St Tr 695 : 1 Smith L C 10th, *Ashby* v. *White.* (The claim of the House of Commons to commit for contempt was expressly admitted by the House of Lords in conference with the Commons in 1704.)]

[2] (1811) 104 E R 501 (561) : 14 East 1, *Burdett* v. *Abbott.*

[3] *See* (1880) 26 Law Ed 377 (386) : 103 U S 168, *Killbourn* v. *Thompson.*

[4] (1839) 112 E R 1112 (1156) : 9 Ad and El 1, *Stockdale* v. *Hansard.*

[4a] (1839) 112 E R 1112 (1156) : 9 Ad and El 1.

> "The privilege of committing for contempt is inherent in every deliberative body invested with authority by the Constitution. But, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every Court in Westminster Hall and every Judge of all the Courts would be bound to discharge him by habeas corpus."

(b) Basis of power

The power of commitment for contempt is inherent in every Assembly possessing supreme legislative authority, whether the contempt is such as tends indirectly to obstruct the proceedings of the Assembly or directly brings its authority into contempt.[5]

The power also belongs to the House of Commons by virtue of the *lex et consuetudo parliamenti* (the law and customs or usages of Parliament), which is a law peculiar to and inherent in the two Houses of Parliament in the United Kingdom.[6] The object of the power is to enable the House to function efficiently and without obstruction and disturbance. In *Burdett* v. *Abbot*,[7] Lord Ellenborough, C. J., observed as follows :

> "The privileges which belong to them seem at all times to have been, and necessarily must be, inherent in them, independent of any precedent; it was necessary that they should have the most complete personal security, to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of self-protection; I do not mean merely against acts of individual wrong; for poor and impotent indeed would be the privileges of Parliament, if they could not also protect themselves against injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual exercise of their Parliamentary functions. This is an essential right necessarily inherent in the supreme Legislature of the kingdom, and of course as necessarily inherent in the Parliament assembled in two Houses as in one. The right of self-protection implies, as a consequence, a right to use the necessary means for rendering such self-protection effectual. Independently, therefore, of any precedents or recognized practice on the subject, such a body must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument, that the House of Commons must be and is authorized to remove any immediate obstructions to the due course

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[5] (1839) 112 E R 1112 (1156) : 9 Ad and El 1, *Stockdale* v. *Hansard*.
(1836) 12 E R 733 (740) : 1 Moo P C 59, *Beaumont* v. *Barrett*.

[6] (1866) L R 1 P C 328 (339) : 36 L J P C 34, *Doyle* v. *Falconer*. (Like powers cannot be claimed by Legislative Assemblies of comparatively recent creation in the dependencies of the Crown.)

[7] (1811) 104 E R 501 (554) : 14 East 1.

Article 105
Note 10

of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection; it must also have the power of protecting itself from insult and indignity wherever offered, by punishing those who offer it. Can the High Court of Parliament, or either of the two Houses of which it consists be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging, to every Superior Court of Law, of less dignity undoubtedly than itself ? And is not the degradation and disparagement of the two Houses of Parliament in the estimation of the public, by contempttuos libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, in his endeavour to resort to the place where Parliament is holden ? And would it consist with the dignity of such bodies, or what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparatively tardy result of a prosecution in the ordinary course of law, for the vindication of their privileges from wrong and insult ? The necessity of the case would, therefore, upon principles of natural reason, seem to require that such bodies, constituted for such purposes, and exercising such functions as they do, should possess the powers which the history of the earliest times shews that they have in fact possessed and used."

In the *Case of the Sheriff of Middlesex*,[8] it was pointed out that the Crown has no right which it can exercise otherwise than by process of law, and has, therefore, no power of committing any person directly to jail for contempt. But, it was pointed out, representative bodies must necessarily vindicate their authorities by means of their own and those means lie in the process of committal for contempt. It was also pointed out that this applies not only to the Houses of Parliament but to the Courts of justice, which, as well as the Houses, must be liable to continual obstruction and insult if they were not entrusted with such power. But there is a distinction between a power to *punish* for contempt which is a judicial power and a power to *remove any obstruction* offered to the deliberations or proper actions of a legislative body during its sitting. It is clear that the latter power is necessary for self-preservation of the Legislative Assembly.[9]

(c) Contempt committed outside the House

On this ground, it has been held by the Judicial Committee of the Privy Council that the judicial power of punishing persons for contempt committed outside the House does not belong to the colonial legislative bodies, and that this power of punishing for contempt by imprisonment is a peculiar feature of the House of Commons, which is only the result of ancient usage and prescription.[10]

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8. (1840) 113 E R 419 (426) : 11 Ad & El 273.

9. (1866) L R 1 P C 328 (340) : 36 L J P C 34, *Doyle* v. *Falconer.*

10. (1866) L R 1 P C 328 (339) : 36 L J P C 34, *Doyle* v. *Falconer.* (*Kielley* v. *Carson,* 4 Moo P C 63 (Overruling *Beaumont* v. *Barrett,* 1 Moo P C 59 and Followed by *Fenton* v. *Hampton,* 11 Moo P C 347), Followed.)

In S. 28 (3) of the Government of India Act, 1935, also, this principle was given expression to and it was expressly provided that the Legislature had not the status of a Court or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the Rules or Standing Orders of the Legislature or otherwise behaving in a disorderly manner.

In *Kilbourn* v. *Thompson*,[11] it was held by the Supreme Court of the United States that the House of Representatives had no general power of punishing for contempt and the precedents of the English Parliament as to the power to punish for contempt non-members of the House were not applicable to the House of Representatives. It was held by the Supreme Court in that case that the power of the House of Commons in England was not an inherent legislative power, but a judicial power derived from the days when it sat with the other House as one body. Professor Willis in his CONSTITUTIONAL LAW, 1936 Edn., page 146, criticizes this view as not being correct. He observes :

> "This position was clearly wrong because either the House of Commons was not a law court (*Jones* v. *Randall*,[11a]) or if it is a law Court, it is such a Court to no greater extent than United States Legislative bodies. It is essentially a legislative body and its practice has persuasive value in this country. The powers of the House of Commons in this respect are only a part of our Anglo-American heritage."

But the above question as to the real basis of the power of the House of Commons in England to punish for contempt—whether it is merely the result of the ancient custom and usage of the House of Commons, whether it is derived from the days when the House of Commons was part of the High Court of Parliament and as such was a judicial body or whether the power belonged to it as essential for its existence as a legislative body is purely academical under this article, as it is clear that the House of Commons possesses this power of committing for contempt and under clause (3), subject to any law that may be made by the Parliament, the Houses of Parliament in India are to have all the powers and privileges of the House of Commons in England at the date of the coming into force of the Constitution.

(d) Warrant for commitment

When a person is committed by warrant of the Speaker of the House of Commons issued by the Speaker on the resolution of the House that the person has committed contempt, the ground of the finding that the person has committed contempt need not appear on the

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(1842) 13 E R 225 (233) : 4 Moo P C 63 (84), *Kielley* v. *Carson*. (A person used insolent language to one of the members outside the House in reference to his conduct as a member of the Assembly — *Held* that the House had not the power to arrest and bring before itself with a view to punish that person.)

[11] (1881) 26 Law Ed 377 (389) : 13 Otto 168.

[11a] (1774) 1 Cowp 17 : 98 E R 944.

Article 105
Note 10

warrant.[12] In *Burdett* v. *Abbot*,[13] Lord Ellenborough observed as follows :

> "If a commitment appeared to be for contempt of the House of Commons generally, I would neither in the case of that court, nor of any other of the superior courts, inquire further but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law or national justice; I say, that in the case of such a commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded."

Thus, although where the warrant of commitment does not give particulars of the contempt, Courts will not enquire into the correctness of the finding that contempt has been committed, yet where the particulars of the alleged contempt are given, the Court can consider whether they amount to contempt. In the *Case of the Sheriff of Middlesex*,[14] Littledale, J., observed as follows :

> "If the warrant declares the grounds of adjudication, this Court in many cases will examine into their validity; but if it does not, we cannot go into such an enquiry. Here we must suppose that the House adjudicated with sufficient reason; and they were the proper judges."

See in this connection, also commentary on ARTS. 32 and 226.

(e) Execution of warrant for arrest

In the execution of a warrant for arrest the officers of the House of Commons may break open the outer door of the house in which the person to be arrested is staying, where such breaking of the door is necessary.[15] But officers of the House of Commons who have a warrant of the Speaker to take a person therein named, although they may have a right to enter his house, and having been peaceably admitted, to search the house, they have no right, in case they do not find him, to remain there to await his return, and if they stay several hours in the house for that purpose, they would be trespassers *ab initio*.[16]

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[12] (1840) 113 E R 419 (425): 11 Ad and El 273, *Case of the Sheriff of Middlesex*.
(1811) 104 E R 501 (538) : 14 East 1 (150), *Burdett* v. *Abbott*.
(1836) 12 E R 733 (741) : 1 Moo P C 59, *Beaumont* v. *Barrett*.
(1705) 92 E R 232 (233) : 2 Ld Raym 1105, *Regina* v. *Paty*.
[*See also* (1845) 116 E R 158 (175) : 10 Q B 411, *Gossett* v. *Howard*. (Warrant of Speaker is not to be construed with the strictness of warrant of commitment by a Justice of the Peace or other inferior jurisdiction, acting out of the ordinary scope of the Common Law, and therefore affords a valid defence to an action for imprisonment under it without any specific cause of the order of the House being assigned on the face of it—Reversing on appeal *Howard* v. *Gossett* 10 Q B 359 : 116 E R 139.)]

[13] (1811) 104 E R 501 (558) : 14 East 1 (150, 151).

[14] (1840) 113 E R 419 (426) : 11 Ad and El 273.

[15] (1811) 104 E R 501 (563) ; 14 East 1, *Burdett* v. *Abbott*.

[16] (1842) Car and M 380 : 66 R R 871 (877), *Howard* v. *Gossett*.

(i) What will amount to contempt

The offences, which will be treated as breach of privilege by the Houses of Parliament, may be summed up under the following heads[17] :—

> "(1) Any act of disrespect to the House itself on the part of one of its members or by some person who is not a member; (2) an act of disrespect to, or an assault upon, an individual member of the House, or a reflection upon his character; (3) any interference with the procedure of the House or one of its committees; (4) any interference with an officer of the House or other person employed by the House, in the performance of his duties; (5) a refusal to obey an order of the House or of one of its committees; or (6) an attempt to induce or procure another person to commit any such act."

11. Power to institute enquiries and examine witnesses.— The House of Commons, which forms the great inquest of the nation, has a power to institute inquiries and to order the attendance of witnesses and in case of disobedience, bring them in custody to the bar of the House for the purpose of examination.[1] In *Kilbourn* v. *Thompson*,[2] it was held by the Supreme Court of America that the House of Representatives of the United States had no power to compel the attendance of witnesses in an enquiry by a committee of the House, into the question whether a certain firm was indebted to the United States. It was held that if a person refused to give evidence before such committee, the House could not convict him for contempt. The decision proceeded on the ground that the House of Representatives was a purely legislative body and the powers and privileges of the House of Commons in England could not be attributed to the House of Representatives in their entirety, inasmuch as they were derived from the days when House of Commons had a judicial role as part of the High Court of Parliament. But this view has been criticised by Professor Willis in his CONSTITUTIONAL LAW, 1936 Edition, page 146. He has also pointed out that either House of the Congress in the United States conducts, as a matter of fact, various kinds of inquiries and investigations and the contempt powers are exercised in connection with such investigations and enquiries.

If there be a charge of contempt and breach of privilege and an order for the person charged to attend and answer it and a wilful disobedience of that order, the House of Commons has the power to cause the person charged to be taken into custody, and to be brought to the bar of the House to answer the charge.[3]

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[17] Halsbury's Laws of England, 2nd Edition, Vol 24, p. 345.

Article 105 — Note 11

[1] (1845) 116 E R 158 (172): 10 Q B 411, *Gosset* v. *Howard*. (Reversing on appeal Q. B. decision in *Howard* v. *Gossett*. 10 Q B 359 : 116 E R 139.)
[*See also* (1839) 112 E R 1112 (1156): 9 Ad and El 1, *Stockdale* v. *Hansard*. (Per *Lord Denman C. J.*— The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the great inquest of the nation.)]

[2] (1881) 26 Law Ed 377 (388) : 13 Otto 168.

[3] (1845) 116 E R 158 (172) : 10 Q B 411 (451), *Gossett* v. *Howard*. (Reversing on appeal *Howard* v. *Gossett*, 10 Q B 359 : 116 E R 139.)

Either House of the Indian Parliament will, under cl. (3), have the above powers of the House of Commons, unless and until they are negatived by any law to be passed by the Parliament.

12. Election Disputes. — Under the American Constitution, each House is made the judge of the election and qualification of its members. In deciding on these, it has the right to examine witnesses and inspect papers.[1] Under the Indian Constitution, disputes as to elections are not within the purview of either House of Parliament, but are to be decided by appropriate authorities as may be provided for by law (ART. 329). Questions of qualification and disqualification of members are to be decided by the President on getting the opinion of the Election Commission. (See ART. 103.)

13. Denial of right to vote—Remedy.— Under the English law, an action will lie against a Returning Officer for refusing to allow a voter to exercise his vote in an election to the Parliament.[1] This matter is not within the jurisdiction of the Parliament itself.[2] Under the Indian Constitution also, the same is the position.

14. Expulsion of member.—Under the English Constitution, although the House of Commons has, like the Houses of Parliament in India, no power to decide disputed elections, it retains its right to decide on the qualifications of any of its members to sit and vote in Parliament. If, in the opinion of the House, a member has conducted himself in a manner which renders him unfit to serve as a member of Parliament, he may be expelled from the House. Members have been expelled from the House of Commons upon various grounds, as for example, as being rebels, or as having been guilty of forgery, of perjury or of misappropriation of public money, of corruption in the administration of justice or in public offices, or in the execution of their duties as members of the House, or of contempts and other offences against the House itself.[1] But unless the cause of expulsion of a member by the House constitutes in itself a disqualification to sit and vote in the House of Commons, it is open to his constituency to re-elect him.[2] The Houses of Parliament in India will also have similar power although under this Constitution the question of disqualification of member of Parliament is left for the decision of the President on taking the opinion of the Election Commission (ART. 103).

Article 105 — Note 12

[1] (1881) 26 Law Ed 377 (386) : 13 Otto 168, *Kilbourn* v. *Thompson.*

Article 105 — Note 13

[1] (1703) 1 E R 417 (418) : 1 Brown 62, *Ashby* v. *White.*

[2] (1704) 92 E R 126 (139): 2 Ld Raym 937, *Ashby* v. *White.* (Holt C. J.'s minority view, upheld by the House of Lords in appeal.)

Article 105 — Note 14

[1] Halsbury's Laws of England, 2nd Edition, Vol. 24, p. 355.
1952 Cal 632 (Pr 37) [AIR V 39] : 1952 Cri L Jour 1454 (SB), *Ansumali* v. *State of West Bengal.*

[2] Halsbury's Laws of England, 2nd Edition, Vol. 24, p. 355.

15. Declaring seat vacant. — See ART. 101, NOTE. 4.

16. Proof of proceedings of Parliament. —Under S. 57 (4) of the Evidence Act, the Court is bound to take judicial notice of the course of proceedings of Parliament. This is also the law in England.[1]

Salaries and allowances of members.

106. Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India.

GOVERNMENT OF INDIA ACT, 1935

"29. Members of either Chamber shall be entitled to receive such salaries and allowances as may from time to time be determined by Act of the Federal Legislature and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the date of the establishment of the Federation applicable in the case of members of the Legislative Assembly of the Indian Legislature."

Legislative Procedure

Provisions as to introduction and passing of Bills.

107. (1) Subject to the provisions of Articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

Article 105 — Note 16

[1] (1845) 85 E R 137 (141): 1 Saund 131, *Lake* v. *King*. (Petition to Parliament is a proceeding of Parliament.)

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of Article 108, lapse on a dissolution of the House of the People.

GOVERNMENT OF INDIA ACT, 1935

"30. (1) Subject to the special provisions of this Part of this Act with respect to financial Bills, a Bill may originate in either Chamber.

(2) Subject to the provisions of the next succeeding section, a Bill shall not be deemed to have been passed by the Chambers of the Legislature unless it has been agreed to by both Chambers, either without amendment or with such amendments only as are agreed to by both Chambers.

(3) A Bill pending in the Legislature shall not lapse by reason of the prorogation of the Chambers.

(4) A Bill pending in the Council of State which has not been passed by the Federal Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Federal Assembly or which having been passed by the Federal Assembly is pending in the Council of State shall, subject to the provisions of the next succeeding section, lapse on a dissolution of the Assembly."

COGNATE PROVISIONS

Article 108 deals with joint sitting of both Houses in certain cases. Clause (5) of that article provides that a Bill may be passed at such a joint sitting notwithstanding that a dissolution of the House of People has intervened.

Article 109 deals with special procedure in respect of Money Bills.

Article 117 deals with special provisions as to financial Bills.

Legislative powers — Distribution of legislative powers between the Parliament and the Legislatures of States, see Chapter I of Part XI.

Synopsis

1. Analogous law.
2. Bill.
3. Initiation of legislation.
4. Money Bills.
5. When can a Bill be said to be passed by Parliament ?
   (a) General.
   (b) Constitutional changes pending a Bill.
   (c) Evidence.
6. Resolutions of Houses of Parliament.
7. Amendment.
8. Vacancy in membership.
9. Prorogation of Parliament — Clause (3).
10. Lapsing of Bills on dissolution of Parliament—Clauses (4) and (5).

1. Analogous law.—(1) Article 196 is the corresponding provision relating to State Legislatures.

(2) This article is practically modelled on S. 30 of the Government of India Act, 1935.

(3) Section 63 of the Government of India Act, 1919, was continued in force under the Government of India Act, 1935. The second para of this section corresponds to cl. (2) of this article.

2. **Bill.** — The Dictionary gives the meaning of this word as the draft of a proposed Act of Parliament.

3. **Initiation of legislation.** — Under cl. (1), the power of initiating legislation on any subject is given to either House of Parliament by its being provided that bills may originate in either House of Parliament. But exceptions are made in the case of Money Bills and other financial Bills, which have to originate only in the House of the People. Under ART. 109 (1 , a Money Bill shall not be introduced in the Council of States.

4. **Money Bills.**—As to definition of 'Money Bills' see ART. 110. Under ART. 109, Money Bills should not be introduced in the Council of States. Under cl. (2) of this article, read with ART. 109, a Money Bill can become law even though it is not accepted by the Council of States and has only the support of the House of the People. These provisions give the control of the purse to the House of the People and are a basis of the principle of ministerial responsibility and the Parliamentary system, already discussed under ARTS. 74 and 75.

(a) General

5. **When can a Bill be said to be passed by Parliament?**— Under ART. 79, the Parliament is to consist of the two Houses of Parliament and the President. Hence, it is clear that a Bill cannot be said to be passed by Parliament unless it is passed by both the Houses of Parliament and is assented to by the President.[1] This is the general rule. This rule is subject, however, to exceptions in the case of Money Bills to which certain special provisions are applicable. (See ART. 109.) In the case of a Money Bill it is deemed to be passed by both the Houses, under certain circumstances, although it is not agreed to by the Council of States.

Clause (2) says that Bills should be "agreed to" by both the Houses. This means that the Bill should be agreed to by both the Chambers, by each of them *successively* passing it.[2] As to a joint sitting of both the Houses, see ART. 108. When a Bill is amended in either House, such amendment must also be agreed to by both the Houses. Where a Bill originating in the lower House and passed by it comes before the upper House, by which it is amended and is passed with the amendment, the Bill will have to go before the lower House again for the amendments to be passed by that House.[3] Till the amendments

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Article 107 —Note 5

[1] (1875) 2 Ch D 9 (12) : 24 W R (Eng) 495, *Ex parte Rashleigh.*

[2] 1945 F C 25 (30) [AIR V 32] : 1945 F C R 1 : I L R (1945) Kar (FC) 39 (FC), *Umayal Achi* v. *Lakshmi Achi.*

[3] 1951 All 674 (680) (Pr 22) [A I R V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.*

are passed by the lower House, although the Bill in a sense has been passed by both the Houses, it should still be deemed as pending in the Legislature.[4]

As regards the question as to when a Bill can be said to be passed by a House, the provisions of ART. 100 may be referred to. Under that article, the Bill should be passed by the majority of the members present at the meeting. The quorum for the meeting is one-tenth of the total number of members of the House. Either House of Parliament shall have power to act notwithstanding any vacancy thereof.

(b) Constitutional changes pending a Bill

The process of law-making is not completed till the assent of the President is received under ART. 111 after the Bill has been passed by both the Houses.[5] Hence, the question whether an Act was or was not within the competence of the Legislature should be determined with reference to the date when the President's assent is received. Till then the Bills are only resolutions passed by Parliament, and it is a well-established principle that mere resolutions of either House of Parliament are not *law*.

The question of change in the competence of the Legislature pending the passing of the Bill into a law, can arise only by the amendment of the *Constitution* during such pendency. Such a question arose under the Government of India Act, 1935, with reference to the Hindu Women's Rights to Property Act, 1937. The Bill in that case had been passed by the Legislative Assembly before the coming into force of Part III of the Government of India Act, 1935, on the 1st of April 1937. The Bill was passed by the Council of State and received the assent of the Governor-General subsequently. The Act made a difference in regard to the legislative power of the Central Legislature and transferred devolution of agricultural land to the jurisdiction of the Provincial Legislature from the Central list, so that when the bill was passed by the Central Assembly, the Central Legislature had power to legislate with regard to devolution of agricultural land, while at the date when the Bill was passed by the Council of State the Central Legislature had lost this power. On a reference to the Federal Court under S. 213 of the Government of India Act, 1935, (corresponding to ART. 143 of the present Constitution) by the Governor-General, it was held by the Federal Court that the competency of the Central Legislature should be determined with reference to the date on which the Bill received the assent of the Governor-General and that, therefore, though the Act was not wholly *ultra vires* yet it would not affect devolution of agricultural land in the Provinces.[6] This view was subsequently followed by the Federal Court in *Umayal Achi* v. *Lakshmi Achi.*[7]

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[4] 1951 All 674 (Pr 22) [A I R V 38 C 182] : I L R (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Government.*

[5] *See* 1945 F C 25 (31) [A I R V 32] : 1945 F C R 1 : I L R (1945) Kar (FC) 39 (FC), *Umayal Achi* v. *Lakshmi Achi.* (Case under Government of India Act of 1935, Sch. 9, S. 68 corresponding to Art. 111.)

[6] 1941 F C 72 (74, 75) [AIR V 28] (FC), *In re Hindu Women's Rights to Property Act.*

When it is said that a Bill should be passed by both the Houses of Legislature before it can become law, it is clear that the identity of the Legislature as well as of the Bill should be the same throughout the life of the Bill till it receives the assent of the head of the State. The validity of the Hindu Women's Rights to Property Act, 1937, was questioned with reference to both these matters in the above cases decided by the Federal Court. It was contended, *firstly*, that the Central Legislature ceased to be the same Legislature after the coming into force of Part III of the Government of India Act of 1935, and *secondly*, that owing to change in the legislative power of the Central Legislature under the new Act, the Bill as passed by the Council of States and assented to by the Governor-General could not be regarded as being identical with the Bill that had been passed by the Legislative Assembly.

Both these contentions were rejected by the Federal Court. It was held with reference to the provisions of Ss. 316, 317 and other provisions of the Government of India Act, 1935, that there was no change in the identity of the Central Legislature. With regard to the identity of the Bill, it was held that although the Bill was expressed in general terms without excluding agricultural lands in the Governors' Provinces and although as a result of the changes in the distribution of the legislative powers, the subject of the devolution of agricultural land was removed from the jurisdiction of the Central Legislature and although this meant that the Act as passed could not affect the devolution of agricultural lands in the Governors' Provinces, this did not mean that the Bill underwent any *amendment* in the Council of State and ceased to be the *same* Bill as had been passed by the Legislative Assembly.

(c) Evidence

In determining the question whether a Bill was passed by the Houses of the Legislature, it is open to the Court to look into the details of the actual procedure of enactment by a Legislature notwithstanding the publication of the Act in the Gazette.[8]

6. Resolutions of Houses of Parliament. — As seen in notes on ART. 105, resolutions of either House of Parliament have not the force of law.[1] Even resolutions passed by both Houses of Legislature will not have the force of law.[2]

7. Amendment.— If a Bill is amended when it is before either House of Parliament, the amendment must also be agreed to by both the Houses. Where a Bill is passed by the lower House and comes before the upper House, which amends the Bill and passes it in the amended form, the Bill will have to go before the lower House again for the amendments being passed by such House (See NOTE 5).

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[7] 1945 F C 25 (31) [AIR V 32] : 1945 F C R 1 : ILR (1945) Kar (FC) 39 (FC).

[8] 1945 F C 25 (37, 42) [AIR V 32]: 1945 F C R 1: ILR (1945) Kar (FC) 39 (FC), *Umayal Achi* v. *Lakshmi Achi*. (AIR 1941 FC 12 (FC) and May's Parliamentary Practice, Edn. 13, p. 444 et seq, Rel. on.)

Article 107 — Note 6

[1] (1884) 12 Q B D 271 (273, 274, 275) : 53 L J Q B 209, *Bradlaugh* v. *Gossett*. (1839) 112 E R 1112 (1153, 1154) : 9 Ad and El 1, *Stockdale* v. *Hansard*.

[2] 1949 F C 175 (190) (Pr 47) [AIR V 36 C 30]: 1949 F C R 595: ILR 28 Pat 703: 50 Cri L Jour 897 (FC), *Jatindra Nath* v. *Province of Bihar*.

"Amendment" is a question of fact. It must not be mixed up with the question of construction or legal presumption. Where, therefore, after a Bill has been passed by the lower House and pending its passage in the upper House, there is a change in the legislative powers of the Legislature, as a result of which the Legislature loses its power to legislate upon a certain subject which is covered by the Bill, it cannot be contended that the Bill was *amended* by the upper House by the omission of such subject from the Bill. Unless there is an actual amendment by the upper House, it cannot be said that the Bill has been amended by it. Nor can it be said that the Bill as passed by the upper House is not the same as the Bill passed by the lower House, merely because of the change in the legislative powers of the Legislature in the interval.[1]

8. Vacancy in membership.—Under ART. 100, cl. (2), either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof. In *Umayal Achi* v. *Lakshmi Achi*,[1] the question arose whether the withdrawal of members representing Burma from the Central Legislature on the separation of Burma on the passing of the Government of India Act, 1935, affected the identity of the Central Legislature so as to make it a different body afterwards. It was held by the Federal Court that the withdrawal of the representatives of Burma did not make the Central Legislature a different body so as to affect pending legislation. On this point it was observed by Spens, C. J., as follows :

> "I turn now to the question whether by reason of cl. 8, Government of India (Commencement and Transitory Provisions) Order. 1936, the Indian Legislature, after the vacation of their seats under that clause by the members elected or nominated to represent Burma or Burma constituencies, was so radically different in composition as no longer to be the same Legislature as prior to 1st April 1937, It is obviously clear that by absence voluntary or through illness of members, or by vacancy of seats owing to death the Indian Legislature constantly and continuously varies in composition from day to day. Neither before nor after 1st April 1937, was it a requirement of the continuity of existence of the Indian Legislature that there should be elected or nominated members for all seats, still less that all elected and nominated members should be present. It follows, in my opinion, that by a proper enactment binding upon the Legis-

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Article 107 — Note 7

[1] 1945 F C 25 (30, 31, 45) [AIR V 32] : 1945 F C R 1 : ILR (1945) Kar (FC) 39 (FC), *Umayal Achi* v. *Lakshmi Achi*.

Article 107 — Note 8

[1] 1945 F C 25 (38, 39) [AIR V 32]: 1945 F C R 1: ILR (1945) Kar (FC) 39 (FC).

lature, the compulsory vacation of some members of their seats does not and cannot *ipso facto* cause the continuing Legislature, less those members, to be a different Legislature in law. Indeed, the very opposite deduction, namely, that it is the same Legislature carrying on without the excluded members, seems to me to be the proper one to be drawn from the provisions in question."

9. **Prorogation of Parliament — Clause (3).** — Under ART. 85 (2), the President may from time to time prorogue the Houses or either House of Parliament. (As to meaning of prorogation, the distinction between prorogation, adjournment, etc., see notes on ART. 85). Under cl. (3) of this article, it is provided that the prorogation of the Houses of Parliament does not cause a Bill pending in Parliament to lapse. There is a similar provision in ART. 196 with reference to State Legislatures. With regard to that provision it was held by the Supreme Court in *State of Bihar* v. *Kameshwar Singh*[1] that notwithstanding the prorogation of a State Assembly before the commencement of the Constitution, a Bill which had been introduced into such Assembly prior to prorogation did not cease to be pending within the meaning of ART. 31 (4) of the Constitution on such prorogation.

The law as stated in cl. (3) of this article is different from the English law under which prorogation as well as dissolution of Parliament causes a Bill pending in Parliament to lapse. In this connection, the following passage from Halsbury's LAWS OF ENGLAND[2] may be quoted :

> "It is a recognised rule of parliamentary procedure that, in addition to bringing a session of Parliament to a conclusion, a prorogation puts an end to all business which is under the consideration of either House at the time of such prorogation. In both Houses, therefore, any proceedings either in the House or in any committee of the House lapse with the session, and any Bill which does not receive the Royal Assent before Parliament is prorogued must be reintroduced as a new Bill in a subsequent session."

The law as stated in cl. (3) is the same as under sub-s. (3) of S. 30 of the Government of India Act, 1935.

10. **Lapsing of Bills on dissolution of Parliament — Clauses (4) and (5).** — Under ART. 83 the Council of States is not subject to dissolution. It is only the House of the People that is subject to dissolution under this Constitution. It is dissolved automatically on the expiration of five years or by the President at any time before. The rules in cls. (4) and (5) as to the effect of dissolution of the House of the People, on pending Bills, may be summed up as follows: If the Bill

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Article 107 — Note 9

[1] 1952 S C 252 (Pr 205) [A I R V 39] : 1952 S C R 889, 1020 and 1056 : ILR 31 Pat 565 (SC).

[*See also* 1951 All 674 (680) (Pr 22) [AIR V 38 C 182]: ILR (1952) 2 All 46 (FB), *Suryapal Singh* v. *U. P. Govt.* (To same effect was the Supreme Court decision on an appeal from this and other cases.)]

[2] Halsbury's Laws of England (2nd Ed.) Vol. 24, p. 268.

Article 107
Note 10

is pending in the House of the People, it lapses in all cases on the dissolution of the House, irrespective of the question in which House it originated. Thus, a Bill originating in the Council of States and passed by it and pending before the House of the People at the time of the dissolution of the House will lapse on such dissolution. But in the case of a Bill pending before the Council of States, it will lapse only if it has originated in the House of the People. If a Bill has originated only in the Council of States and is still pending before the Council of States, the dissolution of the House of the People will not cause the Bill to lapse.

As seen in the notes on ART. 85, under the English law, it is the Parliament as a whole that is dissolved and not the House of Commons alone. Hence, the dissolution of Parliament causes all the pending Bills to lapse and the question before which House the Bill is pending will not arise.

In Alan Gledhill's THE REPUBLIC OF INDIA it is stated at page 118 as follows: "A Bill pending in the Council of States does not lapse on a dissolution of the House of the People." This unqualified statement does not seem to be correct. It is only a Bill pending in the Council of States, which has *not* been passed by the House of the People, that does not lapse on the dissolution of that House (cl. 4). Under cl. (5) a Bill which, *having been passed* by the House of the People, is pending in the Council of States, lapses on the dissolution of the House of the People. In other words, although a Bill is pending in the *Council of States*, it lapses under certain circumstances on the dissolution of the House of the People.

Joint sitting of both Houses in certain cases

108. (1) If after a Bill has been passed by one House and transmitted to the other House—

(*a*) the Bill is rejected by the other House; or

(*b*) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(*c*) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,

the President may, unless the Bill has lapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause *(c)* of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:

Provided that at a joint sitting—

(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed;

Article 108

and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

GOVERNMENT OF INDIA ACT, 1935

31. (1) If after a Bill has been passed by one Chamber and transmitted to the other Chamber—

(a) the Bill is rejected by the other Chamber; or

(b) the Chambers have finally disagreed as to the amendments to be made in the Bill; or

(c) more than six months elapse from the date of the reception of the Bill by the other Chamber without the Bill being presented to the Governor-General for his assent,

the Governor-General may, unless the Bill has lapsed by reason of a dissolution of the Assembly, notify to the Chambers, by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:

Provided that, if it appears to the Governor-General that the Bill relates to finance or to any matter which affects the discharge of his functions in so far as he is by or under this Act required to act in his discretion or to exercise his individual judgment, he may so notify the Chambers notwithstanding that there has been no rejection of or final disagreement as to the Bill and notwithstanding that the said period of six months has not elapsed, if he is satisfied that there is no reasonable prospect of the Bill being presented to him for his assent without undue delay.

In reckoning any such period of six months as is referred to in this sub-section, no account shall be taken of any time during which the Legislature is prorogued or during which both Chambers are adjourned for more than four days.

(2) Where the Governor-General has notified his intention of summoning the Chambers to meet in a joint sitting, neither Chamber shall proceed further with the Bill, but the Governor-General may at any time in the next session after the expiration of six months from the date of his notification summon the Chambers to meet in a joint sitting for the purpose specified in his notification and, if he does so, the Chambers shall meet accordingly:

Provided that, if it appears to the Governor-General that the Bill is such a Bill as is mentioned in the proviso to sub-section (1) of this section, he may summon the Chambers to meet in a joint sitting for the purpose aforesaid at any date, whether in the same session or in the next session.

(3) The functions of the Governor-General under the provisos to the two last preceding sub-sections shall be exercised by him in his discretion.

(4) If at the joint sitting of the two Chambers the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Chambers present and voting, it shall be deemed for the purposes of this Act to have been passed by both Chambers:

Provided that at a joint sitting—

(a) if the Bill, having been passed by one Chamber, has not been passed by the other Chamber with amendments and returned to the Chamber in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Chambers have not agreed,

and the decision of the person presiding as to the amendments which are admissible under this sub-section shall be final.

(5) A joint sitting may be held under this section and a Bill passed thereat notwithstanding that a dissolution of the Assembly has intervened since the Governor-General notified his intention to summon the Chambers to meet therein."

1. Scope of the article.—This article lays down the procedure to be followed in case of conflict between the two Houses of Parliament. It has been seen under ART. 107 that as a general rule a Bill should be passed by both the Houses before it can become law. If a Bill is passed by one House but rejected by the other or if certain amendments are proposed by one House which are not accepted by the other House, the Constitution does not treat the Bill as finally defeated, but provides a further method for seeing whether it can be made into law. This method is the joint sitting of both the Houses of Parliament and the Bill being considered by the Parliament in such joint sitting. This method of joint sitting applies not only to the two cases mentioned above but also where a Bill is passed by one House and sent to the other and for a period of six months thereafter, the latter House does not pass it. In all these cases, the President has the power of notifying his intention to summon the two Houses for a joint sitting and then to summon them for such sitting.

Article 108
Note 1

At such sitting of both the Houses, the Speaker of the House of the People is to be the President (ART. 118 (4)). If the Bill is passed by a majority of the members of both the Houses, who are present at the joint sitting, it is deemed as passed by both the Houses, although the normal rule under ART. 107 is that a Bill should be passed by each House separately.

In order to avoid further delay in the passage of a Bill, the proviso to cl. (4) forbids the introduction of new amendments at the stage of the joint sitting.

Even if the House of the People is dissolved after the President has notified his intention of summoning the Houses for a joint sitting, such joint sitting may be held.

The procedure of joint sitting in case of difference of opinion between the two Houses does not apply to Money Bills for which a special procedure is prescribed under ART. 109, the result of which is that in regard to Money Bills, the House of the People has the predominant voice and such Bills may be passed notwithstanding the opposition of the Council of States.

The corresponding provision in regard to State Legislature is contained in ART. 197. But the procedure there laid down for the purpose of solving conflicts between the Legislative Assembly which is the lower House and the Legislative Council, which is the upper House, is different. Under ART. 197, the method of joint sitting of the two Houses has not been adopted. The effect of that article is practically to enable a Bill passed by the Legislative Assembly to become the law in spite of the opposition of the Legislative Council if the Bill is passed by the Legislative Assembly twice, and is also submitted to the Legislative Council twice for consideration. The provision in ART. 197 follows the principle of the Parliament Act, 1911 (1 & 2 Geo. V, Ch. 13) in England, under which the House of Lords has only a delaying power with regard to the Bills passed by the House of Commons and is powerless to prevent from coming into existence any Act which the House of Commons is bent upon passing.

Article 108 is, however, based upon S. 31 of the Government of India Act, 1935, which also contained the method of joint sitting as a device for resolving deadlocks. This method has been adopted in the Australian Constitution also. (See S. 57 of the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. Ch. 12).)

Special procedure in respect of Money Bills.

109. (1 A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the

Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

GOVERNMENT OF INDIA ACT, 1935

NOTE.—See S. 37 reproduced under ART. 110.

COGNATE PROVISIONS

Provisions as to introduction and passing of Bills other than Money Bills—See ART. 107.

Money Bills—Transmission of, to the Council of States—Certificate of the Speaker—See ART. 110 (4).

1. Scope of the article.—This article deals with the procedure with regard to Money Bills. A Money Bill is defined in ART. 110. In the case of other Bills, the normal procedure is that the Bill can be introduced into either House of Parliament and also should be agreed to by both the Houses of Parliament either separately or in joint session. But this procedure does not apply to Money Bills. Money Bill

Article 109
Note 1

are practically in the absolute control of the House of the People. *Firstly*, a Money Bill cannot be introduced in the Council of States; it can only be introduced in the House of the People. *Secondly*, it need not be assented to by the Council of States at all, in order to be deemed as having been passed by both the Houses of Parliament. In fact, a Money Bill after having been passed by the House of the People is only sent to the Council of States for its recommendations. The House of the People is not bound to accept any of the recommendations made by the Council of States. If the Council of States does not return to the House of the People within a period of 14 days a Money Bill with its recommendations, the Money Bill will be deemed as passed by both the Houses of Parliament in the form in which it was passed by the House of the People. The right to vote supplies is perhaps the greatest privilege accorded to a legislative body.[1] Under the Constitution of India this right is practically the *exclusive* right of the House of the People.

Article 109 — Note 1

[1] 1925 Cal 373 (382) [AIR V 12] (DB), *Shankar Roy* v. *H. E. A. Cotton*.

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Overlooking of Precedents leads to Erroneous Decisions

"Ignorance of the Judge is the misfortune of the innocent." *Latin Maxim.*

(1953) 40 A. I. R. 1953 S. C. 478 (Pr. 20) — "It cannot be disputed that the High Court, even though it was hearing an appeal from an order of acquittal, had full powers to review the entire evidence on the record and reach its own conclusion that the acquittal order should be set aside. But, as the Privy Council pointed out in *Sheoswarup* v. *Emperor*, A. I. R 1934 P. C. 227 (2) in exercising these powers the High Court should and will always give proper weight and consideration to such matters as : . . . . . The High Court, in our opinion, did not clearly keep before it these rules and principles well known and recognised in the administration of criminal justice."

(1953) 40 A. I. R. 1953 S. C. 473 (Pr. 7) — "It is unfortunate that the last mentioned case (i. e. (1949) 29 Tax Cas 395) was not brought to the notice of the High Court before the judgment under appeal was delivered. "

(1952) 39 A. I. R. 1952 S. C. 358 (361) (Pr. 12) — " This decision (*Md. Keramuttullah Miah* v. *Keamutulla*, A. I. R. 1919 Cal. 218) was reached on 19-7-1918, i. e. almost 5 months after the decision of their Lordships of the Privy Council (in A.I.R. 1918 P. C. 11), but it does not appear that the ruling was brought to the notice of the learned Judges of the Calcutta High Court."

(1953) 55 Punjab L. R. 158 (163) (S. C.) — "It seems to us that the attention of the High Court was not drawn to this Court's decision in *Surajpal Singh's case* (A.I.R. 1952 S. C. 52) wherein it was pointed out that . . . . compelling reasons."

(1943) 30 A. I R. 1943 Privy Council 189 (191).—In an appeal from Allahabad the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: "The decision of the Board in A. I. R. 1919 P. C. 55 was not cited in either of the Courts in India . . . . . The application now before the Board . . . . invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution . . . . by the method laid down in A. I. R. 1919 P. C. 55, . . . For this purpose the case must go back to the Court of the Subordinate Judge. . . ."

(1922) 9 A. I. R. 1922 Privy Council 11 (13). — Section 89, T. P. Act, 1882, ended after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34, Civil P. C.

"The difficulty which had arisen as to these words in several cases, e.g., *Vanmikalinga* v. *Chidambara*, (1905) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's case*, A.I.R. 1918 P. C. 34 —therefore no longer arises."

A. I. R. 1954 All. 252 (Vol. 41 C. N. 137 Pr. 7) — "No reference was made in that case (viz. in '*Amritsar Sugar Mill Co. Ltd.* v. *Commr. Sales Tax, U. P. Lucknow*, A. I. R. 1952 ALL. 816) to the decisions in the cases of *Kashi Prasad*, A. I. R. 1932 ALL 598 and *Gulab Chand*, A. I. R. 1931 ALL. 673. It also goes against the doctrine of '*Nursing Sahai* v. *Sheo Prasad*, A. I. R. 1918 ALL. 389 (FB). "

I. L. R. 1954 Hyderabad 650 (654) (F.B.) — " But unfortunately it was not brought to the notice of Hashim Ali, J. (in 36 Deccan L. R. 909) that the Full Bench case on which he had based his conclusions was set aside on review and the question was reheard and a contrary rule . . . . was laid down. The latter judgment of the Full Bench would be found reported in 18 Deccan L. R. 101. "

A. I. R. 1954 Madras 592 (Vol. 41 C. N. 218 Pr. 8) — " Had the attention of the learned Judge (i. e. Chandra Reddi J. in (1951) 2 Mad. L. J. 26) been drawn to the decision in A. I. R. 1934 Mad. 337 and the observations at page 342 . . . . probably the learned Judge would not have taken the view he took. "

A. I. R. 1954 Madras 488 (Vol. 41 C. N. 183 Pr. 7) — "It is unfortunate that a later Full Bench decision of this Court in *Srinivasa v. Swaminatha*, A. I. R. 1944 Mad. 359 was not brought to the notice of the learned District Judge, though it was decided prior to the date of the judgment of the lower Court. "

Side pp. 1954 (4 pp.)

OVERLOOKING OF PRECEDENTS LEADS TO ERRONEOUS DECISIONS

(1953) 40 A. I. R. 1953 All. 722 (723) (Pr. 8). — "Learned counsel in support of this contention has cited two Single Judge's decisions of this Court, in A. I. R. 1954 ALL. 976 and A. I. R. 1950 ALL. 726. As against these, there is a Division Bench decision of this Court in A. I. R. 1929 ALL. 322 . . . . Both the decisions by the learned single Judges, cited above were subsequent to this Bench decision, but neither of the two learned single Judges took notice of this case or of the reasons given in for the view . . . ."

(1953) 40 A. I. R. 1953 Cal. 1 (6) (Pr. 33). — "In this decision (A. I. R. 1949 Cal. 622) no reference is made either to *Doya Narain Tewary's case*, 14 Cal. 256 or to the decision in *Rodrick's case*, 40 Cal. 308, the two most important and relevant authorities of this Court on the point. While the decisions in 14 Cal. 256 and 40 Cal. 308 are binding on me, the decision in Civil Revision of the Division Bench in *Dominion of India* v. *Jagdish Prosad Pannalal, a Firm*, A. I. R. 1949 Cal. 622 is not so binding. A decision which fails to notice the ruling authorities of the Court on the point loses much of its binding character and has little persuasive force."

(1953) 40 A. I. R. 1953 Nagpur 58 (64) (Pr. 29) (D.B.) — "Finally we were referred to the decision in *Mohd. Azar Hussain* v. *The State of Bihar*, A. I. R. 1952 Pat. 220. In that case . . . . operative. If by this the learned Judges mean that the power to repeal statute can be delegated by the Legislature, their view is not in consonance with the decision in — *The Delhi Laws Act case* — A. I. R. 1951 S. C. 332 (Pr. 14) which, though decided before this case does not appear to have been noticed by the learned Judges."

(1953) 40 A. I. R. 1953 Orissa 117 (118, 119) (Prs. 1, 5) (S.B.) — "The decision of the Privy Council in A. I. R. 1948 P. C. 102 was not cited before us when we decided A. I. R. 1952 Orissa 281. We followed the earliar Full Bench decision of the Madras High Court reported in *Sreeramulu Chetty* v. *Commissioner of Income-tax, Madras*, A. I. R. 1939 Mad. 709 (F.B.) and took a contrary view."

(1953) 40 A. I. R. 1953 Punj. 194 (195) (Pr. 7) (DB). — Per *Weston J.*— "Achhru Ram J. in the case relied upon by the trial Court, which appears in A. I. R. 1949 E. P. 373, seems to have placed reliance upon a view expressed by Munro J. of the Madras High Court in a case reported in *In re Bommareddi Somireddi*, 5 Ind. Cas. 974 (Mad.) and it does not seem to have been brought to his notice that Munro J. was a party to the later Full Bench and in that case stated that he was now satisfied that the view he formerly took was erroneous and that a mere demand for payment could not have the effect of changing the pre-existing relationship of debtor and creditor."

(1952) 39 A. I. R. 1952 Punj. 79 (80) (Pr. 5). — "Besides, the attention of the learned Chief Justice deciding *Kirpa* v. *Bakhish Singh's case* ((1948) 50 Pun. L. R. 220) was not drawn to the previous judgments of the Lahore High Court in *Gurdit Singh* v. *Barua*, A. I. R. 1933 Lah. 1005 and *Munshi* v. *Niranjan Singh*, A.I.R. 1937 Lah. 701."

(1952) 39 A. I. R. 1952 Tra-Co. 482 (485) (FB). — *Koshi C. J.* — "We consider it unfortunate that the attention of the learned Judges in *Gunnamudhayan Pakkianathan* v. *Sirkar*, A. I. R. 1950 Tra-Co. 5 was not invited to either of the statutory provisions referred to above or to the case in *Sirkar* v. *Ittycheria*, 1935 Trav-L. T. 524. The learned Sessions Judge who tried the case (sessions case No. 14 of 1123 of the Nagercoil Sessions Court) which gave rise to *Gunnamudayan Pakkianathan* v. *Sirkar* was bound by decision in *Sirkar* v. *Ittycheria*, 1935 Trav. L. T. 524. The Evidence Act and the Identification of the Prisoners Act had long been passed into law when the trial in the later case took place. It is remarkable that the Public Prosecutor or the defence counsel did not bring to the notice of the Judges of this Court the relevant statute or the decision."

P. S. PRAKASHAM,
BINDING CONT

A. I. R. Commentaries [illegible] Noticed.

(1953) 40 A. I. R. 1953 S. C. 23 (27). — [Touching the revisional jurisdiction of the High Court set out in s. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (vol I) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

(1949) 36 A. I. R. 1949 P. C. 156 (158). — *Sir John Beaumont.*— "There have been no doubt, decisions in some High Courts in India which lend support to the view upon which the Judges acted. The cases are collected in Edn. 4 of Chitaley and Rao on the Code of Civil Procedure Vol. I, page 1105."

(1949) 15 Malayan L. Jour. 134 (135).—*Per Storr J.*—"On the point relating to section 127, Civil Procedure Code (corresponding to O. 9, R. 13 in Indian Civil P. C.), raised in this appeal . . . . A. I. R. Commentaries, Code of Civil Procedure (4th Edition, 1944) at page 1755 states: 'But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule' . . . . Agreeing with the views expressed above, I am of the opinion that section 127, Civil Procedure Code, is not available to a person who is not a party to the suit . . . ."

A. I. R. 1954 J & K 39 (Vol. 41 C. N. 20 Pr. 3) — "A reference to Note 14 of the Chitaley's Code of Civil Procedure (Act V of 1908) under O. 20, R. 11 (1951 Edn. at p. 2114) would show that where an order . . . . appealable. "

A. I. R. 1954 Kutch 31 (Vol. 41 C. N. 14 Pr. 2) — "The question raised is discussed in A. I. R.'s Commentaries on the Code of Criminal Procedure, Fourth Edn., at p. 2513 under the caption 'Dismissal of appeal . . . . conviction'; The learned authors observe that . . . . "

A I. R. 1954 Madras 214 (Vol. 41, C. N. 89 Pr. 3) — "But a Criminal Court, as well pointed out in the exhaustive analysis in Chitaley and Annaji Rao's Criminal Procedure Code, Vol. III, (1950) Edn., p. 2862 is not expected, under the provisions of S. 517 to 'try' civil cases . . . . (Note 12 quoted and approved).

A. I. R. 1954 Mysore 1 (Vol. 41 C. N. 1 Pr. 12) — "As however, rightly observed in the Commentary on the Code of Civil Procedure by Chitaley and Annaji Rao on S. 38 while dealing with the decision of the Privy Council referred to above, (A. I. R. 1916 P. C. 16) 'The decision . . . . same property' — (Passage from Commentary quoted and approved).

A. I. R. 1954 Punjab 124 (Vol. 41 C. N. 63 Pr. 6) — 'In long line of decisions it has been held that taking symbolical possession . . . . adverse possession. There are large number of cases quoted in paragraph 65 of Chitaley's Limitation Act, Vol. III, under Arts. 142 and 144."

A. I. R. 1954 Saurashtra 88 (Vol. 41 C. N. 38 Pr. 1) — "On this point we may refer to the Commentary of Chitaley and Rao on the Criminal Procedure Code, 1950 Edn., pages 3008 and 3009 wherein the learned authors have discussed the conflicting rulings and expressed their opinion that irrespective of . . . . S. 256." (The authors' view is approved.)

A. I. R. 1954 Saurashtra 66 (Vol. 41 C. N. 33 Pr. 19) (F.B.) Per *Chhatpar J.*— " A reference to Chitaley and Rao's C. P. Code Note 12 on S. 115 will show the numerous instances where High Courts have interfered in revision under this clause (cl. (c) of S. 115). "

A. I. R. 1953 Calcutta 777 (Vol. 40 C. N. 293 Pr. 8) — "The question naturally arose also before 1923 whether and when the successor-in-office . . . . his predecessors. The general trend of decisions was that the word 'court' implied . . . . the successor-in-office. (*Vide* Chitaley and Rao's Criminal Procedure Code, Note 1 to S. 559). "

A. I. R. 1953 Punjab 298 (Vol. 40 C. N. 133 Pr 5) — "I am unable to agree with this submission. In the present case the decree was a conditional one, the condition being the payment of Rs. 5535-5-8 and the appellant wanted to get rid of this condition. He had therefore to value his appeal according to this sum because the court-fee was payable on this amount. This has been stated in Chitaley's book on the Court-fees Act at page 431 under Sch. 1, Art. 1, Note 7. "